mf

EMPLOYMENT TRIBUNALS

Claimant: **Mrs S Delpratt**

Respondent: **London Underground Ltd**

Heard at: **East London Hearing Centre**

On: **4-5 April 2017 & (in chambers) 2 May 2017**

Before: **Employment Judge A Ross**

Members: **Miss S Campbell**
Mr D Ross

Representation

Claimant: Ms A Hart (Counsel)
Respondent: Ms R Thomas (Counsel)

RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is that:-

1. **The complaints of direct race discrimination are not well-founded.**

2. **The Claim is dismissed.**

3. **The provisional remedies hearing listed for 31st July 2017 is vacated.**

REASONS

1 By a claim presented on 12 October 2016, the Claimant complained of two matters alleged to be direct race discrimination, namely:-

1.1 The letter received on 27 May 2016 in which Abdul Rahim (Manager) informed the Claimant that he had decided to uphold the grievance of Mr Siequien that the Claimant had created a hostile workplace for him.

1.2 By the Respondent charging the Claimant with a disciplinary charge as a result of the above finding.

2 The parties agreed a list of issues as follows:

Direct race discrimination: section 13 Equality Act 2010

2.1 Has the Respondent subjected the Claimant to any of the following treatment; and if so, whether the treatment proved or admitted is a detriment falling within section 39(2)(d) Equality Act 2010:-

2.1.1 By letter received on 27th May 2016, in which Abdul Rahim (manager) informed the Claimant that he had decided to uphold the grievance of Mr. Siequin that the Claimant had created a hostile workplace for him, by her conduct in asking Mr. Ryan (who is Jewish) and Mr. Simmons (who is gay) whether they were offended by a tattoo on Mr. Siequin's leg depicting an eagle perched on a swastika. The letter informed the Claimant that she would be referred for consideration under the Respondent's disciplinary procedure.

2.1.2 By the Respondent charging the Claimant with a disciplinary charge, as a result of the above finding.

2.2 If the Respondent has treated the Claimant as above, did they treat the Claimant less favourably than they treated or would have treated a comparator? The Claimant relies on her German nationality. The Claimant relies on a hypothetical comparator.

2.3 If so has the Claimant proven facts from which the ET could conclude that the treatment was because of the Claimant's nationality?

2.4 If so, has the Respondent shown that the treatment was in no sense whatsoever because of the Claimant's nationality?

3 Although the Respondent had raised jurisdiction as an issue in the amended Grounds of Resistance, it was volunteered by Ms Thomas that the claim was brought in time in respect of both complaints. We confirm that the Employment Tribunal has jurisdiction to determine these complaints, given that the acts or omissions relied upon occurred on 27 May 2016, and the EC identification was received by ACAS on 24 August 2016, with the ACAS certificate being issued on 24 September 2016; so the Claimant had one month from that date to present her claim.

4 The Respondent also agreed in submissions that the two matters alleged in the list of issues were detriments.

Evidence

5 There was an agreed trial bundle. Pages in this set of Reasons refer to pages in that bundle.

6 The Employment Tribunal heard oral evidence from the following witnesses:-

(i) the Claimant;

(ii) Abdul Rahim, Area Manager of South Kensington, and designated by the Respondent an "Accredited Manager Harassment";

(iii) Tracey Simms, Operational Task Manager, and "Accredited Manager Harassment".

7 The Employment Tribunal read the witness statements or Norman Thompson and Neil Cochrane (both RMT representatives) and attached such weight to these as we thought fit.

8 The Respondent challenged the Claimant's credibility, at one point alleging that she was lying. We found that the Claimant was a credible witness, who gave her evidence dispassionately, in a quite diffident way. For the reasons we set out below, we accepted her evidence on the central disputes of fact.

9 Counsel for the Respondent had helpfully prepared a chronology and a cast list.

Findings of fact

10 The Claimant is a train operator. From May 2015 until about October 2015, she was on long-term sickness absence. From December 2015, the Claimant has worked on the Jubilee Line. There are about 200 train operators in the Stratford depot, with 500 train operators working on the Jubilee line.

Respondent's Bullying and Harassment Policy

11 The Policy commences at p.175. Relevant extracts include: 3.3, 4.2, 5.1 and 6.3.

Context and background facts

12 In June 2015, Mr. Dion De Leon (a train operator on the Jubilee Line) raised a grievance against Mr. Siequien in relation to a tattoo on his leg, which included Nazi emblems, namely a swastika, an imperial eagle and a rosette: see photo at p.159. This was visible because Mr. Siequien usually wore shorts. The grievance was not upheld.

13 Subsequently, by Claim presented on 16th November 2015, Mr. De Leon brought claims of discrimination by victimisation in relation to that matter ("the De Leon litigation"). The respondents included Mr. Siequien and the Respondent in this case. The complaints against the Respondent in this case were upheld by the Employment Tribunal after a hearing on 1st to 3rd November 2016, in which the Judgment was promulgated on 10th January 2017: see pp192ff.

14 After the complaint had been made by Mr. De Leon, Mr. Siequien had had the swastika inked over, but the eagle and rosette motifs remained visible above it.

15 Mr. De Leon was and remains in a relationship with the Claimant, as her boyfriend or partner.

Relevant events

16 On 22nd December 2015, the Claimant approached Paul Ryan, train operator, in the Stratford depot canteen. A note of this conversation was made by Mr. Ryan, and later typed. This included that:

> "*She explained that as a German she found some tattoos on Brian Siequien's legs offensive and asked if I also found them offensive.*
>
> *…*
>
> *Gary Simmons was asked the same question by Sandra Del Pratt, he told me last week.*
>
> *Gary is a member of the Gay Community.*
>
> *I feel the question was unreasonable because it was being used to accuse an innocent man of racism.*
>
> *Brian Siequien is not racist and I say this as a Jew, he is a person who has shown respect to all and I offer this memo in his defence*."

17 On 24th December 2015, Mr. Ryan told Mr. Siequien of this conversation.

18 On 11th January 2016, Mr. Siequien made a written complaint of bullying by the Claimant: see p.44-45. This included:

> ***"Summary***
>
> *Train Operator Paul Ryan approached me in Wembley Park canteen on Thursday 24th December 2015 seeking a private word. He informed me that Sandra Delpratt had asked him whether he found one particular tattoo on my body offensive.*
>
> *I have known Paul for many years. I believe Sandra Delpratt approached him, as a Jewish man, to turn him against me. He has offered me his support because he was unhappy with her actions.*
>
> ***Surrounding History***
>
> *Sandra Delpratt is a friend and colleague of Train Operator Deleon, who filed a racial harassment complaint against me in July 2015. He called me a racist, and cited a small Swastika tattoo on my calf as evidence, which he claimed had upset and offended him.*
>
> *I had numerous tattoos, with a variety of symbols, done when I was younger as part of my passion for heavy metal music over 20 years ago. I had this tattoo blacked out by a tattooist once I was advised of the complaint because, although it had not been raised as an issue over the preceding years, I did not want to offend anyone.*
>
> *I was advised subsequently by the investigating manager that the complaint was not upheld against me after train operator Deleon's appeal against the original decision was also rejected.*
>
> *The matter was closed by the company, although it is subject to an employment tribunal externally between LUL and train operator Deleon.*

Complaint

I believe Sandra Delpratt is creating a hostile workplace for me by reigniting the issue of the tattoo directly with my workplace colleagues and trying to imply that I am a racist again.

This is now causing me; stress and anxiety, to isolate myself, to have disrupted sleep. I am currently taking advice from my doctor and an LUOH counsellor because of what is happening."

19 On 15th January 2016, Sean Mobbs, People Management Advice Specialist, approached Abdul Rahim and asked him to review whether the issues raised by Mr. Siequien met the criteria for a complaint of harassment and bullying within the Respondent's Policy referred to above.

20 Mr. Rahim decided that the claim met the relevant criteria, because of the impact and stress that Mr. Siequien stated he was suffering as a result of the Claimant's actions. Mr. Mobbs then asked him to investigate.

21 We found that, on the face of the complaint presented to him, there was a matter for Mr. Rahim to investigate, and the Claimant did not take issue with this. Mr. Rahim, however, made one of a number of mistakes by assuming that the stress must have arisen from the matters in Mr. Siequien's complaint. We find that Mr. Rahim failed to examine the cause of the stress and whether, quite understandably, Mr. Siequien may have been particularly sensitive due to the ongoing Claim brought by Mr. De Leon, in which he was a party (not a mere witness). We note, for example, that there was due to be a Preliminary Hearing in those proceedings on 20th January 2016.

22 The Tribunal found that Mr. Rahim proceeded by not considering matters arising from the De Leon litigation when considering the complainant's perception. The shortcoming of that approach was that, in assessing the question of reasonableness of the perception, Mr. Rahim was deciding a fact-sensitive question whilst at the same time excluding certain relevant facts.

23 On 26 February 2016, Mr. Rahim interviewed Mr. Siequien. He said that:

23.1. the Claimant had approached Mr. Ryan because he was active in the Jewish community, and Mr. Simmons because he was gay, and that if anybody was likely to be offended by his tattoo, it was these two;

23.2. he had had the tattoo for 22 years without complaint;

23.3. the Claimant had been off sick in July and August, and could only have learned of the grievance of Mr. De Leon from him;

23.4. the Claimant's actions had been motivated by her aim to stir up animosity against him, to reinforce Mr. De Leon's case against him in the De Leon litigation; Mr. De Leon had made "*quite disgusting*" claims against him demanding management take action against him that was "absolutely ridiculous";

23.5. he complained that the grievance raised by Mr. De Leon arose because they have fallen out over a pool table and the conduct of a joint picket

(ASLEF and RMT);

23.6. he could not work in the same place as the Claimant; this had caused him considerable stress and he was on medication; if possible he would like the Claimant to be removed from the line, but he understood this might not be possible.

24 Mr. Siequien's representative stated that the Claimant had sought to re-ignite a case that was no longer a company matter, which she had no right to do, and that she should have approached the complainant or a manager.

25 In that interview, Mr. Siequien described the swastika tattoo as "*small*", which Mr. Rahim accepted without checking. This was incorrect, because as the photographs show, the tattoo, with the Nazi eagle perched above it, could not reasonably be described as small. Indeed, Mr. Rahim did not appreciate that a large part of the tattoo was still visible (specifically, that part containing the eagle and rosette). We found the evidence of Mr. Siequien at that interview, who was wearing trousers at the time, to be somewhat disingenuous given the photographs at p159-160.

26 On 23rd March, Mr. Rahim interviewed the Claimant. The notes of this are at p51-53. She stated that she knew several Pauls but did not know who Mr. Ryan was and this was given in the context of the number of train operators. She was not given the dates of the two conversations, but she was asked about them. In response to questions about the two conversations alleged by Mr. Siequien, her evidence was that she could not recall any such conversation with the two train operators, Ryan and Simmons. She explained that she was still undergoing treatment and could not recall what happened a few days earlier, let alone in December 2015. She knew and got on well with Mr. Simmons. She denied any conflict with Mr. Siequien.

27 The Claimant did not state in this interview that she was of German nationality, nor that it was for that reason (or any reason) that she found the tattoo offensive. The Tribunal found that this was due to the nature of the interview, because she did not know the nature of the allegations and because the questioning was focussed on relationships within the workplace: see paragraphs 2,7, and 9 of the interview at p51-52. So there was no reason or context why she would voluntarily raise her nationality.

28 Mr. Rahim did not ask her if she found the tattoo offensive, because of her statement that she could not recall the conversations.

29 On 27th April, Mr. Rahim interviewed Mr. Ryan, who repeated the allegations in his note: see minutes p.57-60. He said that he found the tattoo offensive, but Mr. Siequien was not a racist. His evidence was that the tattoo was being used as a "*weapon*" in a dispute over a pool table.

30 On the same date, Mr. Rahim interviewed Mr. Simmons, and the minutes are at 61-64. Mr. Simmons' evidence was that he had had a conversation with the Claimant about the tattoo and she asked if he was offended by them. She informed him that the tattoo offended her due to her German heritage. On being asked why the Claimant had initiated the conversation with him about the tattoo, he replied that it was probably because he was openly gay and the Claimant wanted to know if he found the tattoos

on display on Mr. Siequien's leg offensive. His evidence was that she had wanted to identify if he would be a witness in a different context.

31 Mr. Rahim prepared a Case review report, which is at p.74-84. His conclusion is at p79:

> "***Conclusion***
>
> *There is clear evidence that R did approach W1 and W2 to ask if they had found C's tattoo to be offensive. On balance of probability it is fair to assume that W1 and W2 were approached by R as the most likely individuals to have found C's tattoos offensive due to their religious belief and sexuality, respectively.*
>
> *…*
> ***Decision***
>
> *On a balance of probability, it is reasonable to accept that R's behaviour was bullying as defined by LUL's Harassment and Bullying policy (effective 1st July 2013). The intentions of R are not considered relevant under the H&B policy and whilst R's intentions may not have been intimidating and malicious, the impact of R's actions undermined and humiliated the Complainant (or which could reasonably have been so perceived by the Complainant).*
>
> *It is my decision to uphold the complaint made by C.*
> *….*
>
> ***4 Summary of conclusions***
>
> *The facts of the case are that C learnt on 24 December 2015 that;*
>
> - *R was creating a hostile workplace for C by reigniting the issue of the tattoo (swastika) directly with his workplace colleagues and trying to imply that he was a racist, again.*
>
> *R stated that she did not recall any conversation where she may have approached colleagues to find out if they were offended by a tattoo that C had on his leg. On a balance of probabilities there is evidence that R had been aware of the tattoos that C had on his leg for a number of years prior to December 2015.*
> *…*
> *In conclusion, it is reasonable to accept that on the balance of probabilities W1 and W2's version of events to the more accurate accounts of the chain of events, which led to the complaint being raised by C. W2 is known by the R and W2 stated that his relationship with the R is such that she has willingly shared personal information about herself to him, so on balance of probabilities it is unreasonable to accept that R cannot recall the conversation with W2."*

32 The report does not refer to the Claimant's nationality at all, nor does Mr. Rahim consider whether this may be the cause of her being offended. Mr. Ryan had stated that the Claimant had told him that "*as a German*" she found tattoos on the complainant's legs offensive. Mr. Simmons's evidence was in the same vein: the Claimant had told him the tattoos offended her because of her German heritage.

33 By letter dated 27th May, at p.73, the Claimant was informed that the complaint had been upheld. Mr. Rahim also decided that the matter be referred to the Respondent's disciplinary procedure. The Respondent's process did not require any Human Resource professional nor any other Manager to review his report and to decide whether the matter should proceed. The decision to proceed to a disciplinary hearing was entirely that of Mr. Rahim.

34 We have considered Mr. Rahim's evidence at paragraphs 23 to 26 of his witness statement in which he seeks to explain why he took the decisions to uphold the complaint of 11th January 2016 and to refer the Claimant for a "CDI" (which is a company disciplinary hearing). We accepted several of the Claimant's criticisms of the grievance investigation and the decisions reached by Mr. Rahim. In particular:

34.1. Mr. Rahim did not consider the offensive nature and size of the tattoos. He did not mention the eagle motif at all.

34.2. The central flaw was that Mr. Rahim did not, as he should have, go back to the Claimant in order to show her the evidence and to ask her whether she was offended by the tattoos because she was German.

34.3. Mr. Rahim should have gone back to the Claimant and told her of the other evidence to see if it would jog her memory about the conversations, and to tell her who was present.

34.4. Mr. Rahim imputed an intention to the Claimant which was simply not there, specifically that she was seeking to imply that Mr. Siequien was a racist. This is highlighted by:

34.4.1. The conversation with Mr. Ryan took place in the canteen, and we find that it was an inevitable subject of conversation within the canteen at that time.

34.4.2. There was no real evidence that the Claimant had sought out Mr. Ryan or Mr. Simmons.

34.4.3. It was never alleged that the Claimant had stated Mr. Siequien was a racist.

35 We have considered paragraph 25 of the witness statement of Mr. Rahim. We find that this evidence represents something of a shift from his earlier statements in his report at p.79. He gave no evidence that he found that the Claimant's questions about the tattoos were a) intimidating or b) malicious.

36 We completely reject the Decision of Mr. Rahim at p.79 that Mr. Siequien was "*undermined and humiliated*" by the questions asked by the Claimant. If we are wrong about this, and Mr. Siequien was humiliated, we find that it was entirely his own fault for having Nazi motifs tattooed on his leg. We cannot see how it is possible for a worker who wears shorts to work, and who carries a Nazi motif tattoo on his leg, to suffer any loss of dignity by another worker asking two other workers if they find the tattoo offensive.

37 It is true that the Claimant did not complain about the tattoo to management; but as Mr. Rahim candidly admitted, and as our experience shows, workers often do not complain about such matters until years have passed.

38 On 9th August, the Claimant was invited to a disciplinary hearing. The charges are stated at p.104 to be as follows:

"*Misconduct in that whilst on duty on 22 December 2015**:***

1. You approached train operators Paul Ryan and Gary Simmons and engaged them both in a conversation regarding Train Operator Bryan Siequien and the Tattoo (Swastika) that Brian Siequien has on his leg.

2. ***Bryan Siequien first learnt of your action on 24 December 2015 and found your behaviour to be malicious and intimidating.***"

39 The CDI took place on 19th August 2016. The minutes are at p.107-122. At that meeting, the Claimant stated that the she could not recall the conversations but admitted they could have occurred: see p.112. Her evidence included:

39.1. she would not have called someone a racist, but that she had seen the swastika and been offended by it, but not made a complaint;

39.2. she would not have asked the questions with any malice or to create a hostile environment;

39.3. she would be shocked if people did not find the tattoo offensive, but she was from a different background; her family had hidden a Jew during the war;

39.4. people had been asking her about the tattoo on her return to work, and this may have been because of her relationship with Mr. De Leon or possibly because she was German;

39.5. staff knew she was German;

39.6. she was shocked to be at a disciplinary hearing for asking questions, when the person with the tattoo was still walking around with the tattoo on display.

40 By letter dated 22nd September 2016, the Claimant was informed that the disciplinary charges were not upheld: see decision letter 141-148. This included the following extracts:

"*In light of your confirmation that you may have asked the question and based on the testimony of Mr Bradbry, the panel find that you had approached Mr Ryan and had asked him if he found the tattoo's offensive.*

…

We consider that you asking if the tattoo was offensive is a perfectly reasonable question to ask. You have confirmed to the panel that you did not put in a complaint as it was a stressful time for you but confirmed that the tattoo offends you not least because of your own heritage, which is of course a protected characteristic. We believe that Mr Rahim would have considered your protected characteristics had he have known that you were offended, the ideal time to have alerted Mr Rahim to the fact that you were offended would have been in your fact finding meeting.

We considered if Mr Ryan and Mr Simmons had colluded, but cannot find any evidence to

suggest this. We consider that it is very likely that their perception of the conversation was that they were approached because of their protected characteristics, but we consider that them having their own knowledge of what the tattoo symbolised had made them more sensitised and so had drawn the inference of their protected characteristics themselves.

We have considered Mr Siequien's perception that you had been attempting to reawaken the previous investigation and in doing so, he perceived that this was a malicious act on your part. Whilst the respondent's intention is not considered, we do consider whether that perception of the complainant is reasonable.

Mr Siequien himself asserts that as soon as he was aware that a complaint had been submitted regarding the swastika, he had the tattoo blacked over as he had not wanted to offend anyone. This demonstrates that Mr Siequien had knowledge that the tattoo should have been removed as it was not appropriate because of what it represents, however, he had chosen only to black out the swastika leaving the imperial eagle and the rosette visible.

It is clear that almost all staff had known of the existence of the swastika tattoo, the subsequent complaint and the Tribunal case. There is no evidence to suggest that you had perpetuated the tattoo discussion any more than others had. Whilst we consider that the general culture of gossip and speculation within the Depot is unacceptable, we understand that the display of such a tattoo is likely to prompt discussion and we consider that Mr Siequien would have known this given that he had known what the swastika and the eagle represented. We consider that Mr Siequien's perception that you acted maliciously and that you were intimidating him is unreasonable.

You have made the panel aware that whilst the swastika may have been covered up you find the remaining part of the tattoo offensive; we will therefore recommend that a formal review is undertaken by an Accredited Manager regarding the tattoo's this gentleman displays."

41 In evidence before us, the Claimant admitted that she had the conversations with both Mr. Ryan and Mr. Simmons. She was challenged as to her credibility and questioned about how she could recall them now, but not when interviewed by Mr. Rahim. In response, the Claimant stated that:

41.1. She had not been given any particulars to jog her memory, such as a description of Paul Ryan or that Janson Bradbury was present with Mr. Ryan at the relevant time, and

41.2. she had been absent for a long time and on her return, a lot of other workers were approaching her on different subjects, including her absence, the tattoo and Mr. De Leon;

41.3. she felt unwell on the date in question;

41.4. she was never asked about the tattoo;

41.5. she was telling the truth.

42 We found that the Respondent's criticism of her evidence was unjustified and the investigation process used worked unfairly against her.

43 To begin with, Mr. Rahim's evidence before us was based on his misinterpretation of her evidence to him. This did not reflect what the Claimant had actually said. His evidence was that she had denied that conversations with Mr. Ryan and Mr. Simmons took place: see, for example, paragraph 30 of Mr. Rahim's

statement. This is incorrect. In her interview on 23rd March 2016, the Claimant stated that she could not recall these conversations.

44 Moreover, at the time of that interview, Mr. Rahim had accepted this: see p.53. Despite this acceptance, he had not prompted the Claimant by giving her any particulars as to dates or attendance sheets, or by showing her the memo of Mr. Ryan at p.42, or by mentioning that Jason Bradbury (another train operator) was also present.

45 In this case, prompting and particulars would have been particularly appropriate, because the Claimant's evidence in the investigation interview was that she was still in treatment and she could not recall what had happened a few days ago, let alone in December 2015.

46 Furthermore, Mr. Rahim had not re-interviewed the Claimant again when he had gathered full particulars from Mr. Simmons and Mr. Ryan. In the Tribunal's experience, an investigating officer faced with this evidence would generally go back to re-interview the alleged perpetrator. He admitted in cross-examination that he could have done so; and maybe in hindsight he should have done so.

47 We found that Mr. Rahim's evidence demonstrated that he had accepted Mr. Siequien's evidence completely without any further analysis. Because of this, he had not put any of the particulars or evidence collected to the Claimant in a further interview. Such particulars may well have triggered her memory in order to allow her to answer so as to inform him whether what she had done was malicious or bullying or harassment.

48 The interview of the Claimant was based largely on what her relationships were like with various people. Mr. Rahim did not consider why she might consider the tattoo offensive – which the Tribunal found was a necessary step for an investigating officer because this could well be relevant to whether the complainant's perception was reasonable.

49 For all the above reasons, we accepted the Claimant's evidence on this point.

50 Further, the Claimant's evidence was that Mr. Simmons had agreed the tattoo was offensive. We preferred her direct evidence to the interview Mr. Simmons gave, in which this is not stated expressly, but which is not dissimilar from the statements made by him in interview: see paragraph 7 at p.62.

51 We find that when the Claimant had the relevant conversation with Mr. Ryan, she did not know that he was Jewish. We accepted her evidence that she did not identify people by their faith. Moreover, given that she knew several Pauls at the depot, but did not know who Paul Ryan was, it was impossible for her to have had a conversation with Mr. Ryan because he was Jewish.

Law & Submissions

52 Counsel had each prepared helpful Skeleton Arguments, which, after we had taken time to read them, they supplemented with oral submissions. The fact that we do not mention every submission is not evidence that it was not taken into account. On

the contrary, all submissions were taken into account.

53 Counsel for the Respondent referred us to the recent case of *Chief Constable of Kent Constabulary v Mr. A. Bowler* UKEAT/0214/16 in which Mrs. Justice Simler DBE sets out a concise summary of the law in respect of direct discrimination, which it is difficult to improve upon. We have directed ourselves to this and we have incorporated relevant passages below.

Direct Discrimination: section 13 Equality Act 2010

54 Direct discrimination is defined by s.13 of the Equality Act 2010 which provides that an employer (A) directly discriminates against a person (B) if: "because of a protected characteristic, A treats B less favourably than A treats or would treat others."

55 The comparison between the treatment A affords to B and the treatment A affords (or would afford) to others, for the purposes of s.13, is designed to shed light on the reason for the treatment. Accordingly, there must be no material difference between the circumstances relating to each case (see s.23) or to put it another way, for the comparison to be valid, like must be compared with like.

56 Section 23 does not require comparators to be precisely the same in every respect. The question of whether particular individuals were appropriate comparators for the purposes of claims of discrimination under s.13 Equality Act 2010 is one of fact and degree: see *Hewage v Grampian Health Board* [2012] ICR 1054 at para 21.

57 Section 39 makes it unlawful for A to discriminate against B in the terms of his employment or in the way A affords B access to opportunities for promotion, training etc. or by subjecting B to any other detriment.

58 Section 136 deals with the burden of proof. So far as the burden of proof is concerned, the proper approach has been addressed by the Court of Appeal in *Igen Ltd v Wong [2005] IRLR 258* and *Madarassy v Nomura International plc [2007] ICR 867*. It has also been addressed by the Supreme Court in *Hewage v Grampian Health Board [2012] UKSC 37*.

59 Although a two stage approach is envisaged by s.136, it is not obligatory. In many cases it may be more appropriate to focus on the reason why the employer treated the claimant as it did and if the reason demonstrates that the protected characteristic played no part whatever in the adverse treatment, the case fails.

60 Where the two stage approach is adopted Mummery LJ explained in *Madarassy* what a claimant must prove in order to establish a prima facie case at the first stage: see paragraphs 55, 59.

61 Whilst in *Igen* (at paragraph 51) the Court of Appeal held that it was open to the Employment Tribunal on the facts of that case to draw inferences from unexplained unreasonable conduct by the employer satisfying the requirements of the first stage, it cautioned tribunals: "against too readily inferring unlawful discrimination on a prohibited ground merely from unreasonable conduct where there is no evidence of other discriminatory behaviour on such ground".

62 The guidance given by Mummery LJ in the passages set out above was expressly endorsed by the Supreme Court in *Hewage v Grampian Health Board [2012] IRLR 870* where Lord Hope added at paragraph 31:

> "The complainant must prove 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 complainant which is unlawful. So the prima facie case must be *proved*, and it is for the claimant to discharge that burden."

63 Lord Hope emphasised again the point that the burden of proof provisions have a role to play where there is room for doubt as to the facts necessary to establish discrimination, but that in a case where a tribunal is in a position to make positive findings on the evidence one way or another, they have no role to play.

64 In their submissions, both Counsel approached this case as a "reason why" case. We agree with that shorthand analysis.

Conclusions

65 Issue 2.1 does not need determining because of the helpful concession made by the Respondent at the start of this hearing.

66 Applying our findings of fact and the relevant law to the remaining issues identified in the List of Issues, we reached the following conclusions.

Issue 2.2: Whether the Respondent has treated the Claimant less favourably than they treated or would have a comparator

67 Counsel for the Claimant contended that the comparator was a British worker who would find an emblem directly connected with British nationality offensive. We could not agree.

68 We found that these emblems are particularly offensive to those of German nationality, as evidenced by the Claimant's reaction and her evidence, even if many British workers also found that the remaining emblems in the tattoo (rosette and eagle) were offensive. These emblems cause very widespread offence. Accordingly, we could not agree with the Respondent's submissions on this issue.

69 We concluded that the treatment identified did amount to less favourable treatment of the Claimant. But in this case, as Counsel had agreed, the more pertinent issue was the reason (or reasons) why the Claimant had been treated as she was treated. Identification of the comparator is really a tool to answer this "reason why" question.

Issues 2.3 – 2.4: Whether the treatment was because of the Claimant's nationality

70 We considered the Claimant's submissions closely. Ms Hart contended that there had been a reference to the Claimant's German nationality in the evidence in the investigation, and that she found the tattoo offensive; she argued that it was inherently necessary for Mr. Rahim to consider the Claimant's nationality when looking at whether

she did something which amounted to bullying or harassment. Additionally, she contended that Ms. Rahim failed to give a plausible explanation as to why her nationality was not taken into account, and, further, that nationality need not be the sole reason for the treatment. Ms. Hart contended that a worker with a different nationality would have been treated differently, in comparable circumstances. The Claimant's case was that Mr. Rahim did not consider the Claimant's German nationality to be a relevant factor.

71 After considering Ms. Hart's arguments with care, we could not agree with them, save that we agreed Mr. Rahim did not consider the Claimant's German nationality at all.

72 We concluded that the Claimant's treatment by the Respondent in the form of the two detriments identified was caused by an inept investigation by Mr. Rahim. We found that he was dismissive of the Claimant because of the De Leon litigation. We concluded that he had viewed the Claimant as a partner helping out her partner, and he assumed that this was due to the Employment Tribunal litigation.

73 We had no trouble in deciding that Mr. Rahim should have treated the Claimant differently. But we did not find that the less favourable treatment was because of her nationality. We find that he would have treated a worker of British nationality in the same way, if their partner was also involved in an Employment Tribunal case involving Mr. Siequien as a respondent and Mr. Siequien made the same complaint as in this case.

74 We have considered the decision to charge the Claimant with a disciplinary charge separately. We find that Mr. Rahim adopted the same thought processes in reaching this decision which are set out in the above two paragraphs. The "reason why" was the same. We reached this conclusion because his report was not checked or reviewed by any Human Resources manager or a more senior manager. Mr. Rahim alone decided to proceed to a CDI.

75 We find that this is evidenced by the charges alleged at p.104, which basically demonstrate an inept investigation and the making of assumptions by Mr. Rahim, as explained by the following points:

75.1. Charge 1 refers to "the Tattoo (Swastika)". This is, as shown by the findings above, incorrect. The nature of the tattoo was that it contained three Nazi motifs, two of which remained visible, and was of a significant size.

75.2. Charge 1 also alleges that the Claimant approached Ryan and Simmons and "engaged them both in a conversation". This was not so, evidenced by our findings set out above. The subject of the tattoo and the related De Leon litigation were common topics within the depot at this time.

75.3. Charge 2 alleges that Mr. Siequien "found your behaviour to be malicious and intimidating". This is not correct (see for example, the original complaint at pages 44-45). The phrase "malicious and intimidating" is the result of assumptions made by Mr. Rahim.

75.4. We found that the charges did not correlate to the original complaint.

76 Having reached the conclusions set out above, the Tribunal found that it did not need to address the burden of proof provisions. In short, we have made positive findings that there was no conscious or unconscious discrimination by Mr. Rahim, but, rather, the performance of Mr. Rahim in his role as investigator in this case was inadequate.

77 We have considered whether there was direct discrimination by omission by Mr. Rahim. It is correct that he took into account the protected characteristics of the witnesses, Ryan and Simmonds, but did not take account of the Claimant's, and thus sent the complaint to the grievance process. We found that the reason why he did not take the Claimant's nationality into account was because he took into account all that the complainant said, because he believed that this was what the Respondent's policy required.

78 We found, also, that there was substance in the Respondent's argument that that Mr. Rahim had totally disregarded nationality. It was not put to him, nor could it realistically have been put to him on the evidence, that he had disregarded the Claimant's nationality because she was German. He simply gave the nationality of the Claimant no thought at all.

79 There could not, in these circumstances, be direct discrimination by omission.

Summary

80 The complaints of direct race discrimination fail. The Claim must be dismissed.

81 The Tribunal found, however, that there were no winners in this case. The Tribunal was concerned that a company carrying out public functions, namely public transport, which (by section 149(2) Equality Act 2010) is likely to owe the Public Sector Equality Duty to the public, had allowed a worker to walk around with universally recognized Nazi emblems tattooed on his leg, in apparent contravention of it own policy as to tattoos. The Respondent's policy requires that such a tattoo as features in this case must be covered. Had that policy been applied, the emotion and upset created by the events set out above could have been avoided.

Employment Judge Ross

14 June 2017