EMPLOYMENT TRIBUNALS

Claimant: Miss B Sule

Respondent: Shoosmiths LLP

HELD AT: Manchester **ON:** 1 & 2 March 2017

BEFORE: Employment Judge Sherratt
Ms D Doughty
Mr P Dodd

REPRESENTATION:

Claimant: Litigant in person
Respondent: Mr J Naylor, in-house Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claim of harassment succeeds.

2. All other claims are dismissed.

3. The respondent shall pay to the claimant the sum of £1,000 inclusive of interest by way of compensation for her injured feelings.

REASONS

1. The claimant was employed by the respondent law firm as an administrative assistant, and following the termination of her employment she brought her claims in the Employment Tribunal. The parties came before Employment Judge Howard on 22 November 2016 for a case management hearing and various orders were made and the nature of the claimant's claims was noted.

2. The claimant brings claims on the basis of race and for the purposes of section 9 of the Equality Act 2010 the claimant refers to her colour as black and her nationality as Nigerian.

3. The issues to be determined, taken from the Case Management Order:

10.2 Harassment and, in the alternative, direct race discrimination – s26 and 213 Equality Act 2010: The unwanted treatment/less favourable treatment identified by the claimant was, the making of the alleged comment; the handling and outcome of her subsequent grievance (which was not upheld) and her dismissal. The claimant asserts that the respondent's treatment of her related to or was because of her colour and nationality and that it would not have treated a white, British person in similar circumstances in that manner. She relies upon hypothetical comparator.

10.3 The respondent does not rely upon the statutory defence pursuant to section 109(4) Equality Act 2010.

10.4 Victimisation – s27 Equality Act 2010: The claimant relies upon her grievance in which she alleged that an overtly racist remark was directed to her by a colleague, as the protected act of making an allegation falling within section 27(2)(d) Equality Act 2010, as a result of which she was subjected to the detriment of dismissal.

Evidence

4. As to evidence before the Tribunal, we have heard from the claimant and for the respondent we have heard from Barbara Rollin, a solicitor and partner in the firm, and Fiona Welsh, who no longer works there but at the time was the HR representative advising Ms Rollin. There was a bundle of documents containing in the region of 235 pages.

Findings of Fact

5. The claimant started her employment on 23 November 2016 in the Property Department. Barbara Rollin, one of the partners in that department, had interviewed the claimant and thought her fit for appointment as an administrative assistant. The administrative assistants worked for personal assistants who in turn worked for the fee earners carrying out, presumably, administrative tasks in relation to the sale and purchase of commercial property.

6. The claimant, we are told, moved to Manchester with her daughter for a better quality of life. Her daughter at the relevant time was around ten years old and in April 2016 the claimant asked for an alteration to her hours to enable her to fulfil her childcare commitments. There was to be a trial period of a month during which time the claimant would leave work for 1½ hours during the afternoon to collect her child from school, take the child to a carer and then having done that the claimant would return to work and work 1½ hours beyond the time when her colleagues would normally have finished work. The respondent decided they would offer that trial period to the claimant of these new hours for a month. The respondent was not obliged to do this because the claimant at the time had not got sufficient service to entitle her to ask for the altered hours. Nonetheless the trial period was undertaken.

7. During the course of the trial period on 3 May the claimant was working on a task for Ms Rollin. She was waiting for further information from Ms Rollin that was

due to come to her by email and it did not arrive. Ms Rollin could not understand why it was not received by the claimant, particularly when she had sent it again. The problem was resolved by Ms Rollin asking a third party to email it to the claimant and the claimant did the work.

8. It later transpired after the claimant had left the respondent's employment that Ms Rollin had sent the email to the claimant's personal email address rather than to her work email address. It is apparent from the correspondence in the bundle that the claimant emailed Ms Rollin from her personal and private email address when she was not in work asking for the variation in working hours, and Ms Rollin appears to have put in the first initials of the claimant's name on her computer and when the whole name of the claimant came up she clicked on that as the email recipient without checking that in fact it was her work rather than her private email. That explains why the problem happened. Ms Rollin has today rightly accepted that it was her mistake, but it is not the most serious of matters, it is not a professional conduct issue, it is not a discrimination issue, it is a simple but unfortunate mistake.

9. We have not heard why the claimant did not see the emails in her personal inbox, or if she did whether she did anything with them at all until way after she left her employment, so we are unable to look at that question.

10. Whatever went on between the claimant and Ms Rollin on 3 and 4 May there is some dispute as to which of them approached the other at their desks, whether or not Ms Rollin searched through the claimant's emails-we do not think it necessary to reach any conclusion on that point. We are, however, satisfied that what went on was a matter of business, a matter or normal give and take within the office in terms of making mistakes such that it was not sufficient to give Ms Rollin reason to take against the claimant or indeed for the claimant to take against Ms Rollin. We have been taken to, for instance, an email from the claimant to Ms Rollin sent on 25 May 2016 on the subject of the changing of the claimant's hours, and the claimant thanked Ms Rollin for her kind assistance, support and understanding with her childcare challenges. She was very grateful for the kind consideration and the opportunity. The claimant might suggest that this was the sort of email that she would have written as a normal polite, pleasant person, thanking her boss for something, but it need not have been sent; the claimant could easily have responded just to the HR officer rather than to Ms Rollin.

11. That was what the claimant stated on email on 25 May 2016. In her witness statement the claimant took a somewhat different view. She used these words (from 4 May):

> "From that day onwards I became extremely scared of Barbara Rollin and I could no longer approach her face to face. I started avoiding even bumping into her at the slightest. I became extremely petrified of her and I usually have a nervous breakdown any time I come in contact with her."

12. We think that is an exaggerated statement. We think that although both parties might have been a little upset on 3 and 4 May relationships thereafter became more normal again.

13. The claimant had her hours changed on a permanent basis on 25 May 2016. The hours became Monday to Friday 9.00am to 2.20pm then she would be back

from 3.50pm to 6.30pm. Those would be normal hours during term time and when the child was on holiday she would revert to the normal 9.00am to 5.30pm. The claimant thinks that after the hours were formally changed her work colleagues were not as well disposed towards her as they had previously been.

14. In the respondent firm staff have one-to-ones. It was anticipated that the claimant would be having a one-to-one on 29 June 2016. With a view to preparing for that the senior PA, Sonia Gadsby, sent an email to the other PAs in the department asking them for feedback and observations and experiences of working with the claimant since last November. We have been provided in the bundle with four of them.

15. One was from Rachel Morgan who is the person who makes the alleged remark. Just to let you know that recently I have found that the claimant was a little non communicative when asking her to do things or not willing to listen when offered assistance. For example she explained a more time efficient way to bind documents, to which she replied she was ok doing it the way she did.

16. The other notes suggested that the claimant had changed in the last couple of months: withdrawn, distant, not concentrating, mistakes, spending a lot of time on her mobile; another one saying she started off really eager and helpful but the past few months taken a massive step back; and the final one says she was fine doing her work but she only gave her bits, nothing drastic.

17. It would appear that had the one-to-one taken place on 29 June there would have been issues to raise with the claimant. The claimant was not, during the course of her employment, made aware of these matters because that one-to-one did not take place. Presumably this information was disclosed to the claimant following her bringing these proceedings.

18. The nub of this case: the events of 28 June 2016. The claimant deals with it in her witness statement, paragraphs 11 and 12 as follows:

> "11. On Tuesday June 28 2016, Rachel Morgan a personal assistant, made a statement while chatting to another member of the department named Melissa Gulcimen right beside my desk, and I quote, 'struggling immigrant should go back to their country'. When I heard the statement, I immediately looked up at Rachel Morgan and she stared at me. I stood up from my chair and continued with my task. Earlier that morning she asked me why a printer was turned off. I told her the printer was working fine as far as I was aware because I had previously begged another member of staff, Leslie Monk, to have a look at the error signs on the printer. We realised it was a paper jam and the paper was taken out. We also discovered that the printer had been left broken by Sonia Gadsby because of the documents we retrieved from it. I told Rachel Morgan that the printer could have been turned off to re-boot as there was no faulty sign message left on it. Later that morning Rachel Morgan saw me in another department and said, 'Bosede I thought you said Leslie reported the faulty printer'. I reminded her that Leslie fixed the printer by taking out the paper which was causing the jam. She apologised and said she had misinterpreted me. She then immediately asked me if I have reported the printer. The attack from Rachel was

> increasing by the minute. We no longer practiced team work. I felt harassed, abused and bullied by Rachel Morgan. I became very distressed and ill. I started crying and I later requested for permission from Sonia Gadsby to go home because I became ill and I just felt like running away from the department.
>
> 12. The situation at work on June 28 2016 left me distressed and in tears. I went to seek medical attention and Citizens Advice Bureau assistance. At the CAB the assessor put me through to Merseyside Employment Law and I spoke with a lawyer who assessed me over the phone, advised me and made arrangements with me on further communication. I was also signed off work for three weeks by the doctor. The doctor was extremely worried of my condition and being a single mother she advised me to get all the necessary help so that my condition does not deteriorate and the issue at work is resolved."

19. We do not know what the claimant said to the doctor but we do know that the doctor noted work related stress was such that the claimant should refrain from working for three weeks.

20. The claimant had a support worker to whom she spoke and on 29 June that support worker telephoned and spoke to Ms Rollin. On 29 June there was a phone call from a Ms Whiteside who was the claimant's support worker. The initial phone call stopped and Ms Rollin went somewhere private with Ms Welsh of HR. They had what they termed a "conference call" with Ms Whiteside who had the claimant with her, although Ms Whiteside did most of the talking. It was made apparent to those from the respondent that the alleged comment had been made, and the claimant was asked to put it in writing. She did this and it appears in the bundle at page 119. It says in the first paragraph:

> "On Tuesday 28 June while I was at my desk Rachel Morgan, a colleague, stood beside my desk and was chatting to another colleague, Melissa Gulcimen, and she made a statement, and I quote 'struggling immigrants should go back to their country'. This statement shattered my morning but it didn't end there."

21. I pause to note that in the claimant's witness statement she referred to "struggling immigrant" and in the grievance document she referred to "struggling immigrants", so there is a slight difference of emphasis there.

22. On receiving the grievance the respondent brought its grievance procedure into effect, and a very quick meeting was arranged with the claimant. The meeting was held on 5 July at 8.30am at the premises of the support worker, an office of Salford Council, rather than at the respondent's premises, and the claimant was allowed to be accompanied by her support worker notwithstanding that such person would not have been normally allowed under the respondent's grievance procedure and indeed the appropriate legislation.

23. The meeting took place between Ms Rollin, Ms Welsh, the claimant and Ms Whiteside. Ms Welsh took some notes in handwriting and later typed them up. The notes say the meeting was on 6 July. The claimant suggests those notes might not be entirely accurate but the claimant has not been able to say in what way she

disagrees with them. She says she had her own notes on an envelope but that envelope has not been produced in discovery or to the Tribunal so the Tribunal will, in the absence of anything to the contrary, accept the notes of Ms Welsh as an accurate summary of what was said at the meeting. They are in our bundle and it is apparent that the issues that the claimant wanted to raise were raised and according to the notes it is "immigrants" (plural) rather than "immigrant" (singular) referred to in the grievance investigation meeting.

24. Having seen the claimant it was apparent to the respondent that they needed to see three other people and so Barbara Rollin and Fiona Welsh on 7 July saw Janine Fox and Melissa Gulcimen. On 11 July they saw Rachel Morgan, the person who is alleged to have made the remark. Looking through the notes of that meeting Ms Rollin asked directly of Rachel Morgan if she had said to Ms Gulcimen that struggling immigrants should go back to their country and she said "no, absolutely not, she would never say that, it was a blatant lie". It may or may not be relevant that in the grievance statement it is recorded that Rachel Morgan's father is Nigerian.

25. Based on her investigation Ms Rollin considered matters and an outcome letter was sent to the claimant on 13 July. After the introduction the letter states:

> "I have asked both Rachel Morgan and Melissa Gulcimen whether they recall having a conversation with each other on the morning of 28 June and in particular whether the alleged statement was made. Both RM and MG denied that such a statement was made and in fact cannot recall having a conversation that morning about anything. RM was shocked, offended and upset that the allegation against her has been made, particularly since her own father is Nigerian and her mother Hawaiian/Caribbean, and she makes a point of not discussing politics or religion in the workplace having been advised to avoid such topics from a very young age by her father who worked for the UN. M G was similarly shocked and said that she was very sensitive to such matters herself as her father is Turkish. She said that she would have remembered such a comment as it would have made her feel uncomfortable."

26. Ms Rollin went onto record that having spoken with the two people she could find no evidence that the comment alleged to have been made was indeed made and she found it highly unlikely that a conversation of any kind took place between the two people that morning. The grievance outcome letter then went on to deal with the incident involving problems with the printer and the other matters raised in the claimant's grievance. It went on over some 4½ pages. On the final page in conclusion she found no evidence at all of any behaviour or comments which should be the subject of a grievance. She was of the view that having spoken to those accused that the escalation of the matter to a grievance had led to a serious breakdown in the relationship between the claimant and those she accused. There had been a serious breach of trust which could perhaps have been resolved if dealt with in the office on the day of the alleged incident. She had serious concerns regarding the alleged aggressive behaviour of the claimant in relation to the printer and also the apparent breakdown in relationships between BS, RM and JF. On that basis she wished to explore and discuss with the claimant whether there was any way in which they might be able to repair these breakdowns and move matters forward or whether the relationships were irreparable and the claimant was to be invited to a meeting in the office to discuss matters further. The claimant was given the right to appeal the grievance outcome by notifying Fiona Welsh in writing within

five working days stating the grounds of appeal. The claimant did not appeal against the outcome of the grievance.

27. The follow up meeting was on 21 July 2016. At that meeting the claimant produced a typewritten note to Fiona and Barbara:

> "Following the recent events concerning the complaints I raised about Rachel Morgan it is now my word against her word. I am therefore willingly not to proceed with the case. However this does not mean I am withdrawing the complaints but for the sake of peace and working relationship I will let it go for now. Should there be another occurrence we will revisit the whole thing. Thank you for your understanding. Kind regards."

28. Ms Rollin took the view that the claimant was not letting go in terms of reserving the right to raise the matter again but was not wanting to appeal either, so she had to consider at that meeting how matters should proceed. They did not appear to be able to reach a way of working in the future and so it was her decision that the claimant should be dismissed from her employment with the respondent, having carefully considered what she called the "current situation" and everything said in the meeting. The dismissal was carried out by a letter dated 22 July 2016:

> "Following our meeting on 21 July 2016, I have considered carefully the current situation and everything that you said in our meetings.
>
> To summarise, you raised a grievance on 29 June 2016 as you felt you had been subjected to segregation and abuse following your recent change of contract. I investigated your grievance in full and provided findings in wiring to you on 13 July 2016. I did not find any evidence to suggest that you had been treated unfavourably or differently, whether for a reason due to your contract change or any other reason.
>
> As you will have noted from the grievance outcome letter…I simply could not accept your version of the events that you say occurred with RM and MG…
>
> Throughout the grievance investigation I was also concerned by the evidence I obtained of your strained relationships with those such as RM, MG and JF, with whom you are required to work closely on a daily basis…Being unable to communicate effectively with colleagues and failing to willingly undertake elements of your job role will ultimately impact negatively on the quality of the service the firm provides to clients.
>
> I have to consider whether the working relationship between you and close colleagues such as RM, MG and JF can be repaired following what seems to be a very clear breakdown of relationships. While of course you were perfectly entitled to bring a grievance, and have not appealed against my decision, it is also obvious that you do not accept my findings. Even yesterday you submitted a note stating that while you would not appeal my decision this did not mean that you were withdrawing the complaints and that you may wish to revisit this matter in the future. This gives me no confidence that working relationships with others can be rebuilt.

My purpose in meeting with you yesterday was to discuss the possible next steps and consider if these broken relationships could be rebuilt. I advised you of the impact that your grievance had had on those accused and also my concerns regarding your working relationships with your colleagues going forward. Unfortunately, given the issues outlined above, I do not feel that you have appreciated the difficulty of the situation and, from your responses in our meeting, I continue to have serious concerns that the necessary working relationships are beyond repair.

You are probably aware that the firm does not have any vacancies for your role in other teams within the Manchester office so redeployment to another role is not possible.

Regretfully, I have therefore come to the conclusion that it is not possible to return you to your current role, nor is it possible to redeploy you.

For the above reasons, it is my view that your employment must come to an end, due to a complete and irreparable breakdown of the working relationship…"

29. In this case we noted that in our view counsel for the respondent did not in any way challenge the claimant's statement as to what had been said by Rachel Morgan. We have all three gone through our notes and we remain of the view that the evidence of the claimant as to what was said by Rachel Morgan was not specifically challenged. We also note that the respondent has not called Rachel Morgan to the Tribunal to give evidence; therefore the only evidence before us on the question of the alleged statement is that of the claimant.

The Law

30. Section 13 of the Equality Act 2010 which deals with direct discrimination states:

(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.

(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.

(4) If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.

(5) If the protected characteristic is race, less favourable treatment includes segregating B from others.

(6) If the protected characteristic is sex –

(a) less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;

(b) in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth.

(7) Subsection (6)(a) does not apply for the purposes of Part 5 (work).

(8) This section is subject to sections 17(6) and 18(7).

31. Section 26 deals with harassment and states:

(1) A person (A) harasses another (B) if –

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of –

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) A also harasses B if –

(a) A engages in unwanted conduct of a sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection (1)(b).

(3) A also harasses B if –

(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,

(b) the conduct has the purpose or effect referred to in subsection (1)(b), and

(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are –

age;

disability;

gender reassignment;

race;

religion or belief;

sex;

sexual orientation.

32. Section 27 deals with victimisation and states:

(1) A person (A) victimises another person (B) if A subjects B to a detriment because –

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act -

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

33. Section 136 deals with the burden of proof and states:

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

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

Submissions

34. The respondent has helpfully provided us with a written statement of the various principles and he has provided us with relevant case law. The claimant, it being her one and perhaps only experience in the Tribunal, did not make any formal submissions; she kindly thanked us for our attentive listening and left us to reach what we thought was the right conclusion.

Conclusions

35. The first matter in time is the allegation of harassment; everything flows from that. We find as a fact that the remark was made based on the unchallenged evidence of the claimant with the respondent not calling the evidence that was available to it to refute the allegation. The views of Ms Rollin who has heard from the relevant people do not in our judgment go far enough to overturn the unchallenged evidence of the claimant.

36. We look at the words in section 26 which deals with harassment. Unwanted conduct in relation to a relevant protected characteristic with the conduct having the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

37. We have heard from the claimant that she, as a black Nigerian woman present when the offending words were said, related them to herself and they had the effect of causing her to feel harassed, abused and bullied by RM. We obviously cannot know what the purpose of the words was because the maker of them has not been called to the Tribunal.

38. We have taken into account the circumstances of the case as we are obliged to by section 26(4) and in all of the circumstances we feel it was reasonable for the claimant to have been upset by the remark being made in her presence although not directly towards her.

39. The preliminary hearing (case management) suggests harassment might also be relevant to the process followed by Ms Rollin when dealing with the claimant's grievance. We do not find any evidence whatsoever that there was any harassment involved in the proceeding undertaken by Ms Rollin when dealing with the claimant's grievance. We find that the claimant was generally treated very well by the respondent in that concessions were made to her that might not have been made to other people in terms of the meeting off the premises and the non statutory companion.

40. Moving forward to the suggestion of victimisation, for there to be victimisation the claimant has to have done a protected act and when she made an allegation that another person had contravened the Act by making the comment towards her the claimant did a protected act.

41. Has she therefore been subjected to a detriment because of it or in terms of direct discrimination which is also alleged, did the respondent discriminate against her by treating her less favourably because of her race? We have examined the grievance process. We do not find any evidence of any discrimination in the course of that process, which seems to us to have been full and fair with the claimant, as we

said, having had the benefit of the off site meeting and representation that was not allowed for in the respondent's procedure. The fact that the claimant did not agree with the outcome does not, in our view, means that the respondent was in any way discriminatory. We take the view that based on the evidence before her Ms Rollin could reasonably have come to the conclusion that she did, which was that in her mind the remark was not made. We do not find any connection between the claimant's race and the process followed. We in simple terms do not find anything of a discriminatory nature, whether victimisation or direct discrimination in relation to the grievance process and its outcome.

42. The claimant also suggests that her dismissal might have been direct discrimination and/or victimisation. Again we are not persuaded that there is any evidence to suggest that there was any discrimination here. The respondent took the view that the claimant should be dismissed. The reasons are set out in the letter in a relatively clear fashion. The reasons were, in our judgment, not because of the claimant's race or because the claimant had done the protected act but because the events related to matters before and after the grievance and in particular the way in which the claimant was not able to let the matter drop whilst not appealing either. The respondent took the view that they could not continue to employ her and so they dismissed her, and given that the claimant had no right to bring unfair dismissal that was the end of that matter.

43. We therefore find for the claimant in respect of the harassment in respect of the remark but all other claims are dismissed for the reasons set out above.

44. The Tribunal finds that this matter is at the lower end of the lower band for the purposes of Vento. The respondent shall pay to the claimant the sum of £1,000 inclusive of interest to compensate her for injury to her feelings.

23 November 2017

Employment Judge Sherratt

JUDGMENT AND REASONS SENT TO THE PARTIES
IN ACCORDANCE WITH AN ORDER OF THE
EMPLOYMENT APPEAL TRIBUNAL
DATED 15 NOVEMBER 2017 ON
24 November 2017

FOR THE TRIBUNAL OFFICE