



EMPLOYMENT TRIBUNALS

Claimant: Ms J Henry

Respondent: Arnfield Care Limited

Heard at: Manchester

On: 14th – 18th May 2018
15th – 16th October 2018
AND 17th and 18th October
2018 (In Chambers)

Before: Employment Judge Elayne Hill
Ms C Jammah
Ms C Clover

REPRESENTATION:

Claimant: In Person

Respondent: Mr S Flynn, Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that the Claimant's claims for race discrimination on the grounds of harassment is well founded and succeeds.

REASONS

1. The Tribunal heard both oral and written evidence. For the claimant: The Claimant, Justina Henry; Mr Mullin; Ms L Kallides and Ashley Lindsay. For the Respondent: Mr W Relf; Mr J Simmons; Ms E French; Ms E Wilson; Ms D Harvey; Mr W Gibbons; Mr Keenan; Mr Garlick; Ms K Wilcox; Ms K Sidebottom and Mr P Keenan.
2. The Tribunal was provided with a bundle of documents comprising of 527 pages.

3. The Claimant brought claims for direct race discrimination and harassment on the grounds of race by way of an ET1 dated 22 August 2017. The respondent resisted the claim by way of an ET3 dated 22 September 2017.

Claims and Issues

4. The Claimant made claims in respect of direct race discrimination and harassment. The basis of these claims was clarified at the beginning of the hearing in May 2018. The claimant had raised several issues by way of a 'list' regarding events that had occurred after 1 June 2017, which was after she had resigned. The Claimant confirmed that the 'list' was a list of questions and not further allegations and that the issues/points raised in this 'list' supported her allegation that there had been pressure on young people to raise concerns about her to Dawn Harvey and this had been referred to in her ET1 and goes to allegation (d) below.

5. The Claimant confirmed that the allegations she was relying upon are those set out below. The Respondent's case is that allegations (b) a. and b. were out of time. The Claimant's case was that it was a course of conduct and or it was just and equitable to extend time.

6. The legal basis for the allegations can be categorised as follows:

- (a) Direct discrimination (Race) - Section 13 (1) of the Equality Act (Equality Act). The Claimant claims that the respondent treated her less favourably on the grounds of her race in that she was escorted from the Respondent's premises on 31 May 2017. The claimant relies on an actual comparator, Daniel Giblin.
- (b) Harassment (Race) – Section 26 (1) of the Equality Act 2010. The Claimant claims that the respondent engaged in unwanted conduct related to her race and the conduct had the purpose or effect of violating her dignity or created an intimidating, hostile, degrading, humiliating or offensive environment. The acts relied upon were:
 - a. Comments made about Ashley Lindsay's former partner in September 2016 by Dawn Harvey;
 - b. Comments made by Dawn Harvey at the Respondent's Christmas party on 2 December 2016;
 - c. A text message sent by Dawn Harvey to Lucie Kirkham on 31 May 2017 and
 - d. Dawn Harvey describing young people of Afro-Caribbean/African descent as 'intimidating' and 'aggressive' when they expressed themselves similarly to young people who were from Caucasian/other racial backgrounds.

7. At the beginning of the first day of the second part of the hearing the Claimant made an application to amend her claim to include victimisation on the grounds of her race. Her application was based on the grounds that during the evidence of Mr W Relf it had become apparent that safeguarding reports had been made about her to

external bodies which she had not known before and that she considered that this had been done because she had brought claims to the Tribunal. The Respondent resisted the application on the basis that this was a significant issue and that they would be required to bring additional witness evidence to refute such allegations and in addition that the claim was out of time. The Claimant confirmed that she had not raised this issue with the Respondent prior to the hearing and had not sought legal advice until just two weeks prior to the return date for this hearing. We considered the application and found that the claim was out of time and that the Claimant had had an opportunity during the last 6 months to have sought advice and made an application to amend her claim. Raising the issue so late in these proceedings would prejudice the respondent. The application was refused.

Findings of Relevant Facts

8. The Tribunal heard a significant amount of evidence from 15 witnesses and much of the evidence related to events that occurred after the Claimant resigned or after her employment terminated. The findings set out below relate to those issues that were relevant and referred to above. Whilst much of the evidence relating to events after the 1 June 2017 could be relevant to a claim for victimisation the claimant did not bring such a claim or make an application to amend her claim to include victimisation. As referred to above, the claimant did make a specific victimisation application in respect of the safeguarding referrals only. That application was refused.

9. The Claimant was employed as a Residential Support worker at Arnfield House from 25 April 2016 until she resigned 31 May 2017. Her employment terminated on 28 June 2017. Throughout her employment the Claimant was not subjected to any disciplinary action. The claimant had previously worked for 7 to 8 years in a care setting and had a degree in Health and Social Care.

10. The Respondent is an organisation that provides residential care and education support to young people who are in the care of local authorities between the ages of 11 – 17 years. The Respondent received young people from various local authorities across the UK.

11. The Claimant's role was to provide support to young people who often displayed difficult/challenging, emotional and behavioural difficulties. This work included working at the residential premises or taking young people on 'activity camps'.

12. The Claimant underwent a short induction into the business and as part of that induction was provided with a copy of the Respondent's Equality policy and other policies including the grievance and disciplinary policy.

13. The Tribunal accepted the Respondent's evidence that John Simmons had provided some in house Equality and Diversity Training. However, we do not accept that this was regular or frequent training. We heard evidence from Jon Garlick who confirmed that he had never received any Equality and Diversity training but was currently expected to undertake such training but was delayed due to family circumstances. We find that whilst training was available and the Respondent had an Equality Opportunities policy it was not actively engaging with staff to ensure that the policy was implemented or followed.

14. The Respondent is heavily regulated, as expected, particularly around safeguarding the young people in its care. The Respondent's policy is that all staff receive 1:1 supervision on a monthly basis and also have two appraisals per year. In the case of the Claimant this did not happen and the 1:1 supervisions were in fact group supervisions/staff meetings although often recorded as 1:1 supervisions. The Claimant did have an appraisal/1:1 supervision with Elaine French on 24 April 2017, details of which are set out below. The Claimant was lined managed by Dawn Harvey and Elaine French.

15. The supervision on 24 April 2017 was positive and showed that the Claimant was meeting the Respondent's required competencies and, in some instances, exceeding them. At this meeting it was agreed that the Claimant would take on more key work responsibilities and she was informed that Elaine had received very positive feedback about her. The supervision also highlighted a concern that had been raised and the Claimant was advised that she should be cautious about what she discussed with the young people.

16. At this meeting the Claimant raised concerns around some things that she had heard that she considered potentially discriminatory and that made her feel uncomfortable. It is recorded that Elaine recommended that the Claimant attend equality and diversity training and that following this training the Claimant should provide a workshop to the staff team. A written record of this meeting is set out at page 359 of the bundle and whilst it does not refer directly to the issues that the Claimant raised we find that the Claimant did raise her concerns and that this is the reason she was asked to attend the training. At page 359D Elaine French says, "Discussed the possibility of Justina to complete difference and diversity training with DCSB and providing a workshop to staff due to lack of confidence/understanding".

17. We accept the Claimant's evidence that she raised her concerns with Elaine French and that she was booked on the course as a result of her raising those concerns. Dawn Harvey had originally been booked onto this course and Elaine French made a decision to send the Claimant on the course in place of Dawn Harvey and we find that this further supports the Claimant's version of events. In any event, it is clear that Elaine French's view was that there was a lack of confidence and understanding amongst the staff group in respect of equality and diversity.

18. In September 2016 the Claimant had witnessed Dawn Harvey discussing a colleague's ex-partner in racially stereotypical terms. Dawn Harvey had said in front of young people and staff members that this gentleman was not what she had expected and that she thought he would be "wrapped in gold chains and holding two staffies". The Claimant was upset and surprised by this comment but did not raise a grievance or formal complaint about the matter at the time. The Claimant was embarrassed and fearful of what would happen if she raised a complaint.

19. In December 2016 at the 'works' Christmas party Dawn Harvey made specific racial comments directly to the Claimant and colleagues. The comments included "you only got the job because you are black" directed at a colleague Ashley Lindsay and referring to a "black girls club". The Claimant did not raise a grievance or complaint at the time for the same reasons stated above. In addition, the Claimant rarely had 1:1 supervisions and did not consider that she had a safe environment to raise her concerns.

20. Shortly after Christmas Dawn Harvey went on leave/sickness leave for around three months. During this time the Claimant was directly supervised by Elaine French and the working environment improved. During this time, however, the Claimant did raise general concerns regarding the culture at the home in particular around equality and diversity and these were discussed with Elaine French at her final supervision session as referred to above.

21. Throughout her employment the Claimant alleged that staff regularly referred to non-white young people as aggressive. We heard evidence that young people were on occasion referred to as aggressive due to their challenging behaviour. We cannot find evidence to support that this was specifically related to non-white young people only. We accept the Respondent's argument that the Claimant was unable to give details of when these comments were made or provide the Tribunal with any dates.

22. On 28 May 2017 the Claimant was asked to go on an activity camp with two of the young people. The Claimant booked the camp herself and she attended this camp with her colleague Lucie Kirkham.

23. The Tribunal heard a lot of evidence in respect of how long this camp was intended to last. The Respondent's case was that Dawn Harvey had said at a staff handover meeting the camp would be cut short. The Claimant's evidence was that she had expected it to last the week. We find that it is clear from the Claimant's evidence and her reaction to the message she received from Dawn Harvey while on camp informing her that the camp would be cut short, that she was not aware. The Claimant response was that she wanted to speak to Mr W Relf about it and we find this supports her version of events that this was a surprise to her. Whether it was said or not before she left for the camp appears irrelevant for the purposes of this judgment and even if it was said the Claimant did not hear it.

24. On 30 May 2017 while the Claimant was with Lucie Kirkham and the two young people on camp there was an exchange of text messages between Dawn Harvey and Lucie Kirkham. The Tribunal was provided with copies of the text exchange as set out in the bundle at pages 200-220C.

25. The text exchange shows that Dawn Harvey had informed them that the camp was going to end and had text Lucie Kirkham telling her not to worry about her hours and that Dawn would sort something out for her. The messages then progressed with Lucie complaining about the Claimant. Lucie was upset that the Claimant was allowing the young people to stay up late and watch videos that were not age appropriate. Dawn responded by saying that she had no doubt this was all happening but told Lucie "no one will say anything about her, I can't get anything out of the kids". The exchange continued with Dawn asking Lucie for information about how the Claimant was acting and what the young people were doing.

26. The text exchange continued into the following day where Lucie said to Dawn that one of the young people had told the Claimant that Dawn was asking questions about her. That the Claimant had said that Dawn was racist and had made racist comments at the Christmas do and that Dawn did not like any of the black kids. Dawn was also informed that the Claimant was going to hand her notice in and put in a complaint about racism. The exchange ended with

- a. Dawn: Hi hope your (sic) ok and things have calmed down a little. Please don't worry about going back in the Tower, you have not been mentioned to anyone at this point Lauren and Justina know nothing only that (a young person) has raised a complaint against her. Wes has been instructed to ensure Justina doesn't cause any problems on her return.
- b. Lucie: OK thank you
- c. Dawn: I need you to come in tomorrow morning at some point and I can speak with you please. It all seems to be an attack to cover and distract from her poor practice as she knows it's been reported by kids and staff, OK will all get sorted out, don't worry.

27. The Respondent's case was that young people had been making complaints about the Claimant prior or during this trip. The Respondent alleged that they had received a complaint by a young person on 29 May 2017. The Tribunal finds that no complaint was received on 29 May 2017 and this is clear from the text exchange on 30 May 2017 from Dawn stating that "I can't get anything out of the kids". The Claimant alleged that Dawn was actively seeking out complaints and the Tribunal finds that this text exchange clearly indicates that this was the case.

28. On Tuesday 30 May 2017 Dawn Harvey telephoned the Claimant and informed her that the camp should return the following day. Dawn told the Claimant this was not her decision and the decision had been made by W Relf. The Claimant telephoned W Relf because she felt it was unfair on the young people, but it was confirmed to her that the camp would be returning.

29. The following day the camp returned. On the journey back to the home, the Claimant received a telephone call from her colleague L Kallides informing her that W Relf had said that he would be coming back on shift later that evening to ensure that the Claimant left straight away and did not have any contact with young people.

30. The Claimant was extremely upset and distressed. When the Claimant returned W Relf was waiting for her in the car park and followed the Claimant through the house. The Claimant went into the office and wrote her resignation and put it in Elaine French's pigeon hole, then left the building. She was followed through the house by W Relf.

31. The Claimant maintained that no other staff member had been treated in the same way upon handing in their resignations. The Tribunal heard evidence from Mr Keenan on this point who confirmed that no staff members had been escorted off the premises but that he had previously followed a Daniel Giblin around the house to ensure her left the premises. We find that the Respondent did ask Mr Relf to attend to ensure that the Claimant left the premises. They were aware that she intended handing in her notice and that this is something they had done previously.

32. On 1 June 2017 the Claimant raised a grievance. She raised concerns about Dawn Harvey and her discriminatory behaviour. In particular, she referred to the Christmas party and the racist comments made and the fact that while Dawn had been absent during the first three months of the year that the working environment had improved.

33. As a result of this grievance (and to some extent the investigation that followed the Claimant's resignation) the respondent appointed John Simmons to carry out an investigation into the Claimant's allegations. The details of this investigation are set out at pages 169 – 186 of the bundle. The Respondent sought to suggest that Mr Simmons' was an independent person. However, it became apparent during evidence that Mr Simmons had previously been employed by the Respondent and in the capacity of Assistant Manager and had a long standing relationship with the Respondent.

34. For the purposes of this judgment, of particular relevance are the interviews that were carried out with staff members in relation to allegations of racism. These interviews were conducted in early June 2017 mainly on the 8th and 9th after receipt of the Claimant's grievance.

35. John Simmons set questions for staff members which included 'Have you ever witness any form of racism towards adults or children at Arnfield Tower, that you felt might be joking or serious? If so could you give examples'?

36. Several staff members gave examples. This is not an exhaustive list but examples that we have found indicate that racist language or talk was commonly used at the home:

- a. W Relf: referred to an incident with a staff member Ashley where she had made a comment about a movie in which Eddie Murphy was in jail and she said 'It is always the black man'. Mr Relf said he spoke to Ashley about this. He also said that "at 10.30 at night when the kids got to bed there are "banterous" jokes going around about being black – nobody is being racist – and there are no kids present. Nobody openly says anything derogatory about black people. If I thought there was an issue re racism this would be highlighted quickly. It's just recurring banter – I don't want to single people out and is quite often led by Ashley as a theme.
- b. Dawn Harvey: Never. Young people against young people occasionally – always dealt with. Information is on file and staff are asked to address this. Never seen a staff member being racist. Over the years I have heard people make silly comments they didn't realise was racist or offensive. These have always been addressed appropriately. Sometimes people talk about race and religion (but not in front of the young people). I don't get involved and I stop people doing this in the office – it's just about people's opinions. Ashley Lindsay – in the current staff team – I have heard myself witnessed her talk 'banter' in light-hearted conversations – her comments about race. Nothing offensive – she does it as if it's a joke. This was apparent on the Xmas do (last year) Ashley kept making comments about "are you serving the white girls before us because we're black". Ashley thanked me and Elaine and said jokingly "I know I only got my job because I'm Black. Ashley made several references to it all night. Other staff were also present. I have never seen staff be racist to anyone, or racism between staff, or from staff to young people. Occasionally young person to young person racism occurs and is dealt with and taken very seriously. Occasionally

staff refer innocently to, for example, “Paki shop”, “half-caste” etc without realising it and have to be pulled up. Elaine and I never allow any type of banter.

- c. Jill Hudson: Not witnessed any form of racism so far, but people are very aware of my position. I am new here and have not joined in any banter or jokes at all.
- d. Lauren Kallides: I feel that some kids from ethnic minorities are treated differently by some members of staff – they have preconceptions. For example when (a particular young person) was coming, someone (I don't remember who) said “I don't know what her name is XXX or XXX or some black person's name” It is stereotypical. I know Justina has put something in her complaint. Me, Justina and (young People) were all there when Dawn made the comment which was when Ashley's ex-partner came to the door with something for her. Dawn said: “I never expected him to be like that I expected him to be wearing gold chains and to be with two staffies”. I didn't challenge this at the time I was shocked. I'm not sticking up for her because she's my sister.
- e. Wesley Gibbons - senior – management said at 10.30 at night when kids go to be there are banterous jokes going around about being black. Nobody is being racist and there are no kids present. Nobody openly goes on to say anything about black people.
- f. Ashley Lindsay: Yes At the Xmas part Dawn said to me and Justina in a jokey way (but it was offensive) that me and Justina only got our jobs because we was black – we was just a number. This was laughed off but deep down I do feel that was truly what Dawn felt.
- g. Melanie McGawley: Yes – on camp with (young people). Calling us whiteys, didn't want to listen to our white music. I pulled them up on this. I try to stop it before it starts. No issues with racism between staff or between staff and children.

Several staff members referred to some young people making comments on occasions.

37. Shortly after the Claimant's employment ended she was informed that a previous employee, Anthony Millin had also experience racist language by Dawn Harvey. At a previous Christmas party in 2007 Dawn Harvey said in front of Mr Millin and other staff members upon waiting for a taxi, “Oh I should've guessed it would be late, you know what those niggers are like”.

38. The Tribunal heard evidence from Mr Millin and the comment was not denied by the Respondent. Mr Millen said the complaint was not taken seriously and that shortly after making the complaint about this incident, his work and his relationships with young people was called into question and an investigation commenced against him. Mr Millin resigned.

39. We were provided with a copy of a letter that was sent to Dawn Harvey at the time of the incident at page 4th January 2008. It referred to the incident as an

“unfortunate comment”; “it was a comment made outside of work, not directed at colleagues, generalised in nature and under the considerable influence of alcohol.” The letter ends “I would ask that you consider carefully the manner in which you make comment on such matters particularly where they could potentially be this controversial. I am extremely thankful this has not required formal investigation.”

40. The Respondent took no disciplinary action against Dawn Harvey and throughout this hearing sought to trivialise this incident and suggest it was irrelevant. In particular Mr Keenan the Managing Director (now and at the time) was defensive and off hand with his evidence disputing its relevance and offering no explanation as to why this matter was not dealt with formally.

41. We find that it was common place for inappropriate and racist language to be used by young people and staff members at Arnfield House. We find that this was witnessed by senior staff members and that no action was taken to prevent or stop this from happening.

42. On 1 June 2017 the respondent initiated an investigation for inappropriate care management practice by (Justina) in respect to a child at the home. The Claimant alleges that the investigation was initiated because she had raised concerns over racism within the organisation. The Tribunal finds that this allegation amounts to a potential claim of victimisation but as stated previously this was not pleaded. We have not made findings in respect of this because the allegations made by the Claimant during these proceedings were not pleaded as a claim for victimisation.

43. The investigation and the allegation that young people were coerced into making allegations about the claimant formed much of the evidence. Whilst we used some of the evidence to assist us in when making our findings on the substantial issues, much of the evidence was relevant to a potential claim for victimisation and therefore we have limited our findings to those we consider relevant to the issues to be determined for these proceedings.

The Law

44. Equality Act 2010

S 13 Direct discrimination (Race):

- (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.

S 26 Harassment (Race):

- (1) A person (a) harasses another person (B) if A engages in unwanted conduct related to a protected characteristic and the conduct had the purpose or effect of violating B’s dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

Burden of Proof

45. The burden of proof under the Equality Act is set out in Section 136 of the 2010 Act and provides:

- (i) This section applies to any proceedings relating to a contravention of this Act.
- (ii) 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.
- (iii) But subsection (2) does not apply if A shows that A did not contravene the provision.

46. A Claimant is therefore required to prove facts consistent with their claim: that is facts, which, in the absence of an adequate explanation, could lead a tribunal to conclude that the Respondent has committed an act of unlawful discrimination. 'Facts' for this purpose include not only primary facts but also the inferences that it is reasonable to draw from the primary facts. If the Claimant does this then the burden of proof shifts to the Respondent to prove that it did not commit the unlawful act in question (**Igen v Wong [2005] IRLR 258**). The Respondents' explanation at this stage must be supported by cogent evidence showing that the Claimant's treatment was in no sense whatsoever because of the protected characteristic.

47. We have borne this two-stage test in mind when deciding the Claimant's claims. We have not however separated out our findings under the two stages in the conclusions. We have reminded ourselves that detailed consideration of the effect of the so-called shifting burden of proof is only really necessary in finely balanced cases.

Time Limits

48. Section 123 of the Equality Act 2010 provides that proceedings may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates or such other period as the Tribunal thinks is just and equitable.

49. For the purposes of section 123 conduct extending over a period of time is to be treated as done at the end of the period and failure to do something is to be treated as occurring when the person in question decided upon it.

Statutory Defence

50. Section 109 of the Equality Act

Liability of employers and principals

(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.

(2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.

(3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval.

(4) In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A—

(a) from doing that thing, or

(b) from doing anything of that description.

The drawing of inferences in discrimination claims.

51. An important task for a Tribunal is to decide whether and what inferences it should draw from the primary facts. We are aware that discrimination may be unconscious and people rarely admit even to themselves that such considerations have played a part in their acts. The task of the Tribunal is to look at the facts as a whole to see if they played a part (see **Anya v University of Oxford [2001] IRLR 377**). We have considered the guidance given by Elias J on this in the case of **Law Society v Bahl [2003] IRLR 640** (approved by the Court of Appeal at [2004] IRLR 799): we have reminded ourselves in particular that unreasonable behaviour is not of itself evidence of discrimination though a tribunal may infer discrimination from unexplained unreasonable behaviour (**Madarassy v Nomura International plc [2007] IRLR 246**).

52. A Tribunal must have regard to any relevant Code of Practice when considering a claim and may draw an adverse inference from a Respondent's failure to follow the Code.

53. The primary question for the Tribunal to ask is: why did the Respondent treat the Claimant in this way? The fact that a claimant has been treated less favourable than an actual or hypothetical comparator is not sufficient to establish that direct discrimination has occurred unless there is something more from which the tribunal can conclude that the difference in treatment was because of the claimant's protected characteristic. **Madarassy v Nomura International plc [2007] IRLR 246 [CA]**.

Conclusions

Specific Allegations and Submissions and Findings

Comments Made by Dawn Harvey in respect of Ashley Lindsay's former partner

54. The Claimant alleged that while she was on shift with Dawn Harvey and Lauren Kallides in September 2016 that Dawn Harvey had told them that she had seen the ex-partner of another colleague Ashley Lindsay when he had visited the premises. Dawn Harvey said that he was not what she had been expecting and that she had thought that he would be wrapped in gold chains and holding two staffies.

55. Dawn Harvey's evidence was that this did not happen and that the only thing she could remember was that she recalled him being a "really muscly guy". We heard witness evidence on this point from Lauren Kallides who confirmed that this comment was made in front of her and young people.

56. We find that the comment was made by Dawn Harvey. The Claimant's evidence and Ashley's evidence was open and honest and we found the evidence credible. John Simmons, who carried out the investigation, found the evidence of the witnesses unreliable because they both said exactly the same thing. We find that the words used by Dawn Harvey were brief and that it was not surprising that both witnesses recalled the exact words that Dawn Harvey had used.

57. We accept the Claimant's evidence that she was shocked and surprised that the comment had been made and did not know how to deal with it. Dawn Harvey was the Claimant's direct line manager and we accept that it is often difficult to raise concerns either with or about your manager. We note that the Respondent's view is that if it had occurred then the Claimant would have made a complaint. We find that it is not unusual for people in these types of situations to do nothing. Indeed the Respondent's own case is that racist comments were made regularly and classed as banter and no action taken about them.

58. We find that this amounts to an act of harassment. We accept that the comments were unwanted and that the comment would have created a hostile intimidating and humiliating environment.

Comments made at the Christmas Party in December 2016

59. The second specific allegation of harassment made by the Claimant related to events that occurred at the Christmas party in December 2016. This event was attended by a number of the witnesses present at this hearing. The Claimant's account was that Dawn Harvey made a couple of comments specifically one to Ashley Lindsay that she had only got the job because she was black and that while they were at the bar that Dawn Harvey had asked if she could "join the black girls club".

60. The Tribunal heard evidence from Ashley Lindsay who said that Dawn made the comment about her only getting the job because she was black twice. Her evidence is set out at para 4 – 6 of her witness statement. She said that after the second time of Dawn saying it that she was shocked and that she responded with "oh well I did only get it because I'm Black because I am shit at paperwork".

61. Dawn Harvey in evidence said that this did not happen and that it was in fact Ashley Lindsay who raised it and that Elaine French had told Ashley she could not say that. Elaine French stated that Ashley had thanked her for giving her a job and stated that she only got it because she was "the token black girl".

62. The Tribunal finds that the evidence of the Claimant and Ashley was credible and that the comments were said.

63. The Tribunal heard evidence on this point from a number of people:

- a. Elaine French who said that she heard jokes in relation to skin colour made by Ashley Lindsay; that Ashley said that she only got the job because she was the "token black girl"
- b. Dawn Harvey who said Ashley Lindsay said to the barman in a jokey way "are you serving the white girls before us?" "Is it because we're

black?” She also said that she remembered Ashley Lindsay thanking Elaine for her job and saying “I know I only got it because I’m black”.

- c. John Garlick who said he heard Ashley Lindsay say to the barman “are you not serving me because I am black” and laughing with the Claimant about the comment.
- d. Kirsty Wilcox also said she had heard the same comment by Ashley Lindsay and that Ashley, Lauren and the Claimant also were comparing skin colours.
- e. Kirsty Sidebottom said she did not hear Dawn making any comments and that she had never heard any racism of any form by any member of staff. However, then goes on to say that she had witnessed Ashley joking about race but not in a malicious way.
- f. Paul Keenan who said in evidence that he had witnessed the claimant and her colleagues comparing skin colour.

64. What was clear to the Tribunal is that on both accounts racial comments were made at this Christmas party. The Tribunal finds that the Claimant and her witnesses gave very credible evidence to the Tribunal. All were open and honest and Ashley confirmed that she did make comments back because she did not know how to handle the situation. We found this plausible and honest.

65. The Tribunal as stated below generally found the evidence of the Respondent’s witnesses to lack credibility. Throughout the oral and written witness evidence the witnesses swung from never ever having witnessed any racial offensive comments being made to anyone to saying that all the ‘black’ staff would make jokes about themselves in a racial manner.

66. No one gave evidence that this was ever tackled by Dawn who was the manager or any other members of staff including Paul Keenan who was the Managing Director. The Tribunal finds that there was a culture of racist language used by staff and in particular Dawn Harvey that remained unchallenged even at this hearing.

67. Dawn Harvey has admitted and the Respondent have agreed that Dawn Harvey made an extremely offensive comment at a previous Christmas party. No action was taken by the Respondent other than a letter from Mr Relf sent to Dawn Harvey which this Tribunal considers completely trivialised the matter and completely disregarded the serious nature of the incident.

68. The letter is dated 4 January 2008 (Page 435A) and states ‘This was as I see it, a comment made outside of work, not directed at colleagues, generalised in nature and under the considerable influence of alcohol’ and ‘I would ask you to consider carefully the manner in which you make comment on such matters particularly where they could potentially be this controversial. I am extremely thankful this has not required formal investigation.’

69. We also heard evidence from Mr Keenan who trivialised this comment and did not consider that an event that had happened 10 years previously had any bearing on

the current case. Mr Keenan also considered that it was appropriate that no disciplinary action had been taken against Ms Harvey.

70. This Tribunal finds it hard to understand how the Respondent took such a stance and continued to do so bearing in mind the explicit and extreme nature of the racist comment made by Dawn Harvey. We also noted that several witnesses who gave evidence to this tribunal described as never having known of any racist behavior by Dawn Harvey despite being employed in 2007/8 and aware of the nature of her comment.

71. Turning to the Respondent's own evidence and in particular the investigation conducted by John Simmons. This investigation suggested that racist comments were made by the Claimant and her witnesses on a regular basis and that those comments were allegedly witnessed by other staff members. It appears that the Respondent took no action to stop such behaviour. The Respondent did not recognise the behaviour as being racially offensive and that the complete lack of training or support in this area only served to allow this culture to develop.

72. Respondent also sought to heavily criticise the Claimant and her witnesses for not raising a grievance or using the whistleblowing policy. The Tribunal finds that there was a complete failure on the part of the Respondent to deal with any type of racial abuse and that the management were complicit in allowing this culture to develop. Dawn Harvey is a qualified social worker and yet failed to acknowledge that her own behavior was unacceptable or that others using such words as 'paki shop' is also unacceptable.

73. We find that the Claimant did raise general concerns with Elaine French and that she attempted to deal with the issues in that way. We find that it was reasonable for the Claimant to have delayed in dealing with these issues particularly as Dawn Harvey was absent from the workplace for the first three months of the year and that she only began experiencing problems again after Dawn Harvey returned to work.

74. The Respondent submitted that the Claimant and her witnesses were unreliable and that the Claimant failed to raise any concerns before resigning. They also sought to rely on the fact that the Claimant had training on safeguarding and discrimination so should have raised concerns sooner. The Respondent asked us to consider why she did not raise the concerns earlier and that the conclusion we should come to is that they did not happen.

75. We have found that there is evidence from both parties that there was a culture of racist language and behaviours. We have also found that the Respondent failed to take any action to prevent it happening and that we have drawn inferences from Dawn Harvey's previous uncontested behaviour, her own witness evidence to John Simmons where she referred to 'paki shop' and half cast' as being innocent comments. We find that as a senior manager within the respondent company that it is incomprehensible that she would consider such language as innocent. We find that Dawn Harvey's previous behaviour was not dealt with and that she views this type of language as acceptable.

76. We accept the evidence of the Respondent that John Simmons had delivered a training session but do not accept that this training was regular or repeated. Jon Garlick gave evidence that he had never received equality training throughout his

employment despite being employed since 2001, although he did say that he was due to do some training.

77. In addition we considered the evidence of Dawn Harvey and the respondent witnesses in general as defensive. All the witnesses appear to have reported hearing some sort of racially offensive language during their employment and yet no one reported this or took any action or appeared in the majority of incidences to consider the comments as potentially racist behaviour.

78. Mr Keenan gave evidence that the Respondent spent £50,000 per year on staff training. He is the managing director and could not answer questions about the type of training that was delivered. He referred to statutory 1:1 supervision and was unable to explain what this meant. It is clear that the Claimant did not get regular 1:1 supervision and was not provided with a safe space to be able to discuss concerns. It is also unlikely that the Claimant would have raised concerns with Dawn Harvey as she was her line manager.

79. When Mr Keenan was asked whether racist comments should be challenged he said 'I don't know, should they?' He was dismissive and vague about Dawn Harvey's previous comments and said that it was a different world now appearing to suggest that her language was acceptable in 2007. His evidence was hesitant defensive and dismissive.

80. We find that this shows an organisation from the top to the bottom did not consider racially offensive comments should be dealt with and allowed a culture of racism to develop.

81. The nature of the placements at Arnfield were for the most difficult young people. They were placed because of their behaviour and mental health issues. It was not therefore unexpected that the young people displayed mental health issues and violence. We cannot say and claimant cannot evidence that staff referred to black people more frequently in those terms than white young people.

82. However, during the investigation a staff member, Michelle Chaplain did say that 'black kids came with attitude'. We are not able to infer that this went further to alleging black young people were described as intimidating and aggressive. The Respondent required a diverse staff group and it was the Respondent who allocated children to staff. There was some suggestion that the Claimant had formed bonds with black young people of her own initiative. We do not agree.

83. We find that the Respondent operated in a way that created a confused culture for staff and that it has given rise to a culture of suspicion about relationships between staff and young people. We have considered what relevance race has in that environment and find that it has given rise to suspicion about staff being both over friendly being described by the Respondent as being a friend and not behaving as a staff member.

84. Comments such as "they all like the same music" and the Claimant wanting to be with certain young people infer that the culture within the organisation saw race at the heart of these relationships. We found it to be unsurprising that staff would be assigned young people from similar cultures but found the Respondent's criticism of those relationships unfair.

85. In its submissions the Respondent asked the Tribunal to have regard to the Claimant's letter of resignation in so far as she states that she enjoyed her time and was genuinely sorry to be leaving. The Respondent suggests that this means the Claimant's evidence cannot be relied upon. We do not find that incompatible with the Claimant's evidence who confirmed that she loved her job and was extremely disappointed to leave but felt that she had no choice. The Claimant sent her notice to Elaine French and chose specifically not to send it to Dawn Harvey. The Claimant considered that she had been escorted off the premises and that this amounted direct discrimination. The Claimant's evidence was that she had determined to resign her position if she was escorted off.

Conclusions in respect of the specific allegations

86. Direct Discrimination - We have found that although the Claimant was followed through the premises that she was not escorted out of the premises and that in any event it did not amount to direct discrimination. The comparator chosen by the Claimant also experienced the same treatment by the Respondent and we therefore do not find that the Claimant was treated less favourably in this regard.

87. The Claimant was very clear in her evidence that she intended resigning if she was 'escorted off' the premises. This was the reason she resigned.

88. Harassment – We have found that Dawn Harvey did make the comments alleged in September 2016 and December 2016. We have drawn inferences from Dawn Harvey's previous behaviour and her view on comments made by staff members as being 'innocent'. We looked at the Respondent's explanation where the comments have been attributed to mainly to Ashley and found Ashley's evidence in this regard credible in that she did respond by agreeing with the comments made. The Respondent's evidence was to completely refute there was any racism within the work place but then give a catalogue of examples of racism by the witnesses themselves. We did not find this credible.

89. We consider both events amount to acts of harassment and that the Respondent engaged in unwanted conduct related to the Claimant's race and the conduct had the purpose or effect of violating her dignity or created an intimidating, hostile, degrading, humiliating or offensive environment.

90. We find that that the two incidents were similar in nature and are acts continuing over a period of time. We consider that it is just and equitable to extend time.

91. The text messages sent by Dawn Harvey to Lucie Kirkham do not amount to harassment. We consider that Dawn Harvey did act inappropriately in asking Lucie to report back to her and discussing possible concerns about the Claimant with Lucie. The text messages refer to the fact that the Claimant intended raising her concerns about race discrimination and Dawn Harvey reacted by suggesting that the Claimant was only raising these issues because of poor practice.

92. We were required to consider whether this amounted to harassment. We consider that this behaviour was unprofessional, but we cannot say that it was racial harassment motivated by Dawn Harvey's personal views towards the Claimant. We consider that it was in part likely a reaction to knowing that a complaint was going to

be made against her but the claimant has not made a complaint of victimisation so we make no finding in that respect.

93. Turning to the complaint that Dawn Harvey referred to young people as aggressive and intimidating, we heard evidence that Dawn Harvey made comments about the young people and in particular described young people as aggressive and intimidating. We also heard evidence that the young people in the Respondent's care all displayed difficult behaviours and that on occasions this would be referred to as aggressive behaviour.

94. We accept and note that this aspect was not referred to in the Claimant's witness statement and it is for the Claimant to put forward her case in the witness statement. We do accept that it is likely that comments were made about young people in this regard but do not have any evidence to support that it was specifically towards young people of afro-Caribbean backgrounds.

Extention of Time

95. The Respondent argues that all the complaints of harassment are out of time. We have considered whether it is just and equitable to extend time. We find that the two acts we have found amount to harassment occurred in a relatively short space of time and by the same person. Immediately after the second act the perpetrator, Dawn French was absent from work for a period of three months and the Claimant gave evidence that her working environment improved. We have also found that the Claimant did raise concerns with Elaine French and whilst may have not been specific in respect of the two allegations was taking action to improve her working environment. The Claimant then raised her concerns in her grievance/s and the Respondent has been aware of these allegations and has not been put to a disadvantage. All the witnesses the Respondent wished to rely on were available and therefore the Respondent has suffered no prejudice.

96. The Claimant gave evidence that she had not experience this kind of racism previously and did not have the benefit of legal advice. We therefore find that in all the circumstances it is just and equitable for us to extend time.

Statutory Defence

97. The Respondent has submitted that it took all reasonable steps to prevent an employee (Dawn Harvey) doing the act or doing anything of that description. We do not agree. We find that the Respondent has failed to deal with issues of racism as a whole and further that it has specifically failed to take action against Dawn Harvey. The Respondent has been aware that Dawn Harvey has made extremely offensive comments previously and took no action against her other than asking her to think carefully.

98. We find that the training provided to staff was at best ad hoc and at worse not given at all. Jon Garlick's evidence was that he had been employed by the Respondent for 17 years and yet has only read the equality and diversity policy at the commencement of his employment and has never attended training. Mr Keenan's evidence was unconvincing and he was unable to describe the training provided. We therefore find that the Respondent has placed little value of training in this regard.

99. We also consider that the allegations of racism raised on the Respondent's own version of events were not considered serious or dealt with. Comment such as "paki shop" and "half caste"; banter about race between staff are serious matters and cannot and should not be described as 'innocent'. We find that in presenting their case the Respondent has continued to show a lack of understanding of acceptable behaviour amongst the staff group.

100. There were steps the Respondent could have taken, including ensuring that all staff received relevant regular training and senior management dealing with issues of racist comments. We therefore find that the Respondent has failed to make out the statutory defence in this case.

Employment Judge Hill

Date 23 November 2018

JUDGMENT AND REASONS SENT TO THE PARTIES ON

28 November 2018

FOR THE TRIBUNAL OFFICE

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