EMPLOYMENT TRIBUNALS

Claimant: Mr A Jayeola

Respondent: Commissioners for Her Majesty's Revenue and Customs

HELD AT: Manchester **ON:** 18 - 20 December 2017

BEFORE: Employment Judge Porter
Miss S Howarth
Mr P Stowe

REPRESENTATION:

Claimant: In person

Respondent: Mr P Gorasia of counsel

JUDGMENT

1. The claim that the respondent directly discriminated against the claimant because of his race within the meaning of s13 Equality Act 2010 succeeds.

2. A remedy hearing shall take place on 7 and 8 June 2018.

REASONS

1. Written reasons are provided pursuant to the request made by counsel for the respondent at the hearing.

Issues to be determined

2. At the outset it was confirmed that the issue to be determined had been identified at a preliminary hearing before EJ Horne on 14 June 2017 and clarified at the preliminary hearing before EJ Sherratt on 26 July 2017. There was a single allegation of direct race discrimination, and the issues were:

    2.1 whether Mrs Cummings treated the claimant less favourably than a hypothetical comparator when she refused the claimant's request that a certain G4S employee be either removed from the premises or barred from the 7th floor of the building where the claimant worked; and, if so,

    2.2 whether there are any facts from which the tribunal could infer that the reason for any such difference in treatment was because of the claimant's race; and, if so;

    2.3 whether the respondent could prove that any such difference in treatment was not an act of discrimination, was not because of the claimant's race.

3. The respondent concedes that on 14 June 2016 there was an incident between the claimant and a white employee of G4S when the lights on the 7th floor were off for maintenance reasons. The respondent does not challenge the claimant's evidence that, as the claimant walked on to the 7th floor, the G4S employee shouted to him "It's a good thing you're wearing a white shirt or I wouldn't have seen you."

Submissions

4. The claimant made a number of detailed submissions which the tribunal has considered with care but does not rehearse in full here. In essence it was asserted that:-

    4.1 if the respondent has the option to veto a G4S employee from starting work there is no reason why they could not request the removal of the G4S employee after he had committed the discriminatory offence;

    4.2 the respondent did remove a G4S employee last year;

    4.3 Mrs Cummings has lied in her witness statement, describing the claimant as aggressive and intimidating, making unfounded allegations against the claimant based on stereotypical assumptions on racial grounds;

4.4 Mrs Cummings could have insisted on the removal of the G4S employee in accordance with the zero tolerance policy. The fact that the G4S employee is still working on the premises shows that the policy is a sham. The respondent's refusal to remove a known discriminator from the workplace was a clear breach of the diversity policy and shows that the respondent simply paid lip service to its declared Zero tolerance policy

4.5 there was a dereliction of her duty of care by Mrs Cummings, who did not take the claimant's complaint seriously;

4.6 the respondent did not investigate the complaint, did not interview an employee who had witnessed the discriminatory treatment of the claimant;

4.7 there is a culture of racism in the office. The discriminatory treatment of the claimant took place in front of witnesses, there was no fear of reprimand;

4.8 Andy Readman was promoted after he made the discriminatory comment to the claimant, who was made ill by the comment;

4.9 Mrs Cummings hid behind the procedure. She initiated the diversity training to provide herself with an alibi, the defence of plausible deniability;

4.10 Mrs Cummings' failure to act made the claimant's return to work impossible. Mrs Cummings knew that – she did not act to make sure that the claimant was not subsequently sacked;

5. Counsel for the respondent made a number of detailed submissions which the tribunal has considered with care but does not rehearse in full here. In essence it was asserted that:-

5.1 Following the guidelines given in **Madarassy,** it is not enough for the claimant to say that there was a difference in treatment. The burden falls on the claimant to show a prima facie case of discrimination;

5.2 The claimant has pointed to no facts from which the tribunal could infer that Mrs Cummings was motivated by race;

5.3 There are no such facts. Mrs Cummings held no animus against the claimant. Quite the opposite. She encouraged him to pursue a grievance on matters she was not directly involved in, she sent an email to staff reminding them of the diversity policy and arranged

Diversity training which she directed should take priority over other business matters;

5.4 Mrs Cummings took advice from HR and the Estates team and she followed that advice. She would have acted in the same way whatever the ethnicity of the employee;

5.5 It is not asserted that the advice from HR and/or the Estates team was "tainted" by race discrimination. It is not necessary for the tribunal to consider the motives of the HR and/or the Estates team. The sole question is what was the reason for Mrs. Cummings' decision. **CLFIS (UK) Limited v Reynolds [2015] EWCA Civ 439**

Evidence

6. The claimant gave evidence.

7. The respondent relied upon the evidence of Mrs Susan Cummings, Grade 7 Senior Delivery Manager.

8. The witnesses provided their evidence from written witness statements. They were subject to cross-examination, questioning by the tribunal and, where appropriate, re-examination.

9. An agreed bundle of documents was presented. References to page numbers in these Reasons are references to the page numbers in the agreed Bundle.

10. After reading the witness statements the tribunal asked the respondent whether the documentary evidence was available to support the following statement in paragraph 77 of Mrs Cumming's witness statement:

"I had no power to remove the G4S employee from the building or to restrict which floors he worked on."

11. Counsel for the respondent confirmed that the Service Agreement between the respondent and G4S had not been disclosed and was not contained in the agreed bundle of documents. Mr Gorasia agreed to obtain a copy of that Service Agreement, which was provided on the second day of the hearing.

Facts

12. Having considered all the evidence the tribunal has made the following findings of fact. Where a conflict of evidence arose the tribunal has resolved the same, on the balance of probabilities, in accordance with the following findings.

13. The respondent (sometimes referred to in these reasons as “HMRC”) has adopted detailed Diversity and Equality Policies. It has declared a zero tolerance policy against discrimination on the grounds of race or ethnic origin. Its policy declares (page 304):

    HMRC will not tolerate discrimination or harassment on the grounds of race or ethnic origin. This will treat such behaviour as a disciplinary offence, which could, in some circumstances, lead to dismissal.

14. All members of staff are required to undertake training modules in equality and diversity, including the addressing of unconscious bias, on an annual basis.

15. Mrs Cummings is a grade 7 Senior delivery manager. At the relevant time she was employed within Personal Tax operations, based at the Manchester Contact centre.

16. Manchester Contact centre is based at Trinity Bridge House. As with many HMRC buildings, Trinity Bridge House has security and cleaning staff provided through HMRC's facilities management contract with the outside contractor, G4S. As a result of this all cleaning and security staff based at Trinity Bridge house are employees of G4S and not HMRC.

17. G4S provides its services to the respondent in accordance with the terms of a written agreement (hereinafter referred to as “the Service Agreement”), in which the respondent is referred to as the client and G4S as the Contractor. Extracts from the Service Agreement read as follows:

    3.3.1 The contractor and the Client Contract manager shall hold meetings to review the performance and effectiveness of the Services.

    3.3.3 The contractor shall inform the client contracts manager of all complaints received about the services delivered under the contract. The contractor shall be required to deal directly with complaints and shall provide a senior employee and any required specialists to attend and participate in meetings at the client’s request.

    3.3.4 Issues, complaints and service failures that cannot be resolved shall be escalated through the SRM meeting structure

    3.5.6 Where staff are employed to work within the sites details of staff shall be submitted in an agreed format to the Client for approval, prior to the relevant person commencing work.

    3.5.10 The Contractor shall ensure that all staff engaged in the delivery of the service, shall in addition to participating in the induction programme, be at all times properly and adequately notified, trained and instructed and the

> information recorded within their personal training records… with regard to, but not limited to:
> ……
> (d) all relevant health and safety hazards, rules, policies and procedures concerning health and safety at work, all Client policies and all other mandatory and statutory requirements

18. The claimant is of Nigerian ethnic origin and describes his skin colour as black.

19. The claimant was employed by the respondent at as an assistant officer from 12 October 2015. He worked on the seventh floor of Trinity Bridge house. The claimant was one of 170 people working within a particular group.. He was the only black employee working within that group of people.

20. In February 2016 Mrs Cummings was informed by one of her managers that the claimant had complained to his line manager that inappropriate language had been used towards him by a colleague, Andy Readman. Mrs Cummings was aware that Andy Readman had apologised to the claimant face-to-face and explained that he had not meant any offence by using the term “Bro” to the claimant. The apology was not accepted by the claimant and formal mediation with two experienced and accredited mediators was arranged. The claimant remained dissatisfied and the claimant was advised of his right to lodge a formal grievance in relation to the conduct of Mr Readman. The claimant did not take that option up.

21. The claimant was offended by the incident with Andy Readman. He believed that being called “Bro” was racial harassment. He took two days off sick as a result of this incident and informed his line manager on his return to work on 22 February 2016 that he had suffered from anxiety due to the incident, which was the reason for his absence.

22. .On 14 June 2016 Mrs Cummings was notified by the claimant's direct line manager, Joanne Legg, that the claimant had reported that unacceptable comments had been made to him by a G4S employee. It was explained to Mrs Cummings that:-

    22.1 both the claimant and the G4S employee had been passing through an area of the building when the lights were off for maintenance reasons;

    22.2 the claimant asserted that the G4S employee said to the claimant that if it had not been for the claimant’s white shirt the G4S employee would not have seen him.

23. Mrs Cummings contacted the Building Responsible manager (BRM) to report the complaint.

24. The BRM is an HMRC employee to whom HMRC managers can report issues relating to the building. This BRM escalated the claimant's complaints to the Estates team to ask for the incident to be investigated. The Estates team is an HMRC team responsible for managing contracts between HMRC and the various service providers who are used across the HMRC estate.

25. The claimant made a complaint to G4S of racial discrimination by the G4S employee involved in the incident on 14 June 2016. Mrs Cummings was aware of that.

26. The claimant attended work as usual on 15 June 2016 but left shortly before his shift was due to finish. He did not attend work thereafter.

27. In June 2016 the claimant told his line manager that he was unhappy with G4S investigating the incident on 14 June 2016 and he requested a meeting with Mrs Cummings and Mr Crawley, a senior manager. That meeting took place on 1 July 2016 when:

    27.1 the claimant was stated that he was suffering from high blood pressure and that he was concerned about his mental health - it had got to the point where he would read a newspaper and think that people were being racist in their commentaries;

    27.2 the claimant told Mrs Cummings that he had met with Andy Crawley after the incident and felt better, but afterwards he had seen the G4S employee again and felt he needed to leave the building;

    27.3 Mrs Cummings confirmed that the G4S employee had been on leave for a week, which had caused some delay, but on his return he had been interviewed by G4S management and the respondent was awaiting the outcome;

    27.4 the claimant expressed his unhappiness that the process had taken so long;

    27.5 Mrs Cummings asked the claimant if he would be returning to work soon. The claimant said that he did not think it was fair that he had a Stage 1 warning on his file as he had only been off work because of the incident with the G4S employee;

27.6 the claimant said that there was a racist culture on the 7th floor. Reference was made to the incident with Andy Readman and the claimant's assertion that this was a "racist" incident;

27.7 Mrs Cummings informed the claimant that he could raise a formal grievance about the conduct of Mr Readman;

27.8 Mrs Cummings asked the claimant if he would feel better if she sent a message to all staff reminding them of HMRC's zero tolerance to racist abuse in the workplace. The claimant agreed it would make him feel safer;

28. On 4 July 2016 the claimant sent an e-mail to Mrs Cummings (page 132) extracts from which read as follows:

> Here's a brief note to follow our meeting last Friday. There was something you said that I should have responded to but didn't
>
> You mentioned this (the racist abuse) being the second incident. It isn't. It is actually the third incident that I've reported to HMRC. Andy Crawley is aware of this.
>
> The first incident I turned the other cheek. The second (Andrew Redman) I tried to move on from. There have been other incidents. The first being in my very first week. One of your managers called me "Young man". I asked him how old he was. It turns out he's younger than me. I told him so. He apologised and hasn't spoken to me since. This is my first example of challenging racism and being ostracised for it.
>
> I feel the need to point out to you "Young man" -- in this case -- is a racist putdown. It is a term where the racist can attempt to argue fraudulent innocence. At least he didn't call me "boy". I bring this to light because I got the distinct impression you didn't believe there is a racist culture -- albeit under the radar -- on the 7th floor.
>
> You also said regarding Andrew Redman "an apology was offered". I had to think about that over the weekend. I question myself who told you this because it sounds like I am being intransigent. This is 180° from the facts. Redman let his true feelings be known during mediation. He basically laughed in my face. Hence mediation was the biggest "waste of my time" in my life.
>
> To close I want to mention my team. After they witnessed the Redman incident they ignored and ostracised me. Only Steve and James asked me how I was. This despite a couple of colleagues from other teams checking up on me. My team reverted to type following this latest incident.

I cannot tell you the reason for this behaviour. I can speculate. Regardless this is contributory to the aforementioned racist culture.

29. This is the first time that Mrs Cummings was aware that the claimant made a complaint about the 'young man' comment.

30. By email dated 8 July 2016 Mrs Cummings replied to the claimant, stating that the claimant could follow the formal grievance route in relation to the incidents he mentioned and offered to send to him the relevant guidance. Mrs Cummings gave no indication that the incidents would be investigated or that disciplinary action would be taken in relation to any of the incidents.

31. .Mrs Cummings had one of her assistants arrange a two hour session called "Diversity and Inclusion". The session was run on two separate occasions and was made a priority over existing commitments for all managers up to Grade 7 to ensure maximum attendance. The session was to be attended by management for them to then cascade the objectives and principles set out down to all staff. The session was designed to raise awareness of inclusive behaviours for tackling discrimination, bullying and harassment in the workplace and support the creation of a more inclusive working environment.

32. On 6 July 2016 Mrs Cummings had her personal assistant circulate an e-mail (page 127) to all members of staff at the Manchester Contact centre reminding everyone of HMRC's zero tolerance approach to discrimination and harassment on the grounds of race or ethnic origin. The e-mail stated that HMRC would not tolerate discrimination or harassment on the grounds of race or ethnic origin and that anyone found behaving in such a manner will be committing a disciplinary offence which could lead to dismissal. The e-mail ended by setting out that anyone who believed they had been treated unfairly due to their race or ethnic origin should raise a grievance, in line with HMRC's policies.

33. On 14 July 2016 the claimant had a keep in touch telephone meeting with Joanne Legg. The claimant stated that :

    33.1 he had been shocked and scared by his health condition, and that work had caused this;

    33.2 he was concerned about going back in to the workplace as it made him ill;

    33.3 he had a responsibility to look after his health;

    33.4 he had no problem with work itself but he was putting himself in a work environment that was putting him in jeopardy as he had reported racial abuse 3 times;

33.5 he could not put himself in this kind of environment as the investigation of the incident with the G4S employee had been delayed;

33.6 he had been racially abused and nothing was going to happen

34. Joanne Legg stated that:

34.1 the matter was out of the respondent's hands as G4S was the employer doing the investigating;

34.2 the claimant had to bear in mind that if the G4S employee was to remain in employment when the claimant returned to work he would probably come into contact with him in the workplace and if he found that unacceptable he should consider whether he can remain in employment with HMRC or resign.

35. The claimant replied that he had a lot of thinking to do.

36. On 15 July 2016 Mrs Cummings received the outcome of the G4S investigation by e-mail. She was told that the G4S employee had been interviewed and reminded of his role and responsibilities in regard to the G4S Equality and Diversity Policy.

37. On receiving this information Mrs Cummings contacted HR to see if there was anything else she could do. HR advised that as his employer the respondent had done all it could do, that if the claimant was unhappy with this result he could take matters further with G4S directly. Mrs Cummings asked that this information be fed back to Joanne Legg, who was asked to pass it on to the claimant.

38. On 21 July 2016 Joanne Legg passed on the information to the claimant by a telephone call.

39. Mrs Cummings understood that the claimant had said that he was unhappy with the length of time it had taken G4S to come to the conclusion and expressed the view that if HMRC accepted that outcome it was not good enough.

40. At a meeting on 26 July 2016 Joanne Legg asked the claimant what support he would require to get back to work. The claimant stated that he wanted the G4S employee sacked or moved to a different location and that Mrs Cummings should ensure that this happened as this was a

reasonable adjustment. Joanne Legg asked the claimant to clarify if he wanted the G4S employee removed entirely, or whether the claimant would be happy if the employee was removed from the floor. The claimant agreed, as a compromise, that he would consider whether a removal from the floor would be sufficient, but would not commit to returning to work at that stage. Joanne Legg agreed that she would raise with Mrs Cummings whether the G4S employee could be removed from the building or, as an alternative, from the floor.

41. Mrs Cummings became aware of this request and contacted HR and the Estates team to discuss whether this was possible. She was told that as the person in question was employed by G4S, and not HMRC, she could not insist that this happened but the Estates team agreed to raise this with G4S.

42. Mrs Cummings was advised that in response to the enquiry from the Estates team, G4S stated that it had dealt with the matter and no further action would be taken. Mrs Cummings fed this back to Joanne Legg and asked her to inform the claimant.

43. Mrs Cummings took no further action, did not question the Estates team any further about the response from G4S, did not carry out any investigation of the incident on 14 June 2016, did not interview any HMRC employees who had witnessed the incident.

44. Mrs Cummings did not investigate whether the Estates Team had taken any action and/or made any request on a voluntary basis that the G4S employee be removed from the premises or 7th floor.

    [Mrs Cummings' evidence before the tribunal is not clear on what action the Estates team took. She is unsure as to whether there was a request from the respondent to G4S to remove the G4S employee from the building or 7th floor. There is no satisfactory documentary evidence as to any contact between the Estates team and G4S on this point.]

45. Mrs Cummings accepted at face value the outcome of the investigation by G4S of the discriminatory conduct of the G4S employee. She was unaware of the actual outcome, whether G4S had found that their employee was guilty of discriminatory conduct, in breach of the respondent's diversity policy and, if so, the reason for allowing him to return to work, the reason for the absence of any formal disciplinary action against that employee. Mrs Cummings did not investigate the terms of the Service Agreement between the respondent and G4S. She was unaware of the terms of the Service Agreement except that she was aware that if there had been another complaint of discriminatory behaviour against the G4S employee it could be escalated through the Estates team.

46. In evidence before the tribunal Mrs Cummings:

    46.1 stated that, with hindsight, she could have done more to investigate the position with the G4S employee;

    46.2 accepted that she was aware that there was a risk that the discriminatory conduct of the G4S employee, which had had such an adverse effect on the claimant's health, could be repeated;

    46.3 used the physical attributes of the claimant, her description of him as being tall and well built, to support her stated opinion that he can at times be aggressive and intimidating.

47. The G4S employee did not work on the same floor as the claimant. He only visited the floor to empty the bin.

48. Joanne Legg suggested that a reasonable adjustment be that the claimant be accompanied from the foyer to the office and offered him a desk that was next to his manager and away from the kitchen area to minimise any risk of potential contact with the G4S employee. The claimant rejected that suggestion, insisting that the G4S employee be removed for the workplace to enable the claimant to return to work.

49. The claimant made it clear to the respondent, as confirmed in the documents retained in his personnel file, that:

    49.1 he was unable to return to work while the G4S guard was still working there;

    49.2 the incident had been witnessed by an employee of the respondent;

50. Andy Readman was promoted after the claimant had made his complaint about the use of the word "Bro". . Mrs Cummings was aware that the claimant had complained that this was a racist comment, was aware that the claimant had taken time off work following the incident with Andy Readman, had informed the respondent that the incident had caused him anxiety.

51. The respondent does not, in reaching any decision on promotion, consider any allegations of discrimination which have not being fully investigated and findings of fact made under the respondent's grievance procedure.

[That is the evidence of Mrs Cummings before the tribunal.]

52. The respondent made no investigation of the conduct of Mr Readman to decide, after its own investigation, whether Mr Readman had breached the diversity policy, had discriminated against the claimant as alleged, to decide whether disciplinary procedure was appropriate. It relied on the claimant to present a formal grievance, if he was dissatisfied with the apology and mediation.

The Law

53. Section 39 Equality Act 2010 provides:-

An employer (A) must not discriminate against an employee of A's (B)-

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment

54. Section 13 Equality Act 2010 provides:

"A person (A) discriminate against another (B) if, because of a protected characteristic A treats B less favourably than A treats or would treat others."

55. Section 23 Equality Act 2010 provides:-

(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case;

56. When considering the appropriate comparator the tribunal notes that like must be compared with like. Previous case law is of assistance in this exercise. Relevant circumstances to consider include those that the alleged discriminator takes into account when deciding to treat the claimant as he did. **Shamoon v Chief Constable of the Royal Ulster Constabulary (2003) ICR 337.** If no actual comparator can be shown then the tribunal is under a duty to test the claimant's treatment against a hypothetical comparator. **Balamoody v United Kingdom Central Council for Nursing Midwifery and Health Visiting (2002) ICR 646.**

57. As regards direct discrimination, a person may be less favourably treated "because of" a protected characteristic *either* if the act complained of is

inherently discriminatory *or* if the characteristic in question influenced the "mental processes" of the putative discriminator, whether consciously or unconsciously, to any significant extent: **Amnesty International v Ahmed [2009] ICR 1450.**

58. Section 136 Equality Act 2010 provides:

Burden of Proof

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

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

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

59. The tribunal has considered the decision of the EAT in **Barton v Investec Henderson Crosthwaite Securities Ltd [2003] IRLR 332**, and its observations on the correct approach to the burden of proof in discrimination cases. The tribunal notes the Court of Appeal's decision in **Igen Ltd v Wong [2005] IRLR 258** where the **Barton** guidelines were amended and clarified and it was confirmed that the correct approach, in applying the burden of proof regulations, is to adopt a two stage approach namely (1) has the claimant proved, on the balance of probabilities) the existence of facts from which the tribunal could, in the absence of an adequate explanation, conclude that the respondent has committed an act of unlawful discrimination? and, if so, (2) has the respondent proved that it did not commit (or is not to be treated as having committed) the unlawful act? We note also the case of **Madarassy v Nomura [2007] IRLR 246**, which confirmed the guidance in **Igen**:

"The employment tribunal did not err by failing to apply a two-stage test when concluding that race was not the ground for the treatment complained of by the claimant. The EAT correctly held that it was permissible for the tribunal to go straight to the "reason why" question…It is not an error of law for a tribunal not to apply the two-stage approach to the burden of proof laid down by the Court of Appeal in **Igen Ld v Wong**. Although in general, it is good practice to apply the two-stage test and to require the claimant to establish a prima facie case before looking to the adequacy of the respondent's explanation for the offending treatment, there are cases in which the claimant is not prejudiced by the tribunal omitting express consideration of the first stage of the test, moving straight to the second stage of the test and concluding that the respondent has discharged the burden on him under the second stage of the test by proving that the treatment was not on the proscribed ground."

60. In **The Law Society v Bahl 2003 [IRLR] 640** the EAT held that a Tribunal is not entitled to draw an inference of discrimination from the mere fact that the employer has treated the employee unreasonably. All unlawful discriminatory treatment is unreasonable, but not all unreasonable treatment is discriminatory, and it is not shown to be so merely because the victim is either a woman or of a minority race or colour. The tribunal must consider all the relevant circumstances to determine the reason for the unreasonable treatment.

61. In the case of **Hammonds LLP v C Mwitta [2010] UKEAT** the EAT (Slade J) reiterated that the possibility that a respondent "could have" committed an act of discrimination is insufficient to establish a prima facie case so as to move the burden of proof to the respondent for the purposes of (now) s136 Equality Act 2010. The tribunal must find facts from which they could conclude that there had been discrimination on the grounds of race. The absence of an explanation for differential treatment may not be relied upon to establish the prima facie case.

62. The approach to be adopted as described in **Igen** was approved by the Supreme Court in **Hewage v Grampian Health Board [2012] ICR 1054**.

63. This approach was confirmed by the Court of Appeal in **Ayodele v Citylink Limited** [2017] EWCA Civ 1913, when the decision of the EAT in **Efobi v Royal Mail Group Limited (UKEAT/0203/16)** was held to be incorrectly decided.

64. The tribunal has considered and where appropriate applied the authorities referred to in submissions.

Determination of the Issues

(This includes, where appropriate, any additional findings of fact not expressly contained within the findings above but made in the same manner after considering all the evidence)

65. The claimant asserts that he was treated less favourably when Mrs Cummings refused his request to remove the G4S employee from the respondent's premises or to ensure that he no longer worked on the seventh floor, where the claimant was based.

66. The claimant has not named an actual comparator. The question is whether the respondent would have treated a hypothetical comparator any differently.

67. In deciding the appropriate hypothetical comparator the tribunal has considered the reason given by Mrs Cummings for refusing the claimant's request that the G4S employee be removed from the building or the seventh floor. The reason given by Mrs Cummings is that she was told by HR that she did not have the power to do it, and that advice was confirmed by Estates Management. Although Mrs Cummings' witness statement sets out a number of attendance, conduct and performance issues which occurred with the claimant during the course of his employment, Mrs Cummings does not say that any of those issues affected her decision on this key point.

68. The relevant circumstances, in constructing a hypothetical comparator, are that:

    68.1 The claimant made a complaint of racial discrimination against him personally by a G4S employee who worked on the same floor as the claimant;

    68.2 The claimant started a period of sickness absence, reporting to the respondent that he suffered anxiety and ill health as a result of that discriminatory act;

    68.3 The claimant informed the respondent that he was unable to return to work while the G4S guard was still working there;

    68.4 The claimant suggested what he termed a "reasonable adjustment" to allow him to return to work, namely the removal of the G4S employee from the premises or the removal of the G4S employee from the 7th floor.

69. The appropriate hypothetical comparator is therefore a white employee, who made the same request in the same or broadly similar circumstances.

70. In deciding how Mrs Cummings would have treated the hypothetical comparator we note in particular that the respondent has adopted a rigorous diversity policy, that it declares a zero tolerance of discrimination. The tribunal notes in particular that:

    70.1 The service agreement between G4S and the respondent:

        70.1.1 provides for the resolution of complaints about the service provision; and

        70.1.2 provides that the respondent's approval is required for employees of G4S to start working at the premises;

70.1.3 provides that G4S employees should be trained in the respondent's policies

70.2 Mrs Cummings admits that, with hindsight, she could have done more to investigate the position with the G4S employee;

70.3 Whereas the respondent had no express right to discipline the G4S employee, or to exclude any such employee from the respondent's premises, it did have rights as a customer to ensure that the service provided met its requirements, that its zero tolerance policy was known by G4S employees.

71. In all the circumstances the tribunal finds that Mrs Cummings would have treated the hypothetical comparator differently, would have taken steps to ensure that the respondent's zero tolerance policy was observed by its service provider, to ensure that the respondent's employees were not subject to the risk of further discriminatory treatment by the service provider's employee. The tribunal is satisfied and finds that Mrs Cummings would have taken steps to ensure that the G4S employee did not work in the same place as the white employee, to facilitate the white employee's return to the workplace. Mrs Cummings would have granted the request by the hypothetical comparator that the G4S employee be barred from the premises or the 7th floor.

72. There was a difference in treatment.

73. The tribunal has considered whether the claimant has proved, on the balance of probabilities, the existence of facts from which the tribunal could, in the absence of an adequate explanation, conclude that the respondent has committed an act of unlawful discrimination, whether there are any facts from which the tribunal could conclude that the reason for any such difference in treatment was the claimant's race.

74. The tribunal has considered carefully the claimant's assertions that:

74.1 there was a culture of racism within the respondent's establishment;

74.2 the respondents refusal to remove a known discriminator from the workplace was a clear breach of the diversity policy and shows that the respondent simply paid lip service to its declared Zero tolerance policy

75. The tribunal notes in particular as follows:

75.1 the claimant's first complaint of race discrimination was when he was called a young man shortly after joining the respondent. The claimant regarded that as a derogatory racist comment because the person who made the comment was considerably younger than the claimant himself. The tribunal notes that the words “young man” do not by themselves relate to race. The claimant made no complaint about this at the time and raised no formal grievance when advised of his right to do so;

75.2 the claimant made a further complaint when Andy Readman referred to the claimant as “Bro”. The claimant was offended by that comment which he considers to be racist. The tribunal notes that the comment does not specifically relate to the claimant's race or skin colour. The claimant complained about this immediately and Andy Readman apologised for the offence caused to the claimant. The claimant was encouraged to bring a formal grievance if he was dissatisfied with the apology and/or the mediation which was put in place to try to resolve any ill feeling between the claimant and Andy Readman;

75.3 Andy Readman was promoted after the claimant had made his complaint. The tribunal notes that the respondent does not, in reaching any decision on promotion, consider any allegations of discrimination which have not being fully investigated and findings of fact made under the respondent's grievance procedure;

75.4 The respondent made no investigation of the conduct of Mr Readman to decide, after its own investigation, whether Mr Readman had breached the diversity policy, had discriminated against the claimant. It relied on the claimant to present a formal grievance. Under this procedure therefore the respondent, in deciding on an internal promotion, takes no account of the fact that the employee has a current complaint of discrimination against him, a complaint which may at any time progress to a formal grievance under the Diversity policy;

75.5 Mrs Cummings accepted at face value the outcome of the investigation by G4S in to the discriminatory conduct of the G4S employee. She was unaware of the actual outcome, whether G4S had found that their employee was guilty of discriminatory conduct, in breach of the respondent’s diversity policy and, if so, the reason for allowing him to return to work, the reason for the absence of any formal disciplinary action against that employee;

75.6 Mrs Cummings did not carry out her own investigation of the discriminatory conduct of the G4S employee. The incident had been witnessed by an employee of the respondent, who was not interviewed;

75.7 Mrs Cummings accepted, without further investigation, that the G4S employee would return to the 7th floor and there was a risk that his discriminatory conduct, which had had such an adverse effect on the claimant's health, could be repeated;

75.8 after the G4S employee made the comment to the claimant Mrs Cummings, at the request of the claimant, took action under the diversity policy by organising the sending of an e-mail to staff, to remind them of their duties under the policy, and organising diversity training for managers, which was given priority over other events;

75.9 Mrs Cummings has used the physical attributes of the claimant, her description of him as being tall and well built, to support her opinion that he can at times be aggressive and intimidating. That does suggest that Mrs Cummings may from time make decisions in part on physical attributes rather than on the relevant facts of the case;

75.10 Mrs Cummings did not investigate whether the Estates Team had taken any action and/or made any request on a voluntary basis that the G4S employee be removed from the premises or 7th floor.

In all the circumstances, whereas the tribunal does not accept that there was a culture of racism, the tribunal does agree with the claimant that the respondent at times pays lip service to its declared zero tolerance policy. It relies solely on individual employees to pursue a formal grievance to police the effectiveness of that policy. It took no action itself over the incident with Andy Readman, took no action itself over the incident with the G4S employee.

76. The facts referred to at paragraph 75 are facts from which the tribunal could conclude that the reason for any such difference in treatment was the claimant's race.

77. The burden shifts to the respondent.

78. The tribunal has considered Mrs Cumming's explanation for the treatment.

79. Mrs Cummings enquired with both HR and the Estates team whether she could, as requested by the claimant, exclude the G4S employee from the premises or the seventh floor. She was informed by HR that she was not entitled to do so, and by the Estates team that G4S said that no further action would be taken. We bear in mind that the respondent concedes that the G4S employee was guilty of the discriminatory act which had led to the claimant's absence from work by reason of ill-health. The respondent has not challenged the claimant's evidence that he was offended by the discriminatory conduct of the G4S employee and that he was absent from work because of it. Mrs Cummings was fully aware that the G4S employee made an unwanted comment relating to the claimant's skin colour and that the claimant was offended by that, had been absent from work with anxiety as a result. Mrs Cummings now admits that perhaps she could have done more. She provides no satisfactory explanation as to why she did not do more at the time, why she quickly and without question accepted what both HR and the Estates team said, knowing that the consequence of her refusal of the claimant's request would be that the claimant would not return to work. That was clear from the information given to the claimant's line manager, as recorded on the claimant's personnel file. The tribunal understands and accepts that the respondent could take no disciplinary action against the G4S employee. However, it is not clear if the respondent and Mrs Cummings restricted their enquiries to this point and, if so, why. The evidence as to what the Estates team actually raised with G4S is not satisfactory. Mrs Cummings is unable to say that a request was made to G4S that the G4S employee be removed from the premises/7th floor The respondent is the customer; G4S is the supplier of a service. The Service Agreement between the respondent and G4S provides a system for the resolution of complaints about service. This was a complaint about service. There was certainly a formal complaint by the claimant to G4S of discriminatory treatment. It is not clear if the respondent ever made a formal complaint to G4S about discriminatory treatment by one of its employees. No satisfactory explanation has been given as to what steps, if any, the respondent took under the terms of the Service Agreement to resolve this complaint of discriminatory treatment, why the respondent and Mrs Cummings simply accepted the assertion by G4S that no further action would be taken. The claimant's request was not unreasonable. The G4S employee did not work permanently on the 7th floor. All he did was occasionally empty the bin. Mrs Cummings has failed to provide a satisfactory explanation as to why the claimant's request that the G4S employee be excluded from the premises or the 7th floor was refused. No satisfactory explanation has been provided as to why the respondent, with a declared zero tolerance policy, would not take reasonable steps to ensure its employees were safe from discriminatory treatment by the employees of the Service Provider.

80. The respondent accepts responsibility for the actions of Mrs Cummings. The respondent has failed to provide a satisfactory explanation for the difference in treatment.

81. The respondent has failed to prove that the difference in treatment was not an act of discrimination, was not because of the claimant's race.

82. The claim succeeds.

Employment Judge Porter
Date: 3 January 2018

JUDGMENT AND REASONS SENT TO THE PARTIES ON

12 January 2018
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FOR THE TRIBUNAL OFFICE