EMPLOYMENT TRIBUNALS

Claimant: Mr J Johnson

Respondents: (1) Reed Specialist Recruitment Limited
(2) Ms D Archer
(3) Ms M Luckhurst
(4) Mr D Prout

Heard at: London Central (via Cloud Video Platform) **On:** 14, 15 and 16 March 2023

Before: Employment Judge Joffe
Ms G Carpenter
Mr A Adolphus

Appearances
For the claimant: In person
For the respondents: Mr Jones, counsel

RESERVED JUDGMENT

1. The claimant's claims of direct race discrimination contrary to Section 13 Equality Act 2010 are not upheld and are dismissed.
2. The claimant's claims of harassment related to race contrary to Section 26 Equality Act 2010 are not upheld and are dismissed.
3. The claimant's claims of victimisation contrary to Section 27 Equality Act 2010 are not upheld and are dismissed.

REASONS

Claims and issues

1. The issues the Tribunal had to decide had been clarified and agreed at a case management hearing in front of Employment Judge E Burns. They remained unaltered at the full merits hearing and were as follows:

Time limits / limitation issues

1. Were all of the claimant's complaints of discrimination and victimisation presented within the normal 3 month time limit in section 123(1)(a) of the Equality Act 2010 ("EQA"), as adjusted for the early conciliation process and where relevant taking into account that section 123(3)(a) says that conduct extending over a period is to be treated as done at the end of the period?

2. If not, were the complaints presented within such other period as the tribunal thinks just and equitable pursuant to section 123(1) (b) of the Equality Act 2020?

Equality Act, section 26: harassment related to race

3. Did the respondents engage in conduct as follows:

3.1 Did R3 deliberately delay in providing him feedback about his trial and addressing his concern about the emergency tax code by not ringing the claimant on 11 April?

3.2 Did R3 deliberate avoid taking his calls on 14 April 2022?

3.3 Was R2 rude and offensive to him during a telephone call on 14 April 2022?

The claimant says she accused him being aggressive, claimed she was recording the phone conversation, didn't address the issues needed to have addressed and dropped the phone on him.

3.4 Did R4 assign the investigation of the complaint to R3 and allow her to investigate it, which he should not done because the complaint was about R3?

3.5 Did R4 fail to ensure that fail the claimant's grievance was properly investigated?

3.6 Did R3 make contact with the claimant that was inappropriate because he had made a complaint against her?

3.7 Did the grievance outcome:

(a) Not fully address the claimant's complaint about emergency tax

(b) misrepresent the feedback about the claimant from the school

(c) contain false allegations about the claimant in that he did not call R3 in "quick succession" and he did not raise his voice on the phone on 14 April 2022

4. If so was that conduct unwanted

5. If so, did it relate to the protected characteristic of race?

6. Did the conduct have the purpose or (taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

Equality Act 2010, section 13, section 39: direct discrimination because of race

7. The claimant is black.

8. Has the respondent subjected the claimant to the treatment outlined in paragraphs 3.1 - 3.7.

9. Was that treatment "less favourable treatment", i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The claimant relies on the person who rang on 14 April and got through to R3 who is white as an actual comparator and/or hypothetical comparators.

10. If so, was this because of the claimant's race and/or because of the protected characteristic of race more generally?

Equality Act, section 27: victimisation

11. Did the claimant do a protected act?. The claimant relies upon the following:

a. The complaint of race discrimination he made on 15 April 2022

12. Did the respondents subject the claimant to any detriments as follows:

12.1 The allegations in paragraphs 3.4 - 3.7 above; and

12.2 Tell him that the school did not want to offer him the position of Behaviour Officer when this was not true, such that he was prevented from taking the role

13. If so, was this because the claimant did a protected act?

Remedy

14. If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the claimant is awarded compensation will decide how much should be awarded.

Findings of fact

Hearing

2. We were provided with an electronic bundle running to 109 pages. The pdf we were provided with was locked for editing, which meant, when it came to our deliberations and preparing this Judgment, it was not possible to copy and paste from the bundle. As an aside, we would discourage the respondents' solicitors from providing bundles in this form in future, as it destroys one of the efficiencies otherwise created by having an electronic bundle.

3. We heard evidence from the claimant himself. He had provided an unsigned statement from Mr C Tay but Mr Tay did not attend to give evidence and we would have been unable to give much weight to his statement had it contained any direct disputed evidence. We observe that it looked like Mr Johnson had drafted this statement on Mr Tay's behalf. Much of the statement was an account of what Mr Tay must have been told by the claimant about events, including this sentence: 'He relayed this to Maddison via email, who in turn replied back saying she would get back to me via telephone that same day', where 'me' is clearly the claimant and not Mr Tay.

4. We also had witness statements and heard evidence from the second, third and fourth respondents. The respondents had produced a late statement from Ms M Yeoman and, at the outset of the hearing, we heard from the parties about whether we should admit that evidence. The respondents told us that this evidence was being adduced to meet a possible change of case from the claimant, if he accepted that the person he spoke to on the phone on 14 April 2022 was not Ms Archer but Ms Yeoman and sought to amend to make allegations against Ms Yeoman. We explored this issue with the claimant. He was adamant that the person he spoke with was Ms Archer and not Ms Yeoman and that he did not wish to amend his claims. In those circumstances, Mr Jones, on instructions, abandoned the application to introduce the evidence of Ms Yeoman.

5. Also at the outset of the hearing, the claimant objected to the inclusion in the bundle of some calls logs produced by the respondents. He told us that there was no proof of their authenticity. We indicated that we generally assumed documents were what they purported to be unless there were reasons to doubt their authenticity, rather than routinely requiring proof that documents were authentic, which practice would be oppressive and disproportionate in most cases. The claimant was not able to point to any feature of the call logs which suggested that they were not what they appeared to be and we admitted them in evidence.

Chronology

Parties

6. The first respondent is an employment agency. The second respondent is a business manager and runs the first respondent's London Secondary Team.

7. The fourth respondent is a customer project executive in the first respondent's 'service excellence team', which we understand inter alia deals with complaints but also with matters such as reference requests and more general enquiries and administrative tasks. He has been in that role since October 2021. We were told that the complaints process is that when complaints are received they are forwarded to the relevant managers first. If the complainant is not happy with the response, the complaint is escalated to the group customer team for a final investigation. If the complainant is still not happy, he or she is directed to the relevant governing body.

8. The third respondent was at the relevant time a recruitment consultant at the first respondent's Croydon branch in the education market. She has since left the first respondent's employment. Her duties included registering new candidates, placing them in roles, compliance screening and organising training events for candidates. She was subject in her role to various targets as to candidates registered and placed with clients, phone calls made and successful placements. She earned bonus payments for targets which were met. It is, we accepted, a challenging role and fast paced, juggling the candidates, clients and vacancies. The priority at any time is live placements.

9. The claimant signed up with the first respondent in March 2022. He had a video call with the third respondent to discuss his background and qualifications. She also processed his ID, a passport with his photograph. She was aware at that point that he is a black man.

10. When an employee signs up for payment through the first respondent's payroll system, an employee checklist / starter form can be filled in. This would be a single page which covered questions about payment details and whether this was the person's only job, the person's address, name and NI number. Recruitment consultants did not have access to this form to fill it in on a candidate's behalf. We did not see an example of such a form.

11. There was a dispute between the parties as to whether the claimant had a valid DBS check at the time of the events the subject of his claims. This was not a central issue for us but the claimant said that it went to the respondents' credibility as they said he did not have a current DBS certificate when he was placed in a trial period with a school, which would have been illegal. The third respondent said that he did not have a current DBS certificate and that the school had agreed to waive the DBS certificate whilst he undertook the trial.

12. We noted that an email from the second respondent to the school dated 29 April 2022 referred to the claimant as 'on interim vetting due to his DBS situation' and that the amended response said that he was on an interim CRC (Criminal Records Check) for that period. Whilst no one explained these matters in detail to us, we concluded that the evidence supported the

respondents' evidence on what was after all a peripheral matter and that there was no impact on the respondents' credibility.

13. On 22 March 2022, the third respondent emailed the claimant about a behaviour support mentor role at Bobbi Moore Academy. On 23 March 2022, she had a phone call with the claimant, who agreed that his CV should be sent to the school and on 24 March 2022, she put him forward for the role. She had a video call with him as part of a compliance check.

14. On 29 March 2022, the claimant began attending at the school for a four day paid trial. He telephoned the third respondent on 30 March 2022 and said he was enjoying the school. 1 April 2022 was the last day before the Easter holidays.

15. On 5 April 2022, the third respondent emailed the claimant to say he would be paid for his trial shifts; her contact at the school was on annual leave so she would get feedback for him by the following Monday (11 April), but: 'From what I have heard so far they love you!'. The third respondent told us that the decision maker at the school was then absent due to sickness and, although she contacted the school almost daily, the person she had contact with did not have authority to make the decision. As a result she did not get feedback timeously.

16. On 11 April 2022, the claimant contacted the third respondent about the fact that he had been put on an emergency tax code and taxed accordingly for his trial shifts. The third respondent said that he would need to contact HMRC about his tax code. She said she would call him back in a minute but told us that she was very busy and that was why she failed to do so.

17. The second respondent's evidence was that when clients start working shortly after registration and do not have a P45, the payroll department liaises with HMRC but HMRC do not process the details quickly enough to avoid an emergency tax code. This is a common incident. The payment details would be between payroll and the candidate. A consultant would not be privy to the new starter form.

18. There was some ambiguity about how the claimant and the third respondent were in communication on 11 April 2022. We had in the bundle one email from the third respondent to the claimant on 11 April 2022 saying, 'Hi Joseph, I will call you in a moment'. In oral evidence, the third respondent thought she had phoned the claimant that day but the call logs did not show an outgoing call from her to him that day. She also thought that she had had an email from him when she came in in the morning about HMRC. We did not see that email.

19. The claimant said in evidence that he had had no call from the third respondent that day. However, in his written complaint to the first respondent, he said that, on 11 April 2022, he emailed the third respondent about emergency tax and she told him he needed to contact HMRC directly. He thought this was weird and that he should have been given a starter form, which he related to the third respondent 'who in turn replied back saying she would get back to me by telephone that same day'. In oral evidence he said that there was no contact from the third respondent on 11 April 2022 and that the emergency tax contact was probably on the previous Friday.

20. We concluded that, given the claimant's account of what had happened in his complaint, there was clearly contact between the claimant and the third respondent about the emergency tax issue on 11 April 2022. The lack of outgoing calls from the third respondent to the claimant caused us to conclude that there must have been emails passing between the two which neither party had provided. This was one of a number of aspects of the documents which we were provided with which was unsatisfactory. The respondents, who were legally represented, bear a significantly greater portion of the blame for the inadequacy of the documentary evidence.

21. The fact that the claimant gave evidence about the lack of contact on 11 April 2022 which we rejected together with evidence about the DBS check which we also rejected caused us to conclude that he was to some extent tailoring his evidence to suit his case and that was a matter we had to bear in mind when resolving disputes of fact. The third respondent's evidence was unreliable on this point in that she believed there was a phone call in circumstances where in fact it appeared that the contact must have been by email. However, given that the important issue was whether there had been contact or not, rather than the form the contact took, it seemed to us that this was an issue with the third respondent's memory rather than an attempt to mislead the Tribunal.

22. The third respondent's detailed explanation for why she did not revert to the claimant after emailing to say that she would do so was that she was very busy on client calls and also organising a training event at Bobbi Moore Academy. She said that these events required a lot of organisation; they were a way of introducing a pool of candidates to a school. She was also catching up with admin and compliance work, and, as it was the school holidays, some colleagues were on leave including her manager, the second respondent. She was covering the second respondent's mailbox, which was very busy.

23. There was no contact between the claimant and the third respondent on 12 or 13 April 2022.

24. 14 April 2022 was the Thursday of Easter week. The claimant called the first respondent's office, repeatedly calling different teams. There was a large

number of calls around the middle of the day in quick succession from the claimant's phone number, as demonstrated by the first respondent's call logs. The claimant did not deny he made those calls. The third respondent believed that he also called from different telephone numbers that day.

25. At one point the third respondent got a message saying a client from Bobbi Moore Academy had called. She looked up the number as she did not recognise the client name provided; the number turned out to be the claimant's number. When she told her colleague it must be a mistake, the person who took the call was adamant that the caller had said he was from Bobbi Moore Academy. At lunch time, she was told that the claimant had called again asking for her directly and she said she would take the call but the colleague would not put the call through to her as the third respondent was on her lunch break.

26. The third respondent said that she diarised to call the claimant back at the end of the day. She was busy with a lot of calls and could not prioritise the claimant, for whom she in any event had no feedback. Later in the afternoon a call was put through to the third respondent from someone saying that he was a candidate looking for work in the third respondent's area. The third respondent took the call and the claimant came on the line.

27. The call was made by Mr C Tay, the claimant's white friend. The claimant said that Mr Tay 'advertised' his whiteness. By this he meant his voice, his tone, his accent. The Tribunal panel were not convinced that race would generally be apparent from voice unless an individual had for example a distinctive accent from an African country and even accent is far from an infallible guide. In any event, the third respondent had not heard Mr Tay's voice when she decided to take his call.

28. The claimant accepted in cross examination that Mr Tay had not signed up with the first respondent and had not done a trial at Bobbi Moore Academy. He had introduced himself on the phone, said he was looking for work and asked for the third respondent by name.

29. When the third respondent became aware that she was speaking with the claimant, she apologised for not calling back earlier and she explained she was busy. She said that there was no feedback on the job and that she was sorry about the HMRC situation. She said in evidence that she told the claimant to call HMRC; he said that was fine and that he understood the HMRC situation was not her fault. He was pleasant. She asked him if he wanted to attend the training day she was organising and he said that he would wait until he got feedback from the school.

30. When she got off the phone, the third respondent said that she told her colleague, Ms Yeoman, that it was in fact the claimant who had called. Ms Yeoman then took a call from the claimant less than five minutes later.

31. The claimant was unsure in evidence why he made a further call. He said it was for some kind of follow up question about HMRC or the placement.

32. We did not have Ms Yeoman's evidence about the call for reasons explained above. Ms Yeoman told the second respondent that the claimant continued to talk about the emergency tax issue and became increasingly unhappy and started shouting. Ms Yeoman said that she wouldn't be able to continue helping if the claimant did not lower his voice and ended the call. The third respondent said that Ms Yeoman told her that she told the claimant that the claimant had made the third respondent uncomfortable with his calls and that was when he became aggressive.

33. The claimant's account of this call in his original email of complaint is that the person he spoke to was the third respondent's manager. He did not provide a name for her in the email. In oral evidence, he said that she referred to herself as 'Debbie'. He said that later in the call, when he asked if he could speak to the manager, she said that she was the manager. His complaints about the phone call were that the person he continued to believe was the second respondent accused him of being aggressive, claimed she was recording the conversation, did not address his issues and put the phone down on him.

34. The second respondent said in evidence that Ms Yeoman was a senior consultant and may have told the claimant that she was someone more senior in order to try to support a resolution of the claimant's complaints.

35. The second respondent said that she was on annual leave that day and this evidence was supported by an annual leave record which was in the bundle.

36. We accepted that evidence, supported as it was by contemporaneous documentation. We accepted that Ms Yeoman probably did describe herself as the manager, given that she was the senior consultant in the team. We accepted that she said that the claimant was being aggressive and ultimately put the phone down on him and that she did not further engage with his issues, although we observe that there does not appear to have been anything more she could say about those, given that the third respondent had told him to take up the emergency tax issue with HMRC and that there was as yet no feedback on the claimant from the school.

37. We saw a log from Ms Yeoman about speaking with the claimant that day which we discuss further later in these Reasons.

38. The claimant emailed a complaint at 16:49 that day to the first respondent's service excellence team, subject line: 'Complaint against Madison Luckhurst'. After setting out the complaint about the third respondent, the email says: 'On the 14th of April 2022, after speaking to Maddison, I spoke with a lady who identified herself as Maddison's manager who in turn was:
    1. Rude and sarcastic
    2. Offered no consolation with regards to how I was wronged
    3. Falsely accused me of being aggressive towards her and Maddison
    4. Dropped the phone on me.'

39. The third respondent's further evidence about the events of that day was that she felt uncomfortable and had a discussion with the regional manager, who gave her advice about avoiding the claimant on social media, not leaving the office by herself, not staying in the office by herself and not saying who she was if approached by a stranger.

40. The third respondent agreed in cross examination that the claimant had not in fact contacted her on social media before or tried to contact her outside of the office. She said that if the claimant had threatened her, there would have been a different process followed and the claimant would have been removed from the first respondent's system.

41. On 15 April 2022 before 8 am the claimant sent the same complaint he had already made the afternoon before to the first respondent but also said that he had suffered race discrimination. He said that he escalated the complaint because it was not being taken seriously.

42. On 19 April 2022, Mr Prout emailed the claimant to say that he had received the complaint and that an investigation had been initiated. He asked the claimant to share any further evidence he considered should be part of the investigation. On 22 April 2022, Mr Prout emailed the claimant to say that the investigation was ongoing as staff were on annual leave. Mr Prout was not questioned about why there was a delay at this point; we were not told who was on annual leave.

43. It appeared that at some point, Mr Prout erroneously marked the complaint as having been completed but again he was not questioned about how this came about.

44. The Tribunal could understand why the claimant was dissatisfied with the communication he was receiving from the first respondent in late April 2022. He had still not received feedback about his trial at the Bobbi Moore Academy and had not received a substantive response to his complaints.

45. On 29 April 2022, because the third respondent was away from the office, the second respondent contacted the Bobbi Moore Academy and chased for

feedback on the claimant. The school responded right away, saying that the claimant was not the right fit for the role but otherwise providing positive feedback. The claimant asserted to the Tribunal that, behind the scenes, the respondents must have spoken to contacts at the school to talk the school out of appointing him. He said that there would be a relationship between the agency and the school such that the agency could influence the school.

46. The second respondent did not revert to the claimant with this feedback, possibly because she was leaving that to the third respondent on her return. Neither were questioned about that matter but we observe that it is unfortunate that no one contacted the claimant at that point.

47. On 10 May 2022, the third respondent emailed the claimant asking if he was looking for work immediately or in September and suggesting they have a chat. We could well understand that this would have been of concern to the claimant, who at this stage still had not been given feedback about his trial at the school nor a substantive response to his complaint.

48. The claimant then copied the second respondent in to his email to the third respondent saying that he had made a formal complaint, that he had not had feedback, that they had made a huge error regarding his pay and that the third respondent's manager 'spoke to me like a second class citizen and dropped the phone on me'.

49. The second respondent replied to the claimant:
- The third respondent had been off sick for a couple of weeks and she had been monitoring her calls and inbox;
- She explained about emergency tax and how he had been advised to contact HMRC as the first respondent could not make amendments;
- She said that she believed that she and the claimant had never spoken on the phone;
- She said that she had not seen his complaint and asked him whom he had sent it to so that she could track it down;
- She explained the reasons for the delay in feedback from the school and said that she would chase again for feedback.

50. What is curious about this email is that the second respondent had obtained feedback by this point but did not mention it to the claimant. However she was not asked about this matter in cross examination and we considered that the most plausible explanation is that she had simply forgotten given the numbers of clients and candidates we understood were being dealt with and the absence of the third respondent.

51. The claimant then re-sent his complaint to the second respondent. The claimant said in oral evidence that there was another 'grievance' he had sent, which was not in the bundle but on a computer which was not available to him

as he was attending the hearing from somewhere which was not his home. We were never shown a further grievance document and were not persuaded that one existed.

52. On 12 May 2022, the second respondent contacted the fourth respondent's team to ask if they were aware of the complaint and discovered it had accidentally been marked as complete. The second and fourth respondents had a discussion in which the second respondent made clear that she was not in the branch on 14 April 2022 and therefore was not the manager complained of. The fourth respondent then forwarded her the correspondence to investigate at branch level.

53. We were not provided with any of the first respondent's policies and procedures about complaints so do not know whether they make any provision about ensuring impartiality of investigations.

54. The second respondent investigated by speaking with the third respondent, other members of the team and the regional manager. She emailed the claimant on 12 May 2022 with the results of her investigation:
- Payment query: She had addressed this in her earlier email;
- Interview feedback: She recounted the feedback given by the school and said that the delay was due to the Easter holiday and staff sickness;
- Communication with the office: The claimant had made multiple calls in quick succession. The third respondent had been busy and not able to return his call before one of his calls had been put through to her. He had then made a follow up call. The person he spoke to was not the second respondent. That person felt that the advice about the payment and tax code issue had been reiterated a number of times and the claimant was sufficiently unhappy about the advice that he was shouting. The person said that they would not be able to continue helping the claimant if he did not lower his voice and the call came to an end.

<u>How telephone calls were recorded in the first respondent's office</u>

55. We heard some oral evidence in response to Tribunal questions about the first respondent's office telephone systems. All calls were received through Microsoft Teams. Calls to a team number would go to an individual line. The Teams system would show with a red or green dot whether a particular person was on the phone or available to receive a call.

56. In terms of logs, we saw examples of three types. There was something called the X3 system where comments could be input manually against dates. These records are time and date stamped and cannot subsequently be edited although new comments can be added. We were told that it was not possible to retrospectively make an entry for a particular date.

57. We were provided with two entries to this system, both filled in on 14 April 2022 and relating to the claimant. Ms Yeoman commented in one entry: 'asked to call back to check his HMRC is okay.' The third respondent's entry said: 'Called to discuss emergency tax code – He became angry about the fact I made him be emergency taxed.'

58. What the third respondent said in oral evidence about that entry was that it referred to the 11 April discussion as she had input that on 14 April 2022. They often did not have time to fill in calls logs but after the events of 14 April 2022 she thought she should fill in about the 11th. She said that the claimant was angry on 11 April 2022 about the HMRC issue. She said that her comments on the 14 April call would have been attached to the profile for the number he used to call. We did not see those comments.

59. We concluded that the first respondent's systems for logging calls were inadequate or inadequately followed and we were not sure whether the third respondent's explanations for the calls logs we saw was correct. We did not however put any sinister construction on her evidence in circumstances where she had been away from the job for some time and seemed to have limited recall of the entries. It is for example possible that the claimant made an entry recording what she had been told by Ms Yeoman and had forgotten that is what she did.

60. We also saw some Teams print outs. These showed that ten calls were received by the first respondent from the claimant's number on 14 April 2022.

61. We further saw records of calls made by the second and third respondents over the relevant period. These appeared to support the third respondent's account that she was busy, amongst other things, with phone calls on the 11 and 14 April 2022, although we were conscious that the records only showed outgoing phone calls and not incoming calls or other work types.

Law

Harassment

62. Under Section 26 Equality Act 2010, a person harasses a claimant if he or she engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of (i) violating the claimant's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. In deciding whether conduct has such an effect, each of the following must be taken into account: (a) the claimant's perception; (b) the other circumstances of the case; and (c) whether it is reasonable for the conduct to have that effect.

63. By virtue of s 212, conduct which amounts to harassment cannot also be direct discrimination under s 13.

64. In Richmond Pharmacology Ltd v Dhaliwal [2012] IRLR 336, EAT, Underhill J gave this guidance in relation to harassment in the context of a race harassment claim:

> 'an employer should not be held liable merely because his conduct has had the effect of producing a proscribed consequence. It should be reasonable that that consequence has occurred. The claimant must have felt, or perceived, her dignity to have been violated or an adverse environment to have been created, but the tribunal is required to consider whether, if the claimant has experienced those feelings or perceptions, it was reasonable for her to do so……..Not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers and tribunals are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other discriminatory grounds) it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.'

65. An 'environment' may be created by a single incident, provided the effects are of sufficient duration: Weeks v Newham College of Further Education EAT 0630/11.

66. Whether conduct is 'related to' a protected characteristic is a broad test but did not cover a failure by union officials to properly deal with allegations of sexual harassment where there was no finding that the officials were motivated by the claimant's sex: UNITE the Union v Nailard [2018] EWCA Civ 1203.

Direct race discrimination

67. In a direct discrimination case, where the treatment of which the claimant complains is not overtly because of the protected characteristic, the key question is the "reason why" the decision or action of the respondent was taken. This involves consideration of mental processes of the individual responsible; see for example the decision of the Employment Appeal Tribunal in Amnesty International v Ahmed [2009] IRLR 884 at paragraphs 31 to 37 and the authorities there discussed. The protected characteristic need not be the main reason for the treatment, so long as it is an 'effective cause': O'Neill v Governors of St Thomas More Roman Catholic Voluntarily Aided Upper School and anor [1996] IRLR 372.

68. This exercise must be approached in accordance with the burden of proof provisions applying to Equality Act claims. This is found in section 136: “(2) if there are facts from which the Court could decide, in the absence of any other explanation, that 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.”

69. Guidelines were set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258 regarding the burden of proof (in the context of cases under the then Sex Discrimination Act 1975). They are as follows:

(1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s.41 or s.42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word 'could' in s.63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such

facts pursuant to s.56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

70. We bear in mind the guidance of Lord Justice Mummery in Madarassy, where he stated: ‘The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal “could conclude” that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.’ The ‘something more’ need not be a great deal; in some instances it may be furnished by the context in which the discriminatory act has allegedly occurred: Deman v Commission for Equality and Human Rights and ors 2010 EWCA Civ 1279, CA.

71. The tribunal cannot take into account the respondent’s explanation for the alleged discrimination in determining whether the claimant has established a prima facie case so as to shift the burden of proof. (Laing v Manchester City Council and others [2006] IRLR 748; Madarassy v Nomura International plc [2007] IRLR 246, CA.)

72. The distinction between explanations and the facts adduced which may form part of those explanations is not a watertight division: Laing v Manchester City Council and anor [2006] ICR 1519, EAT. The fact that inconsistent explanations are given for conduct may be taken into account in considering whether the burden has shifted; the substance and quality of those

explanations are taken into account at the second stage: Veolia Environmental Services UK v Gumbs EAT 0487/12.

73. In Chief Constable of Kent Constabulary v Bowler EAT 0214/16, Mrs Justice Simler said: 'It is critical in discrimination cases that tribunals avoid a mechanistic approach to the drawing of inferences, which is simply part of the fact-finding process. All explanations identified in the evidence that might realistically explain the reason for the treatment by the alleged discriminator should be considered. These may be explanations relied on by the alleged discriminator, if accepted as genuine by a tribunal; or they may be explanations that arise from a tribunal's own findings.'

74. Although unreasonable treatment without more will not cause the burden of proof to shift (Glasgow City Council v Zafar [1998] ICR 120, HL), unexplained unreasonable treatment may: Bahl v Law Society [2003] IRLR 640, EAT.

75. We remind ourselves that it is important not to approach the burden of proof in a mechanistic way and that our focus must be on whether we can properly and fairly infer discrimination: Laing v Manchester City Council and anor [2006] ICR 1519, EAT. If we can make clear positive findings as to an employer's motivation, we need not revert to the burden of proof at all: Martin v Devonshires Solicitors [2011] ICR 352, EAT.

76. In some cases, the question of whether there is 'less favourable treatment' is so intertwined with 'the reason why' that a sequential analysis can give rise to needless problems and should be dispensed with: Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, HL.

77. For an individual to be an actual comparator for the purposes of a direct discrimination claim, there must be no material difference in their circumstances: s 23 Equality Act 2010. Whether the situations of a claimant and his comparator are materially different is a question of fact and degree: Hewage v Grampian Health Board [2012] ICR 1054, SC.

Victimisation

78. Under s 27 Equality Act 2010 a person victimises another person if they subject that person to a detriment because that person has done a protected act or the person doing the victimising believes that person has done or may do a protected act.

79. The definition of a protected act includes the making of an allegation that the person subsequently subjecting the claimant to a detriment (or another

person) has contravened the Equality Act 2010 or done 'any other thing for the purpose or in connection with' the Equality Act.

80. A detriment is anything which an individual might reasonably consider changed their position for the worse or put them at a disadvantage. It could include a threat which the individual takes seriously and which it is reasonable for them to take seriously. An unjustified sense of grievance alone would not be sufficient to establish detriment: EHRC Employment Code, paras 9.8 and 9.9.

81. The protected act need not be the only or even the primary cause of the detriment, provided it is a significant factor: Pathan v South London Islamic Centre EAT 0312/13.

82. A claim for victimisation will fail where there are no clear circumstances from which knowledge of the protected act on the part of the alleged discriminator can properly be inferred: Essex County Council v Jarrett EAT 0045/15.

Conclusions

Time limits / limitation issues

Issues 1. Were all of the claimant's complaints of discrimination and victimisation presented within the normal 3 month time limit in section 123(1)(a) of the Equality Act 2010 ("EQA"), as adjusted for the early conciliation process and where relevant taking into account that section 123(3)(a) says that conduct extending over a period is to be treated as done at the end of the period?

2. If not, were the complaints presented within such other period as the tribunal thinks just and equitable pursuant to section 123(1) (b) of the Equality Act 2020?

83. The claim form was presented on 18 May 2022 after Early Conciliation between 16 and 18 May 2022 and the respondents sensibly did not seek to argue at the hearing that any of the complaints had been presented out of time.

Equality Act, section 26: harassment related to race

Issue: 3. Did the respondents engage in conduct as follows:

3.1 Did R3 deliberately delay in providing him feedback about his trial and addressing his concern about the emergency tax code by not ringing the claimant on 11 April?

84. On our findings of fact, there were emails passing between the third respondent and the claimant on 11 April 2022 in particular about the tax code issue.

85. We accepted the third respondent's evidence that she was busy on that day and did not deliberately fail to ring the claimant back. We understood that the nature of the work was such that the consultants prioritised placements where some activity was required. In the case of the claimant's trial period, the third respondent had no feedback to give at that point and the task was pushed to the back of the queue.

Issue 3.2 Did R3 deliberately avoid taking his calls on 14 April 2022?

86. We accepted that the third respondent was busy again on 14 April and that was why calls sometimes would not go through to her. Some of the claimant's own behaviour, such as pretending to be a contact from Bobbi Moore did not assist him in getting a call back. We accepted that the third respondent had offered to take the claimant's call and a colleague declined to put it through to her during her lunch hour.

87. Once the third respondent had had a clear message from the claimant, we accepted that she diarised to call him back that day. This seemed to us to be of a piece with the general impression we got that relaying to a candidate that there was still no feedback on a role was not a task which the first respondent would prioritise. We found there was no deliberate avoidance of the claimant's calls; equally calling him back was not a priority for the third respondent.

Issue: 3.3 Was R2 rude and offensive to him during a telephone call on 14 April 2022?

88. The claimant said that the second respondent accused him of being aggressive, claimed she was recording the phone conversation, didn't address the issues he needed to have addressed and dropped the phone on him.

89. We accepted the respondents' evidence that the person the claimant spoke to was Ms Yeoman. The evidence that the person said she was 'Debbie' arose only at the hearing and we did not accept it.

90. We could see no evidence that the second respondent's leave records had been falsified and we had telephone records which showed she made no calls that day. We could understand why Ms Yeoman, as a senior consultant dealing with a complaint, might describe herself as the manager.

91. In any event, we could see no good reason why the respondents would have concocted an untrue story about who took the call which would have required

three witnesses to perjure themselves had Ms Yeoman given evidence and which did not seem to benefit the respondents in any way since they attended the hearing prepared to defend an amended case against Ms Yeoman if need be.

Issue: 3.4 Did R4 assign the investigation of the complaint to R3 [should be R2] and allow her to investigate it, which he should not have done because the complaint was about R3 [R2]?

92. The fourth respondent did assign the investigation of the complaint to the second respondent. Is that something he should not have done?

93. What happened was that the fourth respondent accepted the second respondent's assurance that the manager referred to in the claimant's complaint was not the second respondent because she was on leave that day.

94. We considered that it would have been best practice to have appointed another manager to investigate the issue in the circumstances. The second respondent was the third respondent's manager. Ideally someone other than the second respondent should have investigated the issue of who was responsible for the telephone call complained about, including investigating that issue with the claimant.

Issue: 3.5 Did R4 fail to ensure that fail the claimant's grievance was properly investigated?

95. We were not able to assess this issue on the basis of any written complaints policy or grievance procedure the first respondent may have. Apart from the choice of investigator, however, we did not consider that there was anything wrong with the investigation. The second respondent seems to have asked the right questions and spoken to the right people. She offered the claimant the opportunity to contact her with further information and he did not take her up on that offer.

Issue: 3.6 Did R3 make contact with the claimant that was inappropriate because he had made a complaint against her?

96. The third respondent seems to have contacted the claimant as she would any candidate she was looking to place in a vacancy. She was not aware that he had made a complaint of race discrimination about her at that time.

97. We did consider, however, that once a race discrimination complaint had been made, the first respondent should have allocated the claimant to a different consultant. The fourth respondent was not cross examined about this matter, however, so we did not have any evidence as to whether the first respondent had any relevant policy covering such situations and as to whether the fourth respondent considered taking any action on the issue.

Issue: 3.7 Did the grievance outcome:

(a) Not fully address the claimant's complaint about emergency tax

98. The claimant remained of the view at the hearing that the third respondent could have taken some other action to sort out his emergency tax code – whether by providing him with the new starter form or filling it in herself. We accepted the respondents' evidence that the consultants would not have access to the new starter form or any way of speeding up the process so that the claimant was not issued with an emergency tax code.

99. We considered that the second respondent adequately addressed the complaint as she understood it and gave the claimant the opportunity to revert to her if he was not happy with the response. He could at that stage have explained his belief that the first respondent could have filled in the new starter form on his behalf and somehow expedited the process, at which stage she would have had the opportunity to explain to him that consultants did not have access to that form.

(b) misrepresent the feedback about the claimant from the school

98. The feedback which was conveyed was consistent with what we saw in writing from the school. The claimant believed that the respondents had interfered with the feedback in some way but we had no evidence to support that allegation and did not conclude that the feedback had been misrepresented.

(c) contain false allegations about the claimant in that he did not call R3 in "quick succession" and he did not raise his voice on the phone on 14 April 2022

100. The second respondent accepted the evidence she obtained that the claimant called in quick succession and raised his voice. The Tribunal accepted that she believed the evidence to be true.

101. The claimant himself accepted that he had called the third respondent a number of times in quick succession. The Tribunal concluded that it was likely that he had ultimately raised his voice, although he may not have perceived himself to have been doing so. The fact that he was frustrated and agitated was evidenced by the number of times he telephoned and the fact that he

telephoned yet again even after he had spoken to the third respondent. Ms Yeoman reported the raising of the voice contemporaneously to the third respondent and one of or other of them recorded that the claimant was angry in the log for that day.

Issue: If so was that conduct unwanted?

102. We accepted that such of this conduct as we considered was made out on the facts was unwanted by the claimant.

Issue: If so, did it relate to the protected characteristic of race?

103. We looked at each matter we found to have occurred (issues 3.4 and 3.6) and carefully considered whether there was evidence from which we could properly draw an inference that there was a relationship with race.

104. We considered the assignment of the complaint investigations to the second respondent. The hypothetical comparator here would have been a white person who made a complaint of discrimination or some equivalently serious matter. Would the fourth respondent have acted differently in those circumstances?

105. We did consider that it was poor practice simply to have taken the second respondent's word that she was not the manager in question. We considered whether there was any evidence that race played a role in that practice.

106. Our impression of the fourth respondent was that he was working without detailed guidance as to how to handle the situation which had arisen. He was relatively new in his role. He had also managed to lose track of and fail to progress the claimant's complaint. That seemed to us to point to a number of factors which were likely in play – a sense of urgency about now dealing with the complaint which made it convenient to assign it to the second respondent and either an excessive workload or a lack of systems and protocols or indeed experience which might have led him to deal with the matter differently. Had he not assigned the matter to the second respondent, he would have had to seek out another manager with time to carry out a speedy investigation. In a nutshell, it seemed to us that it was expedient for him to assign the matte to the second respondent and he was not aware of any reason why he should not do so.

107. The second respondent presented as a confident, competent and experienced person. She had been in the business longer than the fourth respondent. We considered that it was far more likely that the fourth

respondent simply took the most convenient option to get the complaint investigated than that race had played any role in his decision. It was not apparent to us in his evidence that he could see any problem with simply accepting what the second respondent told him about her role. We could see no evidence that he would not have taken what was the most convenient course whatever the race of the complainant.

108. We considered whether the third respondent's contact with the claimant after he made his complaint was related to his race.

109. Again, we could see no facts from which we could reasonably draw such a conclusion. The handling of the matter seemed to us to be inept. The fourth respondent had lost track of the complaint at this point. The third respondent was simply doing something which was part of her role – contacting a client to see if he was looking for work. Her tone was friendly. There was no evidence that she was aware about the complaint. The fourth respondent had not told the second respondent about the complaint, so that she would be made aware that a different consultant should deal with the claimant.

110. We could not see any evidence that a white client who had made a complaint, whether of discrimination or of equivalent seriousness, would have been treated differently, since the evidence seemed to us to show a lack of competence in the handling of the complaint without any contextual facts which seemed to us to point to race.

Issue: Did the conduct have the purpose or (taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

111. Looking at the issue of who was assigned to consider the claimant's grievance, our findings are that it was not the respondents' purpose to create the proscribed environment or violate the claimant's dignity.

112. We carefully considered whether the conduct had the proscribed effect. Looking at the complaint about the investigator appointed, it seemed to us that in some situations conduct answering the same broad description could have that effect – appointing an alleged perpetrator to investigate a complaint.

113. On the facts of this case, however, we did not consider that it did have that effect. The second respondent explained to the claimant that she was not the manager in in question and he sent his complaint again to her. The claimant

did not seem to object to contact with the second respondent and we did not consider that the evidence showed that he had in fact suffered the proscribed effect. Our impression was that he was angry that he had not been treated differently but not that the effect on him fell within the ambit of the strong words of Section 26 – that dignity be violated or that an environment be created which could be characterised as intimidating or any of the other descriptors. Nor would we have considered it reasonable, looking at the sequence of events in the round, for the conduct to have had that effect.

114. Similarly, the contact from the third respondent after the claimant had made a complaint of race discrimination against her could have had the proscribed effect if the complaint of race discrimination had itself been reasonable. However, we did not consider that the claimant could reasonably have believed that the third respondent was discriminating against him because of his race on the basis of the interactions which had occurred. In those circumstances it would not be reasonable for the treatment to have the proscribed effect.

115. For all of these reasons we did not uphold the complaints of harassment related to race.

Equality Act 2010, section 13, section 39: direct discrimination because of race

Issue: Has the respondent subjected the claimant to the treatment outlined in paragraphs 3.1 - 3.7.

116. Our findings are as set out above.

Issue: Was that treatment "less favourable treatment", i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The claimant relies on the person who rang on 14 April and got through to R3 who is white as an actual comparator and/or hypothetical comparators.

Issue: If so, was this because of the claimant's race and/or because of the protected characteristic of race more generally?

117. We did not find that the third respondent deliberately avoided the claimant's calls on 14 April 2022. We nonetheless considered whether Mr Tay was an appropriate comparator.

118. We concluded that his circumstances were materially different from those of the claimant in that he was allegedly a new client looking for work whereas the claimant was an existing client who was ringing about feedback which the third respondent did not yet have. Even had we found that the third

respondent made herself available for Mr Tay and not for the claimant, those material differences might well have explained any difference in treatment.

119. In any event, we did not conclude that the claimant's case would have been assisted by the use of Mr Tay as a comparator. The third respondent, as she told the Tribunal, could have had no idea of Mr Tay's race when she took his call.

120. So far as hypothetical comparators were concerned, we concluded that it was appropriate to take a Shamoon approach and consider the questions of whether there was less favourable treatment and whether any such treatment was because of race together.

121. Looking at the matters where we found the facts made out, we found no facts from which we could reasonably conclude that there was a relationship with race, nor were there facts from which we could reasonably conclude that a hypothetical comparator of a different race would have been treated differently. We do not repeat here our findings about 'relationship with race' which are relevant to our findings on direct discrimination also.

122. In reaching those conclusions, we gave careful consideration to unsatisfactory aspects of the evidence.

123. We considered whether there was any inference to be drawn from the fact that the second respondent did not send the claimant feedback she had already received when she first wrote back to him about his complaint.

124. The second respondent was not questioned about this matter in evidence. In the absence of direct evidence on the point, it seemed to us most likely that, as a busy person, she had forgotten that she had obtained the feedback and had not taken the time to go back through her emails to see if she had any further information. We could not see any logic in her consciously repressing information she had taken the trouble to obtain in circumstances where she dealt with the claimant's concerns promptly and with courtesy.

125. We were concerned by the lacunae in the documents which were put before us. Some of the earlier email communications which were described in evidence were simply not produced by either party. The respondents, unlike the claimant, were legally represented and they or their representatives should have done a better job. Policy documents explaining how the complaint process worked were not provided.

126. We bear in mind that failures of this sort are material from which we can draw inferences, but they must be inferences which it is logical to draw. Given the wider scale failures in relation to documents, which seemed to include entirely innocuous documents, we did not consider that it was logical to infer that the

respondents were deliberately concealing documents which might have damaged their case. It seemed to us that there was evidence of lack of competence or care or cutting of corners in relation to a case which the respondents may have felt did not present a significant risk. If the latter is the case, we would comment that it is a dangerous approach. Whilst we have not found in this case that, in conjunction the with other facts, the deficiencies in disclosure lead us to draw adverse inferences against the respondents, it is a strategy which could lead to a very different result on other facts.

Equality Act, section 27: victimisation

Issue: Did the claimant do a protected act?. The claimant relies upon the following:

a. The complaint of race discrimination he made on 15 April 2022

124. There was no dispute that the claimant had done a protected act in that he had made allegations of race discrimination.

Issue: Did the respondents subject the claimant to any detriments as follows:

12.1 The allegations in paragraphs 3.4 - 3.7 above; and

125. We concluded that the treatment described in issues 3.4 and 3.6 could reasonably be considered a detriment.

Issue: 12.2 Tell him that the school did not want to offer him the position of Behaviour Officer when this was not true, such that he was prevented from taking the role

127. The claimant suggested that the respondents had acted to deter the school from making him an offer or had concocted the email from the school. His reasoning was that he had been told that they 'loved' him and then that they did not want him.

128. Whilst we could understand why the claimant was upset by what appeared to be a change in approach by the school, we were not persuaded that the email was concocted or that the respondents had influenced the school in some way. There were a variety of reasons for those conclusions. The email appeared entirely genuine and, importantly, predated the second respondent's knowledge that the claimant had done a protected act. We accepted that she did not know about the complaint at the point where she obtained the feedback. Her evidence was supported by the emails which showed how she came to know about the complaint at a later point.

129. Although the third respondent had had some positive feedback about the claimant, it was not clear whether there were other candidates also being seen, including candidates from other agencies, or whether the positive feedback initially received about the claimant came from the decision maker. There were many more plausible possible explanations for the claimant ultimately not getting the job than that the respondents had somehow interfered with the feedback.

Issue: If so, was this because the claimant did a protected act?

130. Essentially we considered that there was a lack of competence behind the matters we found made out in respect of issues 3.4 and 3.6. We were concerned, as we have said above, by the lack of policy documents, but nonetheless we did not conclude that there were facts from which we could reasonably conclude that the complaint would have been dealt with differently had it not included an allegation of race discrimination.

131. So far as the third respondent contacting the claimant was concerned, there was no evidence that she was aware of the protected act.

132. Even if we had concluded that the respondents had concocted or interfered with the feedback and prevented the claimant's appointment to the role, which we did not, we would not have been able to conclude there was any relationship with the protected act due to the second respondent's lack of knowledge of the protected act at the time the feedback was received.

133. For those reasons we did not uphold the claimant's victimisation complaints.

_____

Employment Judge Joffe
London Central Region
13/04/2023

Sent to the parties on:
13/04/2023

For the Tribunals Office