THE EMPLOYMENT TRIBUNALS

Claimant **Mr J Cupid**

Respondent **Premier Global Ltd**

HELD AT: **London Central**

ON: **19-21 July 2017**

EMPLOYMENT JUDGE: Mr J Tayler **Members: Mr N Brockmann**
Mr I McLaughlin

Appearances

For Claimant: **In Person**
For Respondent: **Mr G Watson, Counsel**

The Judgment is this matter was sent to the parties on 27 July 2017. The Respondent requested written reasons on 28 July 2017.

REASONS

Introduction

1. By a Claim Form submitted to the Employment Tribunal on 6 February 2017 the Claimant brought a complaint of direct race discrimination which was subsequently amended to add a complaint of victimisation.

Issues

2. The Claimant attended a meeting on 20 October 2016 during which his performance was discussed. During the meeting the Claimant alleged that he was being treated differently to his colleagues because of his race. He alleges he was told that he was "being childish". The Claimant was dismissed without warning on 19 December 2016. He alleged that his treatment in the meeting and dismissal was direct race discrimination and/or race victimisation because of the protected act of alleging discrimination in the meeting on 20 October 2016.

Evidence

3. The Claimant gave evidence on his own behalf. Mr Haken Saheed, a former colleague, was call pursuant to a witness order.

4. The Respondents called:

   4.1 Robin Williams, Commercial Director

   4.2 Julie Chappell, Human Resources Consultant

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

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

Findings of fact

7. The Respondent is a company that sells of courses for personal trainers. It is a highly competitive business. The Respondent is very much focused on sales success. The Claimant and his comparators were employed as Course Advisors. This is a sales role.

8. One of the Claimants comparators Marcus Bidmead was subject to a warning on 19 March 2014 (P139) for late attendance. This demonstrates that, in appropriate circumstances, the Respondent would warn Course Advisors about issues relating to their conduct or capability.

9. In May 2015 (P140) Mr Bidmead received a further warning, because he had failed to hit his sales target. Again, this demonstrates that the Respondent would warn Course Advisors in appropriate circumstances.

10. On 24 August 2015 the Claimant commenced employment with the Respondent as a Course Advisor (P76). The Claimant was provided with a written contract of employment. The contract stated that there was a disciplinary procedure, but that it was noncontractual. As is apparent from the case of Mr Bidmead the procedure was operated on occasions when employees had less than two years qualifying service.

11. By January 2016 the Claimant was performing well and achieving good sales (see P48-49). We accept that the Claimant thought that if he was achieving good sales he should be left to decide how to do his job. That being said, his line manager Angie Prentice, the sales manager at the time, had a broadly positive opinion of the Claimant.

12. The Claimant was appraised in February 2016 (P189). He passed his probation. In the appraisal, it was recorded that the Claimant was a quick learner, constantly hit sales targets and had a “calm manner”. Under the heading “Areas for Improvement” it was recorded “learn to let the client go with dignity & a professional attitude when they had not chosen Premier”. Mr

Watson suggested that this showed a significant problem with the Claimant's attitude. We do not accept that was the case. All that was being noted in the appraisal document was that where a person had chosen not to buy a course from the Respondent it was important that the Claimant dealt with the termination of the conversation in a pleasant and professional manner. The Claimant was not subject to any conduct or capability proceeding as a result of this issue. We note that Ms Prentice referred to the Claimant having a "calm manner". Her view of the Claimant was mainly positive.

13. Certain matters in the Claimant's witness statement at paragraphs 8-9 were not in the Claim Form and therefore were not responded to by the Respondent. There is an allegation that Ms Prentice was annoyed with the Claimant, but not with colleagues, when they returned late from playing tennis. It is alleged that Ms Prentice made a comment in a disrespectful manner in relation to the Claimant entering a raffle. As these matters were not in the Claim Form and Ms Prentice was not called to give evidence, we had very limited evidence in respect of them. Taking into account the fact that Ms Prentice had been involved in the appointment of the Claimant and decided he had passed his probation we consider that overall, she had a positive view of the Claimant at this time. We are not persuaded that these minor matters raised at paragraphs 8-9 are of any real significance.

14. On 7 July 2016, another Course Advisor, Ryan Donnelly, had his probation extended (P113) because of lateness and unauthorised absence.

15. On 25 August 2016 the Claimant had a day sickness absence.

16. On 3 October 2016 Mr Donnelly had his probation extended again (P114) because he had made too few telephone calls to prospective clients (referred to as client activities).

17. On 1 October 2006 Robin Williams joined the Respondent as Commercial Director. Mr Williams was brought into shakeup the Respondent with the aim of improving its performance. Mr Williams considered that if members of staff, particularly senior members of staff, had no long-term future with the Respondent, their employment should be terminated summarily without any procedure, provided they did not have two years' qualifying service. This occurred in the case of Mark Thornton, the Sales Director, who had been the line management of Ms Prentice. He was dismissed without any procedure.

18. On 20 October 2016 the Claimant commenced a shift at 8.30 am. He started by looking through his emails. About a week previously the Respondent had introduced a new computer system that monitored the number of calls that were made or received by Course Advisors. The systems showed that the Claimant had undertaken very little activity that morning. The Claimant was called into a meeting with Ms Prentice and Mr Thornton. They said that they had noticed that the Claimant had a very low level of activity. The Claimant genuinely felt that he was being unfairly singled out. He considered that colleagues were not being treated in the same way. The Claimant said he felt that he was being unfairly treated and suggested that he might be being discriminated against because of the colour of his skin. We accept his evidence that when he made this comment Angie Prentice said words to the

effect “don't be childish”. Ms Prentice was not called to give evidence. While we note that she has left the Respondent's employment, Mr Thornton who has also left was called to give evidence. We have no evidence from Ms Prentice whether she made the comment. Mr Thornton in his evidence to the tribunal was adamant that the comment was not made. He sated this in his witness statement and in his oral evidence. However, when he was questioned by Mrs Chappell, during the Claimant's appeal against dismissal, it was recorded “Mark cannot recall the childish comment about Josh from MG”. We consider that it is significant that when questioned much closer to the event he only felt able to say that he could not recall the comment. He was not adamant that the comment had not been made. In the Respondent's response, rather than denying that the comment was made, it is not admitted. The Claimant has been adamant throughout that the comment was made. We find on balance of probabilities the comment was made.

19. The Claimant was told that if he wished to raise an official complaint of discrimination he should contact her Mrs Chappell. He was given her mobile telephone number. A record of the conversation was made by Ms Prentice. Surprisingly, she made no reference to the Claimant's contention that he had been subject to discrimination. A record of the conversation was also made by Mr Thornton. He did record that the Claimant had referred to discrimination. That document was not initially provided in the tribunal bundle. Understandably, the Claimant feels that Mrs Chappell attempted to hide the document. However, we consider that the reality is that had Ms Chappell seen, and read, Mr Thornton’s note, it highly unlikely that she would have advised that there could be a termination of the Claimant’s employment without any procedure being adopted. We accept that Mrs Chappell genuinely overlooked Mr Thornton’s email.

20. The Claimant decided not to make a formal complaint of discrimination as he was performing well and obtaining substantial bonuses. He decided not to risk causing trouble for himself.

21. We consider that it is clear and that Ms Prentice was very upset by the allegation. When she interviewed during the appeal process she said “Josh was very defensive, very aggressive … said you're picking on the wrong person you are discriminating against me because of my skin colour”. This is the first time there is any written evidence to suggest that Ms Prentice thought that the Claimant was aggressive. We note that the term aggressive is used in the same sentence in which Ms Prentice refers to the Claimant raising the possibility that he was being discriminated against. We considered that there was a change in Ms Prentice’s opinion of the Claimant after the meeting of 20 October 2016 because he raised the possibility that he might be being subjected to discrimination.

22. The Claimant found the meeting of 21 October 2016 very difficult. He went home that afternoon and had a day of sickness absence on 21 October 2016. The Claimant was absent due to sickness again on 3 November 2016.

23. A record of sales dated 11 November 2016 shows that the Claimant had performed extremely well, as had the rest of the team. It was likely that they would receive substantial bonuses.

24. On 1 December 2016 three of the Claimant's colleagues, Fiona O'Neil, Mathew Russell and Robert Burton, having learnt that they were likely to obtain very substantial bonuses, went to the pub at lunchtime. They had a good deal to drink and did not return in the afternoon. Mr Williams had fostered something of a drinking culture at the Respondent. He thought that they had been over exuberant in their celebrations and decided it would be appropriate for them to be called into a meeting to discuss his concerns. In the meeting they expressed remorse for their actions. They were given oral warnings on 2 December 2016.

25. On 15 December 2016 the Claimant, who had recently returned from a period of holiday, part of which was in Brazil, attended work late. He had mistakenly thought that he was due to work the late shift whereas he was due to work on the early shift. He was late even if he had been due to work on the late shift. While the Claimant had been on holiday a one-to-one coaching session had been fixed for him with a consultant, Fraser Chapman. The Claimant did not want to undertake the coaching. He was feeling tired. He asked if it could be rescheduled. He was told that it could not. The Claimant was negative in the one-to-one session with Mr Chapman. When Mr Chapman was later asked about the session he stated that the Claimant had turned up late, tried to move the session due to jetlag and did not see the value in the management team wanting to know how much activity was being undertaken. Mr Chapman stated that "the way Joshua said management highlighted a lack of respect for the management team which often manifested itself in negative and destructive comments made during the midday stand up". Mr Chapman formed a negative view of the Claimant as a result the coaching session.

26. The Claimant was absent due to stress on 16 December 2016. He returned to work on 19 December 2016. He was late again. Ms Prentice had a discussion with Mr Williams. Mr Williams stated in his witness statement that he took a decision to dismiss Claimant that day. His evidence to us was that he decided that the Claimant and did not have an attitude that was appropriate for the Respondent, that this would not change and therefore he should be dismissed without having an opportunity to put forward his side of the story. In broad terms, we accept that is the case. However, we do not consider it is correct to characterise this is a decision taken solely by Mr Williams. The reality was that it was a joint decision with Ms Prentice. Mr Williams told us that he asked Ms Prentice whether the Claimant should be dismissed. She stated that he should be. Mr Williams concurred with her. We conclude that if Ms Prentice had said that the Claimant should not be dismissed, but should be given a warning, Mr Williams would have concurred with her. During cross examination Mr Williams gave somewhat contradictory evidence about the decision-making process. It was clear was that the a fundamental issue was the relationship between the Claimant and Ms Prentice. Mr Williams said "Angie was scared of the Claimant, intimidated by him, not happy to have one-to-ones, she felt uncomfortable about being in a room with him". When it was put by the Claimant that this was after 20 October 2016, Mr Williams said "yes". Mr Williams was not able to tell us what Ms Prentice said the Claimant done that was aggressive. Mr Williams said that and the decision to dismiss was based on information from Prentice and Mr Chapman. Mr Williams stated that he

considered that the Claimant could not work with Ms Prentice because she was scared. He said "**we**[1] came to a decision" about whether he Claimant was going to be someone who would comply with the rules and demonstrate the conduct that wanted to see. He said "**we**[2] decided to dismiss". There was some at lack of clarity about whether the "we" might refer to Mr Williams and Mrs Chappell. In further questioning it became clear that the "we" was Mr Williams and Ms Prentice. We conclude that they jointly decided that the Claimant should be dismissed.

27. The Claimant was brought into a room and told that he was to be dismissed. There was no preamble or opportunity for the Claimant put forward his side the story. The Claimant and was subsequently escorted from the premises. When he had left the building the Claimant asked Mr Williams why he had been dismissed. Mr Williams said that said that if the Claimant adopted the attitude that he should decide how to do his work he might find it difficult to fit in with future employees.

28. The Claimant appealed his dismissal. The appeal was considered by Mr Chappell and was dismissed.

The Law

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

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

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

31. The Courts have long been aware of the difficulties that face Claimants in bringing discrimination claims and of the importance of drawing inferences: **King v The Great Britain-China Centre** [1992] ICR 516. Statutory provision dealing with how evidence is to be analysed is made by Section 136 EQA:

> 136 Burden of proof
>
> (1) This section applies to any proceedings relating to a contravention of this Act.

[1] Emphasis added
[2] Emphasis added

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

32. Guidance was given in **Igen v Wong** [2005] IRLR 258. It has repeatedly been approved thereafter: see **Madarassy v Nomura International Plc** [2007] ICR 867; although it has now been emphasised that the decision as to whether there are facts from which it could be concluded, in the absence of an adequate explanation, that discrimination has occurred, is determined on an analysis of the totality of the evidence produced at the hearing: **Efobi v Royal Mail Group Limited** UKEAT/0203/16/DA.

33. There may be circumstances in which it is possible to make clear determinations as to the reason for treatment so that there is no need to rely on the section 136 EQA: see **Amnesty International v Ahmed** [2009] ICR 1450 and **Martin v. Devonshires Solicitors** [2011] ICR 352 as approved in **Hewage v Grampian Health Board** [2012] ICR 1054. However, if this approach is adopted it is important that the Tribunal does not fall into the error of looking only for the principal reason for the treatment but properly analyses whether discrimination was to any extent an effective cause of the reason for the treatment. This is because the Claimant's race need not be the sole, or even principal, reason for the treatment, if it has significantly influenced the reason for the treatment: see **Nagarajan v London Regional Transport** [1999] IRLR 572.

34. The fact that treatment is unreasonable or unfair is not, of itself, sufficient to draw an inference that discrimination has occured: see **Law Society v Bahl** [2003] IRLR 640 and **Glasgow City Council v Zafar** [1998] ICR 120.

35. It is the decision maker who must act because of race and/or because a protected act has been done: **CLFIS (UK) Ltd v Reynolds** [2015] IRLR 562. As the Editors of **Harvey** put it "unwittingly acting on the basis of someone else's tainted decision will not be sufficient". However, if there is a joint decision it could only one of the decision makers that acted because of race if that had a significant influence on the decision that was made.

36. Victimisation is precluded by s.27 EqA A person (a) victimises another person (b) if (a) subjects (b) to a detriment or dismisses (b) because (b) does a protected act.

37. In **St Helens BC v Derbyshire** [2007] ICR 841, Lord Neuberger summarised the authorities on the meaning of detriment, at paragraph 67:

> "67 In that connection, Brightman LJ said in *Ministry of Defence v Jeremiah [1980] ICR 13*, 31a that "a detriment exists if a reasonable worker would or might take the view that the [treatment] was in all the circumstances to his detriment". That observation was cited with apparent approval by Lord Hoffmann in *Khan [2001] ICR 1065*, para 53. More recently it has been cited with approval in your Lordships' House in *Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR*

> *337*. At para 35, my noble and learned friend, Lord Hope of Craighead, after referring to the observation and describing the test as being one of "materiality", also said that an "unjustified sense of grievance cannot amount to 'detriment' ". In the same case, at para 105, Lord Scott of Foscote, after quoting Brightman LJ's observation, added: "If the victim's opinion that the treatment was to his or her detriment is a reasonable one to hold, that ought, in my opinion, to suffice."

38. The time limit for discrimination claims to the Employment Tribunal is set out in section 123 Equality Act 2010. It is a period of three months or such other period as the tribunal considers just and equitable. Conduct continuing over a period is treated as done at the end of period. When there are a number of incidents occurring over a period of time they might be considered as being part of a continuing act in the sense of a continuing state of affairs pursuant to which discriminatory acts occurred from time to time; **Hendricks v Commissioner of Police of the Metropolis** [2003] ICR 530.

Analysis

39. The real issue in this case is the reason for the dismissal of the Claimant. We consider that Ms Prentice had a broadly positive view of the Claimant in the initial period of his employment. She was involved in his engagement and in deciding that he had passed his probation. We consider it is very significant that she referred to his "calm manner" when he passed probation, whereas after 20 October 2016 she referred to him being "aggressive", in the same sentence in which she referred to him having raised a complaint of discrimination. We conclude that is it was the raising of the complaint of discrimination that Ms Prentice considered to be "aggressive". That was why she said she was "scared" of the Claimant and did not wish to have one to one meetings with him. We consider that was a substantial element in the decision to dismiss the Claimant, in the sense that if he had not raise a complaint of discrimination he would not have been dismissed. We consider that the decision to dismiss was a joint decision made by Mr Williams and Ms Prentice. In making that joint decision Ms Prentice was substantially influenced by the complaint of discrimination that the Claimant had made. We consider that the dismissal constituted an act of victimisation.

40. We next considered whether the Claimant had also been subject to direct race discrimination. The situation of his comparators showed that other employees within the first two years of their employment were spoken to about their conduct and given a chance to explain themselves. However, we consider that the reality is as follows. We accept that if Mr Williams felt that someone genuinely had no future with the Respondent he would dismiss them without any procedure. The real question was why he concluded that the Claimant had no future. We consider that that was because Ms Prentice said when she was jointly deciding with Mr Williams to dismiss the Claimant that she could not work with the Claimant because he was aggressive. That resulted from the fact that the Claimant had made the allegation of discrimination. In considering whether there is evidence from which it could be concluded that race was a factor, in his dismissal, we note that Ms Prentice initially recruited the Claimant and decided he had passed his probation. She was broadly positive about him prior to 20 October 2016. When Mr Saheed gave evidence, he made it clear

that when in his witness statement he gave evidence about the difference of treatment between the Claimant, who was dismissed, as opposed to his colleagues, who were not after their unauthorised visit to the pub, he considered this was a matter of unfairness rather than race discrimination. Overall, we do not accept that there was evidence from which we could conclude that the Respondent was guilty of direct race discrimination. We consider that the real key to this matter is that the Claimant raised an allegation of discrimination and which resulted in a decision been taken to dismiss him jointly by Mr Williams and Ms Prentice, who was substantially influenced by the fact the Claimant had made a complaint of discrimination.

41. We consider that a reasonable employee who raises a complaint of discrimination would thereafter reasonably feel disadvantaged in the workplace by the reaction that he was being childish. We consider that was a further detrimental act. We consider it is just and equitable to extend time in respect of that act as it would not have been reasonable to expect the Claimant to bring a complaint to the tribunal immediately. It was only when he suffered the key detriment of dismissal and that he thought about bringing a complaint. The main point about the comment is that it is key to understanding the reasons for the dismissal. However, we also conclude that, to a limited extent, it was itself detrimental treatment.

42. We do not consider that the Claimant being called to the meeting on 20 October 2016 was direct race discrimination. It was genuinely and solely due to concerns about his activity rate.

43. While we do not uphold the Claimant's allegations that he was subject to direct discrimination, when he made the allegation in the meeting of 20 October 2016 we accept that he genuinely felt he was being unfairly treated and that this could be as a result of his race. We see nothing whatsoever to suggest that the Claimant was acting in bad faith when he raised the allegation.

44. We went on to deal with remedy. The Claimant explained that when he was told that he should grow up when he raised an issue of discrimination he felt very upset. He felt unable to concentrate. He went home and then was absent for a day sickness. He felt distrustful of management thereafter. He accepted in cross examination that, nonetheless, he performed very well in the period up to the date of his dismissal. The Claimant explained how shocked and upset he felt to be dismissed. We accept that the Claimant has suffered significant upset by being dismissed. The Claimant sought the sum of £15,000 for injury to feeling. The Respondent did not dispute this valuation on the basis that it should take into account inflation from the date of DaBell and the Simons and Castle uplift. Taking both of those into account the middle band spans £7,750 to £19,500. We consider that £15,000, requested by the Claimant and agreed by the Respondent, is an appropriate figure for injury to feeling. This figure takes into account the manner of the dismissal. That is essentially what the complaint is about. We do not consider that there are separate features about the dismissal that aggravate that treatment that should result in a further sum for aggravated damages. We have taken into account the manner of dismissal in assessing injury to feelings.

45. Interest is calculated over a period of 30.6 weeks at 8% per annum comes out approximately 4.8%; giving interest of £720.

46. The parties agreed the loss to the date of the hearing £16,275.06. Interest for half of 30.6 weeks at 8% give approximately 2.4%; £390.60.

47. The Claimant has obtained employment at a lower rate of pay as it does not include commission. The Respondent contended that using his full efforts the Claimant should be able to obtain employment that would bring him back to the level that he earned with the Respondent. The Respondent took a reasonably realistic approach suggesting that it should take one year from dismissal for the Claimant fully mitigate his loss by moving to a level of salary and commission equivalent to that he had with the Respondent. The Claimant stated that he is thinking of moving into equality and diversity training. That may well be an area of interest to the Claimant. We consider that acting reasonably the Claimant should be able to the receive earnings equivalent to those from the Respondent within six months from today. We therefore award a sum of 26 weeks at the agreed net weekly loss of £433.49 in the sum of £11,270 70. That gives a sum of £43,656.40.

48. In considering the ACAS uplift we consider that there was a failure to apply any disciplinary procedure when dismissing the Claimant. We consider that that should lead to an uplift. However, we also consider we should take into account the overall level of damages we are awarding, including the fact we have already awarded £15,000 injury to feelings for the dismissal, including its manner. In the circumstances, we consider that a 15% uplift for failure to comply with the ACAS code is appropriate. That gives a sum of £6,548.40 for the total uplift. That gives a total sum of £50,204 86.

49. The Respondent did not dispute the contention that this should be grossed up as the award is essentially in relation to dismissal. We consider that it is right to follow the approach that has been adopted by the upper tax tribunal in **Moorthy v HMRC** [2010] UKUT 13 (TCC). Nearly all of the sum would fall within basic rate. It was agreed that we should gross up for tax at 20%. That results in a total award to the Claimant to £55,256.08.

Employment Judge Tayler
15 August 2017