THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	*Respondent*
Mr UM Nwakwu	**Westminster City Council**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: London Central **ON:** 30 May – 5 June 2017

EMPLOYMENT JUDGE: Mr J Tayler
MEMBERS: Ms S Samek
Mr I McLaughlin

Appearances
For the Claimant: In person
For the Respondents: Mr S Cheetham, Counsel
(Mr L Harris, Counsel on 5 June 2017)

JUDGMENT

1. The claim fails and is dismissed.

2. The Respondent's application for costs is refused.

REASONS

Introduction

1. The Claimant has brought complaints of race discrimination, harassment, victimisation, under the Agency Workers Regulations and of unlawful deduction from wages. The issues were defined at a Preliminary Hearing for Case Management before Employment Judge Baty held on 13 July 2016 and are set out at annex A.

2. The Claimant gave evidence on his own behalf.

3. The Claimant called:

   3.1 Irene Mends, former Homecare Broker

4. The Respondents called:

   4.1 Brian Vallis, Head of Business Services

   4.2 Jackie Roberts, Home Care Management Team Manager

4.3 Lucie Menzies, Home Care Management Team Officer

4.4 Jennifer Rock, Home Care Management Team Officer

4.1 Aasjana Goxhi, Home Care Management Team Officer

5. The witnesses who gave evidence before us did so from written witness statements. They were subject to cross-examination, questioning by the Tribunal and, where appropriate, re-examination.

6. We were provided with an agreed bundle of documents. References to page numbers in this Judgment are to the page number in the agreed bundle of documents.

The Law

7. Race is a protected characteristic pursuant to Section 4 of the Equality Act 2010 ("EQA"). Direct discrimination is defined by Section 13 EQA:

> **13 Direct discrimination**
>
> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

8. Section 23 EQA provides that a comparison for the purposes of Section 13 must be such that there is no material differences between the circumstances in each case. In **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337 Lord Scott noted that this meant that in most cases the Tribunal will have to consider how the Claimant would have been treated if he had not had the particular protected characteristic. This is sometimes referred to as relying upon a hypothetical comparator.

9. Harassment is defined by Section 26 EQA:

> **26 Harassment**
>
> (1) A person (A) harasses another (B) if--
>
> (*a*) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (*b*) the conduct has the purpose or effect of--
> (*i*) violating B's dignity, or
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account--
(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect.

10. Section 19 EQA provides:

19. Indirect discrimination

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purpose of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if-

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) It puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) It puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

11. The Courts have long been aware of the difficulties that face Claimants in bringing discrimination claims and of the importance of drawing inferences: **King v The Great Britain-China Centre** [1992] ICR 516. Statutory provision for the reversal of the burden of proof is now made by Section 136 EQA:

136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.
(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

12. Guidance on the reversal of the burden of proof was given in **Igen v Wong** [2005] IRLR 258. It has repeatedly been approved thereafter: see **Madarassy v Nomura International Plc** [2007] ICR 867. However, there may be circumstances in which it is possible to make clear determinations as to the reason for treatment so that there is no need to rely on the reversal of the

burden of proof: see **Amnesty International v Ahmed** [2009] ICR 1450 and **Martin v. Devonshires Solicitors** [2011] ICR 352 as approved in **Hewage v Grampian Health Board** [2012] ICR 1054. However, if this approach is adopted it is important that the Tribunal does not fall into the error of looking only for the principal reason for the treatment but properly analyses whether discrimination was to any extent an effective cause of the reason for the treatment.

13. In **Shamoon** it was stated that, particularly when dealing with a hypothetical comparator, it may be appropriate to consider the reason why question first; why the treatment was afforded.

14. It is also important to note that the Claimant's race need not be the sole, or even principal, reason for the treatment, if it has significantly influenced the reason for the treatment: see **Nagarajan v London Regional Transport** [1999] IRLR 572.

15. Before making our findings, we considered the totality of the evidence but set them out in chronological ordering including our findings as to the reason for certain of the Claimant's treatment to make the decision easier to follow.

16. Regulation 5 of the Agency Workers Regulations 2010 ("AWR") provides that:

> **5 Rights of agency workers in relation to the basic working and employment conditions**
>
> (1) Subject to regulation 7, an agency worker (A) shall be entitled to the same basic working and employment conditions as A would be entitled to for doing the same job had A been recruited by the hirer—
>
> (*a*) other than by using the services of a temporary work agency; and
>
> (*b*) at the time the qualifying period commenced.
>
> (2) For the purposes of paragraph (1), the basic working and employment conditions are—
>
> (*a*) where A would have been recruited as an employee, the relevant terms and conditions that are ordinarily included in the contracts of employees of the hirer;
>
> (b) where A would have been recruited as a worker, the relevant terms and conditions that are ordinarily included in the contracts of workers of the hirer,
>
> whether by collective agreement or otherwise, including any variations in those relevant terms and conditions made at any time after the qualifying period commenced.
>
> (3) Paragraph (1) shall be deemed to have been complied with where—

(*a*) an agency worker is working under the same relevant terms and conditions as an employee who is a comparable employee, and

(*b*) the relevant terms and conditions of that comparable employee are terms and conditions ordinarily included in the contracts of employees, who are comparable employees of the hirer, whether by collective agreement or otherwise.

(4) For the purposes of paragraph (3) an employee is a comparable employee in relation to an agency worker if at the time when the breach of paragraph (1) is alleged to take place—

(*a*) both that employee and the agency worker are—
(i) working for and under the supervision and direction of the hirer, and
(ii) engaged in the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualification and skills; and

(*b*) the employee works or is based at the same establishment as the agency worker or, where there is no comparable employee working or based at that establishment who satisfies the requirements of sub-paragraph (a), works or is based at a different establishment and satisfies those requirements.

(5) An employee is not a comparable employee if that employee's employment has ceased.

17. The time limit to bring a claim under the AWR is set out in regulation:

18 Complaints to Employment Tribunals etc

(1) In this regulation 'Respondent' includes the hirer and any temporary work agency.

(2) Subject to regulation 17(5), an agency worker may present a complaint to an Employment Tribunal that a temporary work agency or the hirer has infringed a right conferred on the agency worker by regulation 5, 12, 13 or 17 (2). …

(4) Subject to paragraph (5), an Employment Tribunal shall not consider a complaint under this regulation unless it is presented before the end of the period of three months beginning—

(*a*) in the case of an alleged infringement of a right conferred by regulation 5, 12 or 17(2) or a breach of a term of the contract described in regulation 10(1)(a) or of a duty

> under regulation 10(1)(b), (c) or (d), with the date of the infringement, detriment or breach to which the complaint relates or, where an act or failure to act is part of a series of similar acts or failures comprising the infringement, detriment or breach, the last of them; ….
>
> (4A) Regulation 18A (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of paragraph (4).
> (5) A tribunal may consider any such complaint which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so.

18. We consider that the provision that allows the consideration of a complaint submitted out of time should be construed in an equivalent manner the provision in the EQA which uses the same words "just and equitable". The Tribunal has a broad discretion to consider an extension of time on just and equitable grounds. It should not adopt either a liberal or a restrictive approach to such applications, but take into account all the circumstances of the case and balance justice and equity in deciding whether to extend time or not.

19. In **Robertson v Bexley Community Centre** [2003] IRLR 434 it was stated that the exercise of the discretion to apply a longer time limit that three months is the exception rather than the rule. In **Chief Constable of Lincolnshire Police v Caston**, Lord Justice Auld noted that the comments in Robertson were not to be read as encouraging tribunals to exercise their discretion in a liberal or restrictive manner. The tribunal may where appropriate gain assistance by looking at the factors applied in personal injury actions, see **British Coal Corpn v Keeble** [1997] IRLR 336. The tribunal may wish to consider the length and reason for the delay, the extent to which the cogency of the evidence is likely to effected by the delay, the extent to which the parties pursued has cooperated with any request for information, the promptness with which the Claimant acted once he or she knew of the facts giving rise to the cause of action and the steps taken by the Claimant to obtain appropriate professional advice.

20. Pursuant to section 13 Employment Rights Act 1996 ("ERA") a worker has a right not to have an unlawful deduction made from his wages. Pursuant to section 13(3) a deduction is defined:

> (3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

Findings

21. The Claimant entered an agreement with Caritas recruitment on 19 September 2012 whereby he was to be assigned to work as a Homecare Broker at Westminster City Council. He was involved in arranging provision of care for people living in their own homes. He commenced the role on 24 September 2012. When he started work he was paid £13 per hour.

22. On 3 June 2014 (P363) the Claimant sent an email to his then manager, Charles Stephens, stating that he and his colleague, Irene Mends, would like a meeting to discuss "inequality and equal treatment of staff in the working environment". Their contention was that as agency workers they were receiving less favourable terms than those provided to employees of Westminster. A meeting was arranged and an action plan was produced designed to deal with concerns that had been raised by the Claimant. The Claimant raised a number of issues including the fact that he did not receive a day of special leave over the Christmas period. That had been the case for Christmas 2012 and 2013. During the meeting it was agreed that the Claimant would be provided with a mobile telephone that would enable him to work occasionally out of the office.

23. Subsequently, Brian Vallis, Head of Business Services was involved in an email exchange about the appropriate rate of pay. He suggested an increased to £10.40, but refused to countenance an increase to £11. It may be that he was considering the applicable rates for those staff that were taxed at source. The Claimant, who was not taxed at source, was already receiving £13 per hour. Shortly thereafter, on 16 November 2014, the Claimant's rate pf pay was increased to £13.70 per hour.

24. On 19 December 2014, Jeannette Parkinson, the Claimant's then line manager wrote noting that 2 January 2015 was to be a day off for staff employed by Westminster and that this benefit would be provided to the Claimant.

25. In respect of his complaint that his rate of pay was a lower than it would have been had he been an employee, the Claimant has relied on a comparison with a member of staff of Westminster, Elizabeth Okone, who he states worked placing vulnerable adults in care homes. He contends that her role was similar to his role organising care for people in their own homes. The Claimant states that Ms Okone told him that she earned £32,000 per annum. The Claimant states that he last saw her in the Hammersmith office in 2014. We have been provided with the banding and the Inner London Pay Spine Scheme. The role of broker was in band B. If Ms Okone was at paid £32,000 per annum that would put her well into banding C and would put her on a rate of pay above team leaders who manage homecare brokers. The Respondent has been in some difficulty as they were not able to identify Ms Okone as an employee. It is likely that she has left the council's employment. We consider in circumstances in which there a pay spine system and job evaluation that her role must have been significantly different to that of the Claimant.

26. In a supervision on 21 July 2015 the Claimant complained about the level of work that he and Ms Mends were undertaking and suggested that there needed to be an increase in staffing.

27. In July 2015 Jackie Roberts was appointed as a Homecare Team Manager. Mrs Roberts had previously worked for one of the service providers. Mrs Roberts was engaged during a reorganisation to provide a tri-borough service that would cover Kensington and Chelsea, Westminster (both of which had previously been managed together) and the London Borough of Hammersmith and Fulham. There were also to be new service providers. The change would involve a considerable degree of administrative reorganisation. A number of new agency staff were recruited.

28. Mrs Roberts considered that the Claimant and Ms Mends were carrying out the role on the Westminster contract well. She decided to allow them to get on with that role, whereas new agency staff were involved in administrative roles, particularly in respect of the proposed transfer of contracts to new service providers and introduction of the new service for Hammersmith and Fulham. Mrs Roberts managed the Hammersmith and Fulham herself for a period.

29. At paragraph 32 of his witness statement the Claimant states:

> "Jackie Roberts told some staff members that 'there are some temporary staff members she will like to keep such as Lucy Menzies and Jason Southwell and there are also some temporary staff members that she will not like to keep such as Martin and Irene Mends'. Jackie Roberts concluded by saying 'you know what Africans are like'."

30. This was an allegation that was made for the first time in the Claimant's witness statement. The allegation is repeated in the witness statement of Ms Mends. We have faced some difficulty as Ms Mends' statement is in many sections word for word identical to that of the Claimants, and clearly was produced together with him. During cross-examination, the Claimant stated that he had been told about the comment by two other members of staff Aasjana Goxhi and Jennifer Rock. We indicated that we were minded to make witness orders for them to attend. Both attended voluntarily. Ms Goxhi provided a witness statement. One was not provided for Ms Rock as she had been absent from work due to sickness. We heard her evidence first. She stated that she and had been told by Donna Harris, the team leader, that Jackie Roberts had made some comment to the effect of "you know what Africans are like". She said it was said in the open office in the presence of the Claimant. She was not able to explain the context in which the comment was made. She did not support the Claimant's contention that the comment was made when describing the fact that the was some agency staff that Mrs Roberts wished to keep and some that she wished to let go. Ms Goxhi was adamant that Donna Harris had not told her about such comment, she had not heard such a comment and she had not passed it on to the Claimant. We have found this factual issue difficult to grapple with. There are a number of difficulties with the evidence. The allegation was raised for the first time in the Claimant's witness statement, which has limited the Respondent's opportunity

to prepare to respond to it. It is hearsay. Such evidence is notoriously unreliable. It is made more unreliable when there is no contemporaneous note of what was said and where a considerable time has passed since the comment was allegedly made in 2015. We also consider that may explain significant inconsistencies, such as the fact that Ms Goxhi is adamant that no comment was made while Ms Rock says that such comment was reported to her by Ms Harris, but not in the context suggested by the Claimant. Ms Rock's evidence that she felt it necessary to inform the Claimant of the comment is rather hard to follow if he was present when the comment was made. On balance we are not satisfied that the evidence is sufficient to persuade us that such a comment was made. The alleged comment does not form one of the specific allegations of discrimination. Had we been persuaded on balance of probabilities that the comment had been made the effect would have been to lead us to consider whether the burden of proof had shifted, so that the Respondent must establish that the Claimant's race played no part whatsoever in the decisions in respect of which specific claims are made. For reasons which we will set out later we have adopted that approach when considering the "reason why" in determining whether the Claimant's treatment was to any extent affected by his race. Accordingly, our analysis would not be significantly different had we accepted that the comment had been made.

31. The first chronological allegation of direct race discrimination (the 5th in the List of Issues) relates to an incident that occurred on 11 September 2015. Lucy Menzies was asked to undertake some data cleansing by Mrs Roberts. Mrs Menzies found that there was an entry described as "pending" in respect of a request for care made two weeks previously. She was concerned that the request might not have been actioned by the Claimant and that this might have left the service user without care for two weeks. The Claimant was extremely unhappy when Mrs Menzies raised the issue with him. That there was a misunderstanding. The Claimant believed that at Mrs Menzies was referring to a different care package and felt that Mrs Menzies, who had recently joined the team, was telling him how to do his job and making a false accusation. He became angry and repeatedly told Mrs Menzies in a raised voice that she did not know what she was talking about. We appreciate that in such circumstances the Claimant may genuinely have felt that he was not shouting and that he was simply trying to explain his position, whereas we accept his voice was raised sufficiently that Mrs Roberts heard it and it was heard by other staff members who were disturbed by the altercation.

32. Mrs Roberts and Mrs Menzies wrote out their recollection of the event shortly thereafter. We accept that they set out an accurate recollection of what had occurred. When Mrs Menzies at was an asked about the incident in evidence, without looking at her statement or the contemporaneous note, she was able to set out her recollection as it appears in the contemporaneous note:

> "On 11/9/2015 I was asked to check through some cases for WCC to identify whether they were still live as we were closing some down. I came across a CP which was still outstanding to HCMT for care. As there was no case notes or a completed home care order, I asked Martin whether he knew anything about this – he kept repeating himself and

saying 'you don't need to look at that, it's done, it's done' however, as I tried to explain to him that no confirmation been put in place and it was concerning, he began to raise his voice and say 'you don't know what you're talking about'.

I then decided to call Respect care and confirm the care was actually place, as this CP was originally scheduled to commence over a week ago. As I was speaking to a co-ordinator, Martin kept pointing his finger at me and his voice again began to raise saying 'you don't know what you are talking about!!' - I was embarrassed and I couldn't hear the person on the phone over his voice. I then, told the coordinator I would speak with them late because I couldn't understand what they were saying or hear them.

I left my desk and walked into the kitchen Martin then followed me and brought a piece of paper and continued to point at it. I said to Martin I didn't understand what he was trying to explain to me because the piece of paper didn't make sense and I was merely concerned the SU did not have care.

I then went back to my desk and he started saying over and over 'you don't know' and I again explained to Martin that I was not trying to interrogate him, I was asked by management to check care packages and this was outstanding. Then, both Martin and Irene started to yell at me, Martin stood up and shouted at me, pointing his finger across at me accusing me, Irene was also. Everyone in the office starting to look over, I put my head down and continued to do my work as it was very embarrassing.

My manager Jackie came over to our desk where they were shouting. Jackie told them both to stop shouting as it was inappropriate and to sit down in his chair. Jackie then asked what the problem was and he was explaining to Jackie, something that didn't relate to the issue at all.

Trish, team leader then came over to our desks and suggested that we take this into another room as the yelling in the office was inappropriate and was disturbing. Jackie told Trish that it was under control and she was handling it."

33. We found and Ms Mends evidence about the 11 September 2015 incident very significant. From the outset of her oral evidence she was keen to speak about the incident. She said "the reason we are all here is because of 11 September". Ms Mends stated "they never liked both of us ever since this incident … they didn't like us from the 11th, before then okay, after the 11th everything went haywire". She said "after then we were side-lined in everything … all is to do with 11 September … before then a friendly environment. All that happened after 11 September was all because of it". Later in her evidence she said "I think it all happened because of 11 September, before that we did not have anything against her and she did not have anything against us. This is a reference to Mrs Robert. We consider it is key to understanding this case.

34. After the 11 September 2015 altercation Mrs Menzies states that she spoke very little to the Claimant. The Claimant continued to be extremely upset about the incident. It is that incident that led to a breakdown in working relations. We considered it was particularly notable that Ms Mends stated that before the incident Mrs Roberts didn't have anything us and we didn't have against Mrs Roberts. She was thereby accepting that she and the Claimant did have something against Mrs Robers after the incident. There was a falling out over this dispute that affected the remaining period during which the Claimant worked for the team. Although the Claimant genuinely believes that he was not at fault we consider that he was responsible for the altercation and that Mrs Menzies did not do anything for which she deserves criticism.

35. The Claimant contends that from 11 September 2015 until the termination of his engagement Mrs Roberts checked up on him. It is notable that the timeframe given starts on the date of the incident. We accept Mrs Roberts evidence that she was in the office 2 to 3 days a week and before going home would check up on how members of staff were getting on. We do not consider that there is any evidence to suggest this had anything whatsoever to do with the Claimant's race.

36. On 24 September 2015 (p290) the Claimant attended a supervision with his direct manager, the Team Leader, Donna Harris. The Claimant stated he was happy with the recent changes and went on to say that he remained unhappy about the incident on 11 September 2015. The Claimant said that in his opinion he did everything he was supposed to do with regards to his work. He said that he felt that he behaved properly in the situation and spoke with normal tone. He said that he felt that the team manager had not handled the situation fairly. He said he remained very unhappy about the situation.

37. Ms Harris produced a note about a discussion with the Claimant shortly after the incident (P287):

> "When I met with Martin, he was still very angry, he said that he didn't feel supported and felt that Team Manager took Lucie's side. I asked him to speak to Jackie about this, but he was adamant that he wouldn't
>
> Since the incident, I have encouraged Martin several times to speak to Jackie about why he still felt angry and he refused."

38. It is notable in the context in which it is at is alleged that Mrs Roberts failed to have meetings with the Claimant that the Claimant's position was that after the 11 September 2015 incident he was not prepared to discuss it with Mrs Roberts.

39. On 27 September 2015 the Claimants hourly rate was increased to £14.70.

40. From October 2015 to the termination of the Claimant's engagement the Claimant alleges that Jackie Roberts had regular meetings with Rachel Williams, Lucy Menzies and Jason Southwell, but not with him. While we accept that there were meetings with the individuals mentioned they were held

in because they were recently engaged agency staff working on administrative tasks in respect of the transfer to new service providers; and because they did work on the Hammersmith and Fulham service as part of the new tri-borough arrangement. There was a period for which this was managed by Mrs Roberts. We accept that is the entire explanation for why such meetings took place. It had nothing to do with the Claimant's race.

41. The Claimant alleges that in late October 2015 Jackie Roberts removed flexitime for agency staff. Mr Vallis stated in his evidence that such flexitime was not provided for the new agency workers such as at Mrs Menzies and Mr Southwell. We accept that he was mistaken. They were allowed flexitime. That was the evidence of Mrs Menzies. She stated that she had taken days off under the flexi system. There are a number of reasons why we accept Mrs Menzies evidence that she was allowed to take flexitime. An email was sent on 21 October 2015 stating that flexitime would no longer be provided but extra time would be added to timesheets. The email was sent to team members including at John Leedham and Mrs Menzies. We cannot see any reason why they would have been sent the email if they were not in receipt of flexitime. There is a subsequent email about the withdrawal of flexitime that was sent to Mr Leedham and Mrs Menzies. There is a further email on 25 January 2016 asking that the cards which were used when recording flexitime be deactivated. This included the card of Mrs Menzies. There was a further email reminding staff that although they could not take flexitime they could claim overtime. Again, this was sent to Mrs Menzies who replied "thank you". We cannot see any reason why it would have been sent her, and why she would have replied, if it flexitime had not been provided.

42. This forms the backdrop to one of the Claimants allegations. The Claimant considers the fact that there are two sets of minutes that appear to record a meeting on 22 October 2015, one of which refers to withdraw of flexitime from the "Westminster Team", demonstrates that the version that does not refer to the Westminster Team has been fabricated, to cover up the fact that flexitime was only withdrawn from Westminster staff. We do not accept that flexitime was only withdrawn from Westminster staff. Accordingly, there is no reason for the notes to be a fabricated. We consider it is likely that Mrs Roberts is correct in stating that and that she may have incorrectly failed to change the date on a template. Save for the words "Westminster staff" there is no other material difference that could be of any relevance to the claims raised by the Claimant. We do not accept that the minutes were fabricated, although we do understand why the Claimant was suspicious when he discovered that there were two sets of minutes for the same meeting.

43. We accept that Mrs Roberts was advised by human resources that flexitime was not available for agency workers. We accept that is the complete and entire reason for her decision to withdraw it. We do not consider it had anything to do with the Claimant's race whatsoever.

44. The Claimants alleges that from November 2015 Jackie Roberts excluded him from private discussions. As set out above when considering the specific allegation made in respect of meetings with Rachel Williams. Lucy Menzies

and Jason Southwell that there Mrs Roberts met with staff members when necessary. Mrs Roberts allowed the Claimant and Ms Mends to get on with doing the day-to-day work on the Westminster contract. We accept that the meetings with other staff members were supervisions for new agency workers and about matters such as arranging for the transfer of contracts to new service providers and dealing with management of the Hammersmith and Fulham team. After the dispute on 11 September 2015 Mrs Roberts may have been more reluctant to speak to the Claimant and Ms Mends. It is also the case that they were reluctant to speak to her. However, we do not consider there is any evidence to suggest that this had anything to do with the Claimant's race.

45. In November 2015 the Claimant alleges that Mrs Menzies was asked to manage the Claimant for a week in the absence of Ms Harris. Mrs Menzies did on occasions allocate work. The Claimant in his evidence stated this was not a management duty. The evidence we have seen demonstrates that this task was routinely allocated to all members of staff. We do not accept that Mrs Menzies doing some allocation involved her managing the Claimant, nor do we consider that the way this matter was dealt with had anything whatsoever to do with the Claimant's race.

46. On 2 November 2015 the Claimant raised a complaint. He again raised his concerns about the events of 11 September 2015. He stated:

> "On 11th September 2015, a new staff member Lucie M, who has little or no knowledge of the work we do, misunderstood a common task given to her to do and she accused me of not been providing a service user with services for more than two weeks. I reported this false accusation to the Team Manager Jackie R and the Team Manager asked me to show her how to find the information in the system which I did but she did not listen to me as she was trying to impress some of her friends by speaking very loudly. I explained the situation to the Team Manager and the Team Manager was fully aware that this staff member got the information wrong but she did not tell her that but the Team Member accused me of shouting at her when I did not shout."

47. We accept that the Claimant believed that he was not at fault and that he had not shouted. However, we accept that this is not an accurate perception of what occurred on 11 September2015. There was a misunderstanding, but it was the Claimant who had raised his voice as he was angry because he felt that a new member of staff who did not know what she was doing was telling him how to do his job.

48. On 19 November 2015, the Claimant attended a supervision with Ms Harris. He stated that he was very unhappy about the withdraw of flexitime which he he considered was unlawful. The Claimant understood that agency staff should have comparable contractual terms to those of permanent employees. From this time, he could have investigated the matter and bought a claim.

49. On 1 February 2016 an email was sent to the Claimant reminding him to add extra time worked to his timesheet. The Claimant told us in evidence that he was not prepared to do this he was, in his words, working under protest.

50. On 9 march 2016 an email was sent by Ms Harris to the Claimant and Rachel Williams about the work being done on transfers to the new service providers stating "let me know if you want to do an extra hour's overtime to do some of the transfers". The Claimant declined to do the work. He was not interested in doing the transfers work. That was one of the duties that had led to some of the meetings staff had with Mrs Roberts.

51. On 17 March 2016 Patricia McMahon sent an email to Mrs Roberts including interview questions in respect a new structure for the service. In the new structure agency staff were to be replaced by employees. Agency staff were encouraged to apply for the new roles. It must have been apparent that if they did not do so their engagements would be brought to an end. In the email Ms McMahon stated "I spent some additional time with Irene and Martin trying to persuade them to apply for the roles, explaining and guiding them that this would be the next step in their professional careers. As a result of the reorganisation other agency staff did not apply for roles. Mr Leedham resigned as did Marie Bailey. Ms Bailey been working in role part-time for some time as she was proposing to retire. Ms Bailey and Mr Leedham were aware that they would be leaving the Council in good time and therefore told staff and were able arrange a proper farewell.

52. The Claimant alleges that between March and April 2016 Mrs Roberts promoted Rachel Williams to be a team leader but not himself. We do not accept as a matter of fact Ms Williams was promoted to be team leader. While Ms Williams may have done some allocation, deciding which jobs were to be done by which members of the team; that was something that was rotated around the team. Ms Williams also attended some meetings about the new contracts. That was in an administrative assistant role not in a managerial role. We do not accept that Ms Williams was at any stage promoted to the role of team leader.

53. The Claimant submitted his Claim Form to the tribunal on Friday 4 March 2016 raising complaints under the Agency Workers Regulations and a complaint of race discrimination. The Claimant contends that the Claim Form was a protected act for the purposes of his victimisation complaint. That is not challenged by the Respondent.

54. The Claimant alleges thereafter, which must be on his return to work on Monday 7 March 2016, he was subject to racial harassment by Mr Southwell and Mrs Menzies. There are a number of oddities about the allegation. The Claimant in his evidence spent a great deal of time explaining the seating on the desks on which he was working. He stated that at the time that the harassment occurred he sat at one end of a number of desks with Ms Mends to his left and next to her Rachel Williams and at the end Mrs Roberts. The Claimant states that Mrs Menzies was opposite to him, next to her, opposite Ms Mends was Jason Southwell, then Edvin Panichucks and Donna Harris.

His evidence was that Ms Mends was at present for part of the period during which the harassment occurred. However, Ms Mends' evidence was that she left on 4 March 2016 so could not have been present when any of those comments were allegedly made. The allegations are set out at paragraph 11 of the Case Management Order. The Claimant alleges that Mr Southwell and Mrs Menzies on a daily basis called him the following names; kangaroo, African goat, African bushman and aborigine and that Mr Southwell said that in Australia they never sit close to aborigines as they sit with the Claimant because of fears of being stabbed by the aborigines as they carry knives with them always. The Claimant alleges that Mrs Roberts, Mrs Menzies and Mr Southwell laughed at the comments.

55. In his oral evidence Claimant said that Mrs Menzies and Mr Sothwell would talk in whispers together, that Mrs Menzies would write something down and they would laugh. He stated that offensive words were said with no context and not as part of any sentence or comment.

56. In a supervision with Ms Harris on 18 May 2016 the Claimant referred to the word kangaroo being used 308A as follows:

> "Martin said he is very distracted sitting at his desk, he said that this is because Lucy and Jason makes a lot of noise, consequently he is finding it difficult to concentrate on his work. Martin said that they are often talking about other people and using foul language which he doesn't want to hear. He also said they make comments that he considers to be racist and feels that these are used to describe him i.e. reference to kangaroos. Martin has requested to move from his current seat."

57. In the supervision record the Claimant refers only to the word kangaroo having been used and to his "feeling" that it was a reference to him. In his evidence he suggested the word kangaroo was used when he was chewing gum, suggesting that it was a reference to the way in which the side of his face moved while chewing. At the supervision there was no reference to the more explicit racist comments that the Claimant says were used; although by the date of the supervision the Claimant had already made an application amend including the other alleged comments. We find it hard to understand why he did not raise them with Ms Harris. We also find it hard to understand how other people on the desk failed to hear those words being used or accepted such comments being made. On balance we do not accept those terms were used. We do not accept that the Claimant was subject to race harassment. If such comments had been made we consider that they would have been overheard by others who would have raised an issue in respect of them. We also consider the Claimant's current case is inconsistent with what he said to Ms Harris. Mrs Menzies was adamant that such words were not used. There is no record of any of the other staff on the desk having complained. On balance of probabilities we do not accept that the words alleged by the Claimant were used.

58. On 30 June 2016 the Claimant's engagement was terminated. The Claimant had not applied for one of the jobs in the permanent structure and therefore his service was no longer required. There was no budget for his role to continue. The agency agreement could be terminated immediately. The Claimant was paid one week's money. We accept that the real reason that the engagement was terminated was because the Claimant had not applied for any the new roles in the structure. We do not consider that this had anything whatsoever to do with his race or of him bringing his tribunal claim. However, we do understand why the Claimant feels aggrieved that he had so little notice of the termination, which did not permit him to arrange a proper farewell.

59. Dealing with the remainder of the allegations set out in the list of issues. The first allegation under the AWR is about the withdrawal of flexitime; being able to take off one day a month after accruing enough hours through overtime. That was done in October 2015. There is a 3 month time limit under the AWR unless the tribunal considers it just and equitable to apply extend the time limit. As set out in our fight findings of fact the Claimant considered the change to be unlawful from the outset. We consider that had he wished to bring a claim he could have done so within three months. We do not consider he has put forward any reason why it would be just and equitable to extend time over so long a period.

60. The Claimant next alleges that he was paid a lower hourly rate than his comparators. We do not accept that that this is the case. In any event, the provision of the agency workers regulations rests on determining what the Claimant would have been paid if employed by the Respondent. We accept Mr Vallis' evidence that the relevant pay rate at which the Claimant would have started if he had been employed is towards the bottom of the local government pay scale that was providing at the hearing. Even assuming moved up one pay scale per year the Claimant would have been on a lower rate of pay had he been an employee of Westminster.

61. The Claimant alleges under the AWR that he was not provided with a day off for Christmas in 2012 and 2013. These complaints are very substantially out of time. The Claimant has shown that he was aware of the right to parity and of the AWR and has not put forward any reason why it would be just and equitable to apply a longer time limit than three months.

62. We have dealt with the and direct race discrimination complaints above. We do not accept the Claimant's race played any role whatsoever in such treatment that we have found occurred.

63. We do not accept that the racist terms alleged by the Claimant were used or that Mrs Roberts or Mrs Menzies laughed at them. Accordingly, the complaints of harassment failed.

64. The Claimant claims as an unlawful deduction from wages arising from the removal of flexitime. The Claimant was informed in clear terms that he could include any overtime hours on his timesheet and that he would be paid for them. For the Claimant it was a matter of principle and he refused to do so. In

such circumstances, we do not accept that he had any right to payment for those hours, and therefore that there has not been a deduction from any sum that was payable to him.

65. We do not accept that the termination of the Claimant's engagement resulted from him bringing his claim. We accept that it is fully explained by the fact that the Claimant had not applied for a role in the new structure and therefore there was no longer any budget for his role to continue.

66. In respect of the indirect discrimination complaint, the Claimant contends that there was a provision criterion or practice applied that agency staff are not entitled to work from home once a week, whereas permanent staff members are. We do not accept that the Claimant established that such a provision criterion or practice was applied. Employees of Westminster and agency staff working on the home care team worked from the office as they needed to do so because of the and telephone system which rooted calls around the various and team members. It may be that there are other members of staff doing other jobs that have agreed flexible working, but we do not agreed that accept that the Claimant has established that there was any general provision criterion or practice applied employees could generally work one day a week from home whereas agency staff could not. Accordingly, the claim of indirect discrimination also fails.

67. At the conclusion of the hearing the Respondent made an application pursuant to rule 76 of the Employment Tribunal Rules 2013 alleging that the claim had no reasonable prospects of success and/or that the Claimant had acted unreasonably in bringing and pursuing the case. The tribunal is empowered to make an award of costs under rule 76 if certain thresholds have been surpassed. That does not alter the fact that the Employment Tribunal is a venue in which costs do not follow the event and the making of an award of costs that is not a commonplace: **Gee v Shell UK Ltd** [2002] EWCA Civ 1479, [2003] IRLR 82, at paras 22, 35. It is also venue that is designed to be available for parties representing themselves. It has been long accepted that those representing themselves, as often they must before the Employment Tribunal, may not be able to bring to the consideration of their own claims the objectivity and legal knowledge that would be expected of a representative: **AQ Ltd v Holden** [2012] IRLR 648, EAT.

68. Mr Harris's submission that the Claimant was guilty of unreasonable conduct had a number of strands. Mr Harris alleged that that these were serious and unpleasant allegations including allegations of offensive racist comments. They were made in a public hearing. He alleged that they were divisive and insidious allegations. It is the nature of discrimination complaints that they are very serious for those that bring them and for those that are subject of the allegations. However, they are cases that are considered to be of particular importance in a pluralistic society. If the fact that the allegations necessarily are extremely upsetting for those against whom they are made meant that there has been unreasonable conduct anyone who did not succeed in a discrimination claim would be liable to costs. We do not consider that there is proper basis for an award of costs in this case.

69. Next it was suggested that there was no evidence to substantiate any of the allegations. We have had to reach our conclusions on balance of probabilities. Often where allegations depend on the word of one witness against another there is relatively little supporting evidence. We have also had to grapple with the issue of the alleged comments made by Mrs Roberts. While on balance of probabilities we did not accept that the comment alleged against her was made, particularly not in the context alleged by the Claimant, there was evidence to support the allegation which was properly put before the tribunal. We do not accept that there was no evidence to support the claims that the Claimant brought.

70. While it is suggested that some of the allegations were inconsistent with the documents, that is nothing unusual in the case of this nature. It is the type of evidence upon which the tribunal generally has to make its findings of fact in these sensitive and difficult cases

71. Next it is alleged that that there was unreasonable conduct through the allegation of fabrication of a document. We have already stated in our findings of fact that the Claimant was understandably suspicious when he found that there appeared to be two versions of minutes an important meeting, one of which fitted with his view that it was only Westminster staff that were affected by the removal of the flexitime. We held that was incorrect but we understand why the Claimant was concerned. We do not consider it is a proper basis for making a costs order and against the Claimant.

72. The Respondent also relied on a section in their response where they suggested certain claims are out of time and that this may lead to an application for costs. We did not have to deal with any time issues in respect of the discrimination claim. Had we found in favour of the Claimant there might well have been a strong argument that there was some form of continuing act. As the specific warning about costs was in respect of time, not in respect of the claim as a whole, we do not consider that there is any reason for awarding costs.

73. Although we appreciate the great upset that has been caused to those involved in this case and we do not consider it is anything out of the normal range of discrimination claims that the tribunal has to determine. If cost were awarded too easily in such difficult claims Claimants with valid claims would be put off from bringing them for fear that they would be subject to a costs award.

74. In all the circumstances, we do not accept that the Respondent has established either that this was a claim that had no reasonable prospects of success or that the Claimant was unreasonable bringing and conducting it.

_____
Employment Judge Tayler
17 July 2017

Annex A

1. Agency Worker Regulations 2010 ("AWR") (against 1st and 2nd Respondents)

1.1. It is accepted that the Claimant was at all material times an agency worker for the purposes of AWR Regulation 3 and that his AWR complaints can be brought against both Respondents.

1.2. Was there at the relevant times a comparable employee to the Claimant employed by the hirer (the 1st Respondent) for the purposes of AWR Regulation 5(4)? The Claimant relies on the following individuals whom he maintains were comparable employees: Elisabeth Okone; Jitte [ ]; Donna Harris; and Jack [ ]. The Claimant maintains that all four are employees of the 1st Respondent and that, apart from Ms Okone who is based at King Street, Hammersmith, all are based at Chelsea Town hall. The parties will in due course liase to clarify the full names of the four individuals in advance of any full merits hearing.

1.3. Are the terms which the Claimant maintains he was entitled to "relevant terms and conditions" for the purposes of AWR Regulation 6? The Claimant relies on the following alleged "relevant terms and conditions":

1.3.1. the right to take one day off a month after accruing enough hours through overtime;

1.3.2. the Claimant was on a lower hourly rate than his comparators from late 2012 until the end of his engagement at the 1st Respondent on or around 30 June 2016; and

1.3.3. the provision of one day's special leave during the Christmas period.

1.4. Did the Claimant's comparators have the benefit of these terms?

1.5. Was the Claimant entitled to them under the AWR?

2. Section 13 Equality Act 2010: Direct discrimination because of race (against 1st Respondent only)

2.1. The Claimant is black and relies on his colour as the protected characteristic of race.

2.2. Did the 1st Respondent, because of the Claimant's race, treat the Claimant less favourably than it treated or would treat others? The allegations of less favourable treatment relied on by the Claimant are as follows:

2.2.1. in November 2015, Ms Jackie Roberts, a manager, invited every member of the team who was white into a private room for a discussion individually but not the Claimant (or the Claimant's agency worker colleague, Ms Irene Menz, who is also black);

2.2.2. for a period of around one week in November 2015, Ms Roberts asked Ms Lucie Menzies (who is white and Australian) to manage the Claimant (and Ms Menz) despite the fact that Ms Menzies only had a few months experience in the job;

2.2.3. from October 2015 through to the end of the Claimant's engagement at the 1st Respondent on or around 30 June 2016, Ms Roberts held regular meetings with Rachael Williams (who is white British), with Ms Menzies and with Mr Jason Southwell (who is white and Australian) but did not hold such meetings with the Claimant (or with Ms Menz);

2.2.4. in late October 2015, Ms Roberts gave instructions that temporary/agency staff would not be entitled to take flexi time off because they were not permanent and confirmed this instruction in a team meeting. The only two agency staff who had this benefit at the time were the Claimant and Ms Menz;

2.2.5. on 11 September 2015, Ms Roberts accused the Claimant (and Ms Menz) of shouting at Ms Menzies when they did not in fact shout at Ms Menzies;

2.2.6. from March 2016 – April 2016, Ms Roberts promoted Ms Williams to carry out the duties of the team leader and did not promote the Claimant;

2.2.7. from 11 September 2015 through to the end of the Claimant's engagement at the 1st Respondent on or around 30 June 2016, Ms Roberts has continually gone round to the Claimant's desk checking what he is doing and asking him what the level of his workload is;

2.2.8. the 1st Respondent's terminating the Claimant's engagement at the 1st Respondent on or around 30 June 2016, before it expired of its own accord on 29 July 2016.

3. Section 19 Equality Act 2010: Indirect discrimination on grounds of race (against 1st Respondent only)

3.1. Did the 1st Respondent apply the following provision, criteria and/or practice ('the provision') generally, namely that agency staff were not entitled to work from home once a week whereas permanent staff were?

3.2. Does the application of the provision put people who are black at a particular disadvantage when compared with persons who are not black because a greater percentage of agency staff at the 1st Respondent are black as compared to the percentage of permanent staff who are black?

3.3. Did the application of the provision put the Claimant at that disadvantage?

3.4. Does the 1st Respondent show that the treatment was a proportionate means of achieving a legitimate aim? ***(The Respondent will confirm the legitimate aim it relies on at the end of the Preliminary Hearing referred to above if still appropriate.)***

4. *Section 26: Harassment related to race (against 1st Respondent only)*

4.1. Did the 1st Respondent engage in unwanted conduct as follows in the period since the Claimant submitted this Employment Tribunal claim on 4 March 2016:

4.1.1. Mr Southwell and Ms Menzies on a daily basis have called the Claimant the following names: kangaroo; African goat; African bushman; and Aborigine;

4.1.2. Mr Southwell said that in Australia they never sit close to Aborigines as they sit with the Claimant because of fears of being stabbed by the Aborigine as they carry knives with them always;

4.1.3. Ms Roberts, Ms Menzies and Mr Southwell laughed at the comments referred to in the sub-paragraphs above.

4.2. Was the conduct related to the Claimant's race?

4.3. Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

4.4. If not, did the conduct have the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

4.5. In considering whether the conduct had that effect, the Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

5. *Section 27 Equality Act 2010: Victimisation (against 1st Respondent only)*

5.1. The Claimant brought these Employment Tribunal proceedings on 4 March 2016 and it is accepted that this was a protected act.

5.2. Did the 1st Respondent subject the Claimant to a detriment because the Claimant did that protected act? The alleged detriments are as follows:

5.2.1. those set out at 11.1.1 – 11.1.3 above;

5.2.2. that set out at 9.2.8 above.

6. Unlawful deduction from wages (against both Respondents)

6.1. The Claimant maintains that, over the period from November 2015 to the end of his engagement at the 1st Respondent on or around 30 June 2015, he was not paid flexitime owed to him (and that this totals around £1,000, although the Claimant has not yet precisely calculated it). He maintains that this occurred because Ms Roberts stopped agency staff taking flexitime in lieu of overtime worked, but that the Claimant nonetheless worked the overtime and was not paid for it.

6.2. *Was the Claimant due any sums as a result and, if so, how much and from whom was this due?*

7. Time/limitation issues

7.1. Were any of the complaints under the Equality Act 2010 presented outside the relevant tribunal time limit?

7.2. If so, does the Claimant prove that there was conduct extending over a period which is to be treated as done at the end of the period? Is such conduct accordingly in time?

7.3. If not, was any complaint presented within such other period as the Employment Tribunal considers just and equitable?

7.4. Are there any time/limitation issues in relation to the AWR and/or unlawful deduction from wages complaints?