THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH EMPLOYMENT TRIBUNAL**

BEFORE: **Employment Judge Webster**
Ms BC Leverton
Ms J Bird

BETWEEN:

Mr S Kidd **Claimant**

AND

Wates Living Space

Respondent

ON: **24-26 September 2018**

Appearances:

For the Claimant: **In person**

For the Respondent: **Ms N Connor (Counsel)**

JUDGMENT

1. The Claimant's claims for direct discrimination are not upheld.
2. The Claimant's claims for age and race related harassment are not upheld.
3. The respondent's application for costs is refused.

WRITTEN REASONS

4. Oral reasons were given to the parties at the hearing. The respondent requested written reasons.

5. By an ET1 dated 16 August 2017 the claimant brought claims for direct race discrimination, harassment on grounds of race and age and a claim for victimisation. By an ET3 dated 11 October 2017 the respondent refuted all the claims stating that they had dismissed the claimant due to poor performance and that the events he relied upon for discrimination had not occurred or were not because of race or age.

6. At a preliminary hearing on 10 November 2017 a Tribunal struck out the claimant's victimisation claim as having no reasonable prospects of success. The parties then agreed the List of Issues at the same hearing and this was recorded in the Case Management Order dated 17 November 2017.

Case summary

7. The respondent provides maintenance and repair services to various providers of social housing. The claimant identifies his race as Black British. The claimant started working for the respondent as an agency staff member on 3 October. He became a permanent member of staff as a multi-trader on 11 January 2017. The claimant worked exclusively on the respondent's contract with Notting Hill Housing.

8. It was agreed that the claimant's work as an agency member of staff had been good and that this was why he had been made a permanent member of staff. However, on 24 April, whilst still in his probationary period, the claimant was dismissed. The respondent states that he was dismissed because of poor performance. They state that the claimant had been placed on an informal performance improvement plan from 21 March 2017 because of various concerns including time keeping. The decision to terminate his employment was made when the claimant performed a particular maintenance job very poorly causing a tenant to complain, on 13 April, to senior management.

9. The claimant disagrees. He states that he had been racially discriminated against during his employment in various ways (as set out in the list of issues below) and that therefore his dismissal stemmed from this discrimination.

However his dismissal was not part of his claim. The claimant also states that he was subjected to harassment on grounds of race and age during a phone call with an employee for the respondent, Kevin Grant, on 23 March 2017.

The Hearing

10. The tribunal was provided with 6 witness statements (1 for the claimant and 5 for the respondent) and 2 lever arch bundles. The claimant's witness statement was in the form of an email he had sent to the Tribunal and the respondent's representative on 26 March 2018.

11. The respondent decided not to call one of their witnesses as his evidence pertained to the victimisation claim which had been struck out. The tribunal therefore did not read that witness statement. All the other witnesses gave evidence during the hearing.

12. At the outset of the hearing the claimant stated that he had recorded a phone conversation between him and a friend who still worked for the respondent and asked if we would listen to the recording as a witness statement for his friend. The tribunal informed the claimant that if he wanted us to consider listening to the recording he should write up what had been discussed and give it to us and we would then consider whether it should be allowed as evidence and give the respondent an opportunity to respond to his application. The claimant was not given a time limit for producing that evidence but the Tribunal suggested that he could come to the hearing that afternoon (after the tribunal had read the papers) or the following day which would have given the claimant time to set out the gist of the conversation for the tribunal and the respondent to consider. However the claimant did not provide the tribunal with any information regarding what was discussed in the conversation for us to consider and did not raise the matter again.

13. The claimant gave evidence on the first day (24 September). Although the respondent had finished cross examination by the end of the day the Tribunal had not had an opportunity to ask the claimant questions. The Tribunal explained to the claimant that he remained under oath overnight and that this meant that he should not discuss his evidence with anybody else. At the beginning of the following day (25 September) the respondent brought to our attention that immediately after the hearing had concluded on 24 September the claimant had called an ex-colleague.

14. On questioning the claimant initially denied making the call but when the respondent confirmed that they had a call log for the ex-colleague, the claimant confirmed that he had called the ex-colleague following receipt of an abusive text message from the ex-colleague but that he had not got through.

15. The tribunal reminded the claimant of his obligations to the tribunal and that such breaches of the rules could result in serious action including the possibility that his claim would be struck out due to an abuse of process. The claimant

confirmed that he understood. No further matters were brought to the Tribunal's attention.

The Issues

16. The issues were agreed between the parties at the preliminary hearing on 10 November 2017. At the outset of the full hearing the tribunal went through the issues and both parties agreed that they were still the issues that the tribunal needed to consider save that the respondent wanted the tribunal to consider whether the harassment claim was in time.

Direct Discrimination

17. Was the claimant treated less favourably in the following respects because of his race:

    a. In being sent out to jobs in less salubrious areas;
    b. In being given more jobs to undertake each day;
    c. In being sent to solo jobs, without the assistance of a partner;
    d. In not being paid for the period 7.30-8.00 am each day and/or;
    e. In being subjected to excessive supervision and scrutiny from his manager Kevin Grant?

    The Claimant compares his own treatment with that accorded to white employees: Mr B Pike, Mr R McMahon and Mr R White.

Harassment

18. The claimant relies on a phone call on 23 March 2017 with Kevin Grant and Stephen Thompson as being the sole act of harassment. The claimant contacted ACAS on 6 July 2017 and Early Conciliation was concluded on 18 July 2018. The claimant submitted his ET1 to the tribunal on 16 August 2017. Is the claimant's claim either:
    (i) Within 3 months of the date of the alleged act of discrimination, taking into account any extension created by the ACAS Early Conciliation regime?
    (ii) If not is it just and equitable to extend time?

19. If the claim is in time then the Tribunal will consider:
    (i) Was the claimant spoken to abusively by Stephen Thompson in a telephone call on 23 March 2017
    (ii) If so was this unwanted conduct related to his race and/or age?
    (iii) If so, was it conduct that had the purpose or effect of violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him?

The Law

20. S9(1) Equality Act 2010 defines race as a protected characteristic under the Equality Act.

21. Section 13 of the Equality Act 2010 states that 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.

22. S 23 Equality Act 2010 states that a claimant must show that it has been treated less favourably than a real or hypothetical comparator whose circumstances are not materially different to theirs.

23. The tribunal must consider the "reason why" the claimant was treated less favourably. It must consider what the employer's conscious or subconscious reason for the treatment? (*Nagarajan v London Regional Transport and others [1999] IRLR 572 (HL)*).

24. The discriminatory reason need not be the sole or even principal reason for the employer's actions. If race was a substantial cause, a tribunal can find that the action infringed the Equality Act 2010. The EHRC Code states that for direct discrimination to occur, the relevant protected characteristic needs to be a cause of the less favourable treatment "but does not need to be the only or even the main cause" (*paragraph 3.11*).

25. S 26 (1) Equality Act 2010 sets out that harassment occurs where both:

(i) A engages in unwanted conduct related to race.

(ii) The conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

S26(4) EqA states that in deciding whether conduct has the effect referred to above, each of the following must be taken into account:

- The perception of B.
- The other circumstances of the case.
- Whether it is reasonable for the conduct to have that effect.

26. *(Burden of proof) Section 136(2) and (3)EqA* state:

136(2) If there are facts from which the court [or tribunal] 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.

136(3) But subsection (2) does not apply if A shows that A did not contravene the provision."

27. S123 Equality Act states that a discrimination claim must be brought within

(a)the period of 3 months starting with the date of the act to which the complaint relates, or

(b)such other period as the employment tribunal thinks just and equitable.

…..

(3)For the purposes of this section—

(a)conduct extending over a period is to be treated as done at the end of the period;

(b)failure to do something is to be treated as occurring when the person in question decided on it.

Findings of Fact

Overview

28. The claimant, despite being a litigant in person was remarkably adept at questioning the respondent's witnesses and asking questions relevant to his case and the issues at hand.

29. However, we found that when being questioned himself he was often vague or evasive and frequently changed his account of events depending on how the question was phrased or the topic being dealt with. As a result of the Tribunal felt that the facts and circumstances he relied upon were akin to continuously shifting sands. Throughout the hearing he changed what he was saying to contradict not only evidence previously given to this hearing but also contradicting the facts as he had relayed them in meetings at the time of the various incidents, the facts in his witness statement prepared for this hearing or the facts that he had set out in writing in correspondence to the tribunal on previous occasions. We therefore found that overall, he was not always a reliable witness.

30. In contrast the respondent provided a large amount of documentary evidence and analysis which underpinned their refutation of the claimant's claims.

The Claimant's role

31. There was significant disagreement between the parties as to what the claimant's job was. The claimant asserted that he was employed as a multi-trader carpenter on an "improver" basis. Geoff Light states at paragraphs 9 and 12 of his witness statement that the claimant was employed as a multi-trader with carpentry as his specialism. We concluded that everyone was taken on as a multi-trader with a particular expertise e.g. Barry Pike was a multi-trader but generally used as a finisher and Robin McMahon was a multi-trade carpenter and Ryan White was a multi-trade plumber. We conclude that everyone was expected to do general jobs but where possible their specific expertise was used. We believe this applied to the claimant as well. The

expectation was that he could do a bit of everything with his specialism being carpentry.

32. There was no evidence provided of an 'improver' status but we believe that it was recognised the claimant might need some on the job training. We base this conclusion on an incident which both parties gave evidence of where the claimant struggled with a tiling job. Kevin Grant arranged to meet the claimant early to assist him and helped him finish the job. This was then signed off by Kevin Grant as a satisfactory job that he had inspected.

Being sent to work in less salubrious areas

33. It was not in dispute that the Notting Hill Housing ('NHH') contract's sole purpose was to maintain social housing. The claimant did not provide any examples of what he meant by being sent to less salubrious areas. He did not appear to understand the word salubrious nor be able to explain what it was about the locations he was sent that were different from those of his white colleagues. He agreed that nobody worked on anything apart from social housing.

34. Geoff Light gave detailed evidence as to how jobs were allocated. We accept his evidence that there were 3 possible routes.

    (i) The jobs were allocated primarily by planners at NHH who did not know the operatives and only have a resource number and skills attached to the operatives' profiles.
    (ii) Work was also assigned directly by an NHH housing officers who also did not know the operatives.
    (iii) Finally the supervisors such as Geoff Light and Kevin Grant would allocate work which had been referred to them by NHH if NHH had difficulties finding workers for whatever reason.

    There was also clearly some input which took into account the location of the operatives either that day so that their jobs were geographically close to each other when possible, or so that jobs near the operatives' homes were allocated at the beginning and end of the day.

35. We find that two of the work allocation methods were carried out by people who did not know the claimant's race. The claimant accepted that this was the case.

36. The final method was allocation by the supervisors who did know the claimant's race. However, the claimant did not provide any evidence that he was sent to less salubrious areas than his colleagues by the supervisors. The claimant gave no specific or general examples of this happening and did not really address this issue other than to make the general assertion. He was asked questions about this matter by respondent's counsel and by the tribunal but could not elaborate on what he meant or was referring to beyond the statement itself. We therefore find that the claimant was not sent to less salubrious areas

than any of his colleagues because he could provide no examples of this happening.

Being given more jobs than his white colleagues

37. The claimant's second allegation was that he had to undertake more jobs each day than his white colleagues. A 'job' in this instance was being sent to an address to carry out repairs. The respondent provided a table analysing the job allocation data. It did not give detail of what the work entailed so the tribunal could not tell if it was to fix a leaking tap or repair entirely re-tile a bathroom. The respondent's data was based it on time sheets and trackers which were in the bundle as well and explained to the tribunal how they had reached the numbers provided. This table was an appendix to Mr Light's witness statement.

38. Taken at face value the tables clearly show that the claimant did not, on average get given more jobs than any of his comparators save for Mr Pike. Mr Pike was an exception on the basis that he was a decorator/finisher which meant that his jobs were almost always day long roles. The claimant accepted this was true for Mr Pike in evidence. There was data missing for Mr White after 7 April but this was explained because he had been absent during that period. This absence was not disputed by the claimant.

39. The number of jobs performed by the claimant and his comparators were put to the claimant in cross examination. He initially disputed the figures and said that they must be wrong. Then, when taken to the documents on which they were based he said that where he had been given fewer jobs than his comparators he must have been undertaking more complicated work on those occasions. When the Tribunal sought clarification on this answer, the claimant confirmed that his claim was in fact that he was given more work overall than his colleagues and that he was not trying to assert that he was given more 'jobs' than his colleagues. This is different from what he said in his claim form and his witness statement. He has provided no evidence at all to substantiate that assertion and had not mentioned it until provided with the documentary evidence supporting the respondent's case that he had received a similar number of jobs to his colleagues.

40. On the basis that the respondent provided ample documentary evidence that, on average, the claimant was given a similar number of jobs to his comparators we find that he was not given more jobs than his colleagues. We were given no evidence about the amount of work involved in each job. However, given that the claimant raised this issue very late and provided no evidence of this happening we cannot conclude that it did occur.

Being required to carry out work on his own and without necessary assistance

41. The claimant asserted that he was sent solo on jobs whilst his colleagues were allowed to take a partner. We do not accept that this was the case. The claimant referred to several occasions where he had worked with colleagues. In his witness statement he says,

    "Supervisors would always make me work alongside Clifton St John and Clifton Bascal on the majority of jobs."

42. Further Mr Light set out in detail at paragraph 30 of his statement that they would send out a second worker depending on the operatives' assessment of the work and the supervisor's own knowledge of the type of work. The only routine allocation of two workers was when NHH had flagged that the tenant was either potentially violent or vulnerable.

43. The claimant only gave one example of a job where he had asked for help and been refused it. This was where he had to put up some fencing panels. Mr Light and Mr Grant both confirmed that given the size of the fencing panels they had assessed that someone with the claimant's skills ought to have been able to perform this on his own.

44. There was also some discussion regarding the job done on 13 April where the claimant was asked to lay a plywood floor in a bathroom which involved moving a toilet. We will discuss this in detail below but the claimant asserted that he had asked for help on this job and been refused. We do not accept that. We find that Steve Thompson had spoken to the claimant on numerous occasions throughout the day and had agreed to send a plumber the following day to fix the leaking toilet.

45. We therefore conclude he was not denied the assistance of a colleague where it was appropriate and that this was no different from his colleagues – although he provided no evidence of his colleagues receiving assistance.

46. It was not credible to us that an organisation such as the respondent would unnecessarily send two operatives to a job that had not yet been assessed and incur additional costs.

    <u>Being required to work between 07.30 and 08.00 without pay</u>

47. The claimant was contracted to work 8-5 with a half hour unpaid lunch break. It was agreed by Stephen Thompson that the claimant was told to put 7.30 as his start time and that this was the general practice by all the operatives at that time. This practice resulted in all the operatives being paid an additional half hour whether or not they were working at this time. This practice had been introduced by a previous senior supervisor (Mr G Roseman) so that the operatives could drop off their time sheets at the depot every morning and then still get to their first job around 8am. The practice of requiring the operatives to drop off their time sheets lapsed when that supervisor left but the practice of putting 7.30 as a start time did not. This meant that even when the operatives

went straight to a job for around 8am, without attending the depot first, they were still paid between 7.30 and 8am despite not working for that time.

48. The respondent provided evidence at pages 232-246 (claimant's payslips), 247-320 (claimant's timesheets) which were then analysed and attached as an appendix to Geoff Light's witness statement. The analysis and the primary documents show that the claimant was paid for every period he claimed for including all the 07.30- 08.00 am periods as were his comparators. We accept, based on this documentary evidence, that the claimant was paid for all the 07.30-08.00 periods that he claimed for.

49. It was not clear why the claimant continued to assert that he was not paid properly. It is notable that he has not brought an unlawful deduction from wages claim and has not quantified how much he says he is owed.

50. It was confirmed by Ms Mazzola that there were continued mistakes on the claimant's pay regarding how his payments were split between normal time and overtime but that these were rectified. The error occurred due to an individual within payroll misinterpreting the claimant's contractual hours and his entitled to overtime. The claimant did not dispute that they had been rectified though it is clear that he had to challenge his payslips and the amount he received on several occasions during his employment which must have been frustrating and confusing. We also find it more likely than not that the claimant believed that some if not all of the errors were related to whether he was getting paid for the period between 07.30-08.00 though why he thought this we do not know.

51. It is also clear that on 24 April Mr Fusco, the Operations Manager, sent an email instructing all supervisors to stop allowing operatives to claim from 07.30- 08,00 unless there was a 'toolbox talk' which was a team meeting requiring the operatives to be at the base at 07.30. This system has been in place since and none of the operatives are allowed to claim that additional 30 minute payment anymore.

52. The claimant said that the decision to stop these payments created bad feeling against him as it was felt by his colleagues that him questioning his pay and raising the issue with the HR or payroll department had led to that decision.

53. We accept that the claimant spoke to payroll on several occasions and possibly queried whether he was being paid between 07.30 and 08.00. However, we have no evidence to suggest that it was his conversations that led to the cessation of 07.30-08.00 payments given that the errors on his payslips were about something else entirely. Further, from the dates of the documents we have been provided the practice was only stopped on or around the time that the claimant was dismissed. We therefore do not believe that he was subjected to any negative

comments by his colleagues as he was no longer working there when the practice ceased.

Excessive supervision

54. The claimant asserted that he was subjected to excessive supervision from Kevin Grant because of his race. In cross examination the claimant was taken to the phone logs for Mr Grant which demonstrated that he called all the operatives several times a day (pgs 605-714). Having been taken to several days during the period the claimant conceded in cross examination that he had not been called more than his colleagues.

55. In submissions the claimant repeated his assertion however that he had been called more and cited that the respondent's failure to disclose the claimant's work phone logs and those of his comparators meant that we could not properly see how many times he was called. We disagree. The claimant's case is that he was excessively called by Mr Grant. Mr Grant's phone logs show that he did not call the claimant excessively or more than his comparators. No further evidence was necessary for us to be able to conclude that Mr Grant was not calling the claimant more than his comparators.

56. The claimant also said that Kevin Grant overly scrutinised his work and checked up on him a lot. There was only evidence of Kevin Grant doing one Post Inspection report (p163a) on the claimant's work which was passed as satisfactory. This was an occasion where Mr Grant assisted the claimant in rectifying a tiling job whilst he was an agency worker. Otherwise the claimant provided no evidence of Mr Grant checking on his work. We accept Mr Grant's evidence that he simply did not have time to do more checking than that given the volume of work he had to complete.

57. The claimant also alleged that Mr Grant was following him or getting colleagues to follow him. The claimant provided no specific examples of being followed but Mr Grant cited an occasion when he had walked past the claimant on an estate whilst on his way to another job on the other side of the estate. The claimant had asked him why he was there and why he was following him to which Mr Grant said that he was not following the claimant and was going to another job. The claimant did not challenge that version of events at the hearing and we see no reason as to why Mr Grant would lie about such an incident. We prefer Mr Grant's account of this incident and find that he was simply walking to another job. No information was given about other incidents of the claimant being followed and therefore we find that Mr Grant was not excessively supervising or scrutinising the claimant or his work.

Telephone call on 23 March 2017

58. Turning then to the phone call on 23 March. The claimant had a phone conversation with Mr Grant which became very heated. Mr Thompson then took the phone from Mr Grant and continued the conversation.

59. The claimant in his ET1 and his witness statement alleged that Mr Thompson called him a cunt and that this had been said because of his race and his age. In cross examination, when the respondent's counsel asked him how that word was related to his race the claimant then said that in fact Mr Thompson had called him a 'black cunt'. When the tribunal asked him how he related such a comment to his age, he said that he had inferred that it was due to his age as well because it said in the general context of people previously making comments about how he was quite young.

60. We do not accept that Mr Thompson called the claimant a 'black cunt'. The claimant added the word 'black' when under pressure in cross examination. He was assisted by Lambeth Law Centre when drafting his claim and given that his claim was for race discrimination it is inconceivable that he would not have mentioned this key word earlier had it happened. His explanation that he did not want to 'go all in' was entirely implausible given the nature of his claim.

61. The respondent's evidence was that the call was quite heated and that swearing is quite common place within the team and the industry. However, Mr Thompson and Mr Grant state that Mr Thompson did not swear at the claimant but was trying to calm him down and find out why he was angry with Mr Grant though the conversation did become bad tempered.

62. On balance, given the number of inconsistencies and discrepancies in the claimant's evidence during this hearing and regarding this phone call in particular, we prefer the evidence of Mr Grant and Mr Thompson who both confirm that Mr Thompson did not say 'black cunt' or 'cunt' during this conversation.

63. Even if we wrong in our factual finding as to whether the word cunt was said in isolation there is nothing to suggest that it was said because of the claimant's race and the claimant provided no evidence to support that assertion.

64. When questioned by the tribunal about how the comment could relate to his age, he said that he was subjected to numerous comments about being young and in that context, he felt that any swearing at him was related to his age. We do not agree. If he was called a cunt, we cannot find any evidence to suggest that it was because of his age. His colleagues were broadly of a similar age to him and there were younger members of the team indicating that in the absence of any further evidence age was not a distinguishing factor about the claimant in this context.

65. To further support our conclusion that the swearing did not happen we turn to the documentary evidence supplied by the claimant. The claimant's handwritten notes of calls at pgs 602-604 conspicuously do not include reference to that call. The claimant stated that he had made

notes of events and calls as they occurred. If they are a true log of events as asserted by the claimant we do not understand why he would not have noted this difficult conversation down given the importance he attaches to it.

66. It is worth noting however that we find that the notes are of little probative value in any event. They are out of date order and the claimant's evidence to the Tribunal about how they have been written and why was unsatisfactory. This was particularly so when he was quested about the times of the calls as opposed to the duration of the calls. Here, when the claimant was challenged by the Tribunal about the evidence he was giving, he became, in our view deliberately misleading and attempted to say that although every other note had been about the time at which a call was made, a note in exactly the same format actually depicted the duration of a call. We therefore think this log was created for the purposes of this litigation as opposed to being a contemporaneous note of what happened and was a note from the claimant's phone logs of when calls were made.

67. The claimant also stated in evidence that he was in frequent contact with HR about the difficulties he was having with his supervisors and that he had told them about this call. It is not in dispute that he spoke to Louise in payroll about the pay issues and that he had to do that on several occasions because there were repeated mistakes with his pay. However, the claimant stated that he was speaking to people called Alex and Gemma. We accept Ms Mazzola's evidence that there was nobody at the respondent either in payroll or HR with those names.

68. The claimant went further and said that he had had a 1:1 meeting with Carla from HR where he had been told not to submit a grievance but to try and sort things out with his managers in a 1:1 meeting. He said that this was the reason he had not submitted evidence of his concerns to the respondent before he was dismissed.

69. However, he accepted at the tribunal hearing that he had never met Carly Mazzola from the respondent's HR who gave evidence to the tribunal. He does not know who he met and could not describe them other than saying and continuing to repeat that he had met a woman called Carla.

70. Ms Mazzola said that she would have been aware of any meeting with someone from HR because the team is small and she was the HR adviser to that team and any meetings would have to have been approved by her. None of the team are called Carla and it was agreed by both Ms Mazzola and the claimant that they had never met before.

71. The claimant was clearly confused and seemed adamant that he had gone to Enfield and spoken to HR. The tribunal suggested that the claimant consider the tracker evidence to see if that supported him having gone to Enfield around the relevant time. The claimant did not

check the evidence despite being reminded by the tribunal that this might be helpful.

72. We therefore conclude that the claimant was confused as to who he spoke to and when. However, the confusion and lack of reliable information would indicate that he did not contact anybody about this call with Mr Grant and Mr Thompson which we feel supports our conclusion that the conversation did not occur as described by the claimant and that Mr Thompson did not call the claimant a cunt or a black cunt during that conversation.

Conclusions

Race Discrimination

108. Our primary conclusion is that none of the factual incidents which the claimant relied upon as demonstrating race discrimination actually happened. We have given our reasons for those factual conclusions above. In summary we find:
   a. The claimant was not sent out to jobs in less salubrious areas than his comparators;
   b. The claimant was not given more jobs to undertake each day than his comparators;
   c. The claimant was not sent to solo jobs, without the assistance of a partner in a way that was different from his comparators;
   d. The claimant was paid for all periods between 07.30-08.00;
   e. The claimant was not subjected to excessive supervision and scrutiny from his manager Kevin Grant either at all or when compared to his comparators.

109. However, if we are wrong in those conclusions we have been presented with no evidence that establishes a prima facie case that any of the alleged incidents occurred because of the claimant's race. The claimant has shown no difference in treatment between himself and his comparators for any of the incidents relied upon. We have asked the 'reason why' question and have not found any evidence to support that any of the incidents, if they occurred, occurred because of his race.

110. We have applied this thought process to each incident of race discrimination relied upon separately and come to the same conclusion.

111. We understand the two stage test as set out in the guidance from Barton v Investec Henderson Crosthwaite Securities Ltd [2003] IRLR 332 and confirmed in *Igen Ltd and others v Wong and other cases [2005] IRLR 258 and more recently in* Ayodele v Citylink Ltd [2017] EWCA Civ 1913. That two stage test is essentially:

Stage 1: can the claimant show a prima facie case? If no, the claim fails. If yes,

the burden shifts to the respondent.

Stage 2: is the respondent's explanation sufficient to show that it did not discriminate?

112. We have born in mind that the two stage test is not rigid. In Hewage v Grampian Health Board [2012] IRLR 870, the Supreme Court found that "it is important not to make too much of the role of the burden of proof provisions" and that the test "will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other." (*Hewage, paragraph 32)*.

113. We had to reach conclusions as to the primary facts and then decide whether they are sufficient to justify whether an inference could be drawn, not whether it should be drawn. If we decide that there is that prima facie case then we must consider the respondent's explanation to decide whether it had non-discriminatory reasons for the treatment. If the tribunal does not accept those reasons then it must make a finding of discrimination.

114. The claimant must establish more than just a difference in treatment. This would only indicate the possibility of discrimination whereas a prima facie case requires that a reasonable tribunal could properly conclude from all the evidence that there has been discrimination. (Madarassy v Nomura International plc [2007] IRLR 246 (CA)). It is therefore not enough to show just a protected characteristic and a detrimental event, there must be some evidence of a third element, which is a causal link between the two.

115. As stated above we found that the claimant had failed to establish any factual basis for a prima facie case. Firstly, there was no difference between how the claimant was treated and how his comparators were treated. Secondly, the claimant did not in evidence say how this treatment was, on the face of it, because of his race even if it was just how he had been made to feel.

116. We have not gone on to consider whether there was a non-discriminatory reason provided by the respondent for each incident given our conclusions that the incidents did not occur and if they did that the claimant had not established any evidence that show they could be, on the face of it, because of his race.

117. The claimant's claims for direct race discrimination are not upheld.

Harassment

Time

118. S123 Equality Act states that a discrimination claim must be brought within 3 months of the discriminatory act or decision or such other time period as the tribunal thinks is just and equitable. This has been amended to allow

for the Early Conciliation process. Time can be 'paused' and then 'added' if ACAS is contacted within the initial 3 month limitation period.

119. The incident of harassment occurred on 23 March 2017. There was no suggestion that it was part of an ongoing series of events. This means that the primary limitation date was 22 June 2017. The claimant contacted ACAS to initiate Early Conciliation on 6 July 2017 and Early Conciliation was concluded on 18 July 2018. The claimant therefore contacted ACAS after the primary limitation date. The claimant submitted his ET1 to the tribunal on 16 August 2017.

108. The claimant made no submissions to the tribunal as to why it would have been just and equitable for time to be extended and why he had contacted ACAS after 3 months had elapsed. However, the tribunal has considered whether it would be just and equitable to extend time to allow the harassment claim to proceed.

109. We conclude that it is not. The claimant did not assert that there were any other occasions of harassment and has not sought to say that there was a continuing course of action against him. This was a one-off event. The claimant's dismissal did not take place until 24 April 2017 which may have given rise to an argument that any harassment continued until that date. However, no evidence of continuing harassment was provided to the tribunal and the claimant did not seek to rely on his dismissal as an act of discrimination or harassment in any of his claims to the tribunal during this hearing. The claimant has given no reason as to why he did not contact ACAS earlier. He appeared to be aware enough of his rights to initiate the ACAS process and seek help from Lambeth Law Centre to draft his claim. Therefore, on balance we do not find that any reason had been provided as to why there ought to be an extension of the normal deadline of 3 months from the act of harassment to contact ACAS. We have weighed up the relative prejudices to the parties and in the absence of a good reason from the claimant we do not see why his situation ought to be prioritised over that of the respondent. The claim for harassment is therefore out of time.

110. If we are wrong in that conclusion we have considered the substance of the harassment claim in any event. We have reached the primary conclusion that the claimant was not called a black cunt or a cunt. If he was called a cunt we have found that the claimant has not established that it was related in any way to his race or age. It therefore did not have the purpose or effect of violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him related to his age or race.

111. The claimant's claims for harassment on grounds of race and age are not upheld.

Respondent's costs application

112. The respondent's counsel made an application for costs after we had delivered the above judgment orally. They applied for all their costs from 27 March 2018 until the hearing. We have decided not to award costs in this matter.

113. The general principle in costs applications is that it is the exception not the norm.

114. The respondent relies on its costs warning letter to the claimant dated 27 March 2018 as being the starting point for their costs application. They state that hereafter the claimant's decision to continue his claim was him behaving either vexatiously or the date from when he ought reasonably to have known that his case had no reasonable prospects of success.

115. Whilst the case of Anderson v Cheltenham and Gloucester allows for a limited application of the Calderbank principle in Employment Tribunal cases we do not think that the existence of this letter is persuasive as a starting point. The claimant was unrepresented when he received this letter and to the best of our knowledge has remained unrepresented throughout these proceedings other than initial help in drafting his claim.

116. Nonetheless we have found it incredibly difficult to make this decision. We find that in respect of two aspects of the claimant's discrimination claim there was objective evidence that he had from when he had the bundle and the claimant's witness statements (namely the issues regarding pay and jobs worked) that demonstrated he was not treated less favourably than his comparators.

117. However we are also mindful of the fact that discrimination claims are very difficult to amass evidence for and the case of Saka v Fitzroy Robinson Ltd EAT which states that there is very rarely overt evidence of discrimination and it may be difficult for a claimant to know whether or not he has any prospect of success until the explanation of the employer's conduct is heard, seen and crucially in this case tested.

118. The respondent did make a successful application for the strike out of the claimant's victimisation claim but not for other parts of the claim so the claimant may have had reason to consider that the case had reasonable prospects or that there were factual issues that needed testing, particularly in the absence of legal advice. The claimant had limited access to legal advice and he says he was told by those advising him that he did have a prima facie case. We have no reason to disbelieve him.

119. We therefore do not consider that the claimant has acted vexatiously in pursuing his claims. He was genuinely aggrieved regarding his situation.

Although not dealt with in our main judgment as it was not an issue that needed determining to determine the claimant's claims, we do conclude that there were significant gaps regarding procedure in the performance management of the claimant and his subsequent dismissal. The respondent's evidence regarding how the claimant had been managed and what their concerns were prior to the incident of 13 April was vague. There were some assertions regarding his time keeping which were contradicted by their own witnesses but not much else was provided in terms of evidence whether oral or documentary. A lot of discussion was had regarding the job that the claimant had done on 13 April as being so unsatisfactory as to warrant dismissal in its own right. This may be correct but what was clear was that between 21 March and 13 April there was not a significant amount of clarity regarding the claimant's alleged failings in terms of his performance or what he was required to do to improve and pass the performance improvement process.

120. We did not put this in our main judgment because this was not a claim for unfair dismissal nor a claim where the claimant asserted that his dismissal was an act of discrimination. However, it is relevant to the claimant's justification as to why he felt aggrieved and why he felt the possibility that their behaviour towards him could be ascribed to a discriminatory reason as opposed to purely poor performance. That is also reinforced by the fact that evidence of discrimination is hard to find as mentioned above.

121. Further we have concluded that although part of the direct discrimination claim has been objectively disproved by the respondent, nonetheless we do not think these two discrete elements of his claim significantly contributed to the costs of this hearing which would have to have gone ahead for the evidence in respect of the other matters to be heard.

122. With regard to the costs of the preliminary hearing it is worth noting that we seriously considered awarding costs in respect of that hearing because of the claimant's failure to comply with the Tribunal's original orders. However, having reviewed the judgment it is clear that the claimant did attempt to comply with the order though the information given was not sufficient. Further it is not recorded that any costs application was made by the respondent at the time nor was the right to bring a costs application reserved at that stage. We therefore do not feel it is appropriate to award costs in respect of that hearing when we were not party to the conduct or evidence provided by the parties at that hearing.

123. The respondent's application for costs is therefore refused.

Employment Judge Webster

Dated: 28 October 2018