EMPLOYMENT TRIBUNALS

Claimant: Mr Michael Tella

Respondent: Serco Limited

Heard at: Liverpool **On:** 9-10 January & in chambers 11 January 2019

Before: Employment Judge Wardle
Mr R W Harrison
Miss J M Stewart

Representation
Claimant: Mr I Mohamed – McKenzie Friend
Respondent: Miss R Barrett - Counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that the claimant's complaints of direct discrimination and victimisation are not well founded.

REASONS

1. By his claim form the claimant has brought complaints of direct discrimination and victimisation relating to the protected characteristic of race based on his colour. In respect of his direct discrimination complaint the less favourable treatment that he alleges than that which a hypothetical comparator would have had is his dismissal. In respect of his victimisation complaint this is based on his assertion that he did a protected act by lodging a grievance on 2 February 2017 and that because of this he was subjected to detriments in the form of (i) the respondent carrying out a Counter Terrorist Clearance check on him (ii) the respondent suspending him from work and (iii) the respondent dismissing him.

2. By its response the respondent denies the complaints in their entirety.

3. The Tribunal heard evidence from the claimant and on his behalf from Mr Stephen Doolan, a former colleague and Mr Abdi Moalim, a Housing Officer with the respondent. On the respondent's behalf we heard from Ms Sarah Taylor-Dayus, Director for Risk and Assurance, Mr Simon Dorset, Risk and Security Manager and Mr Scott Ross, Operations Director. Each of the witnesses gave their evidence by written statements, which were supplemented by oral responses to questions posed. We also had before us documents in the form of a bundle, which we marked as "R1".

4. We concluded the hearing at the close of the second day and informed the parties that we would reserve our decision and use the third and final day of hearing to sit alone in chambers to reach conclusions on the matters requiring determination by us having regard to the evidence, the submissions and the applicable law.

5. Having heard and considered the evidence we found the following facts.

Facts

6. The claimant, who is of British subject of Eritrean origin, was employed by the respondent as a Housing Officer based in Liverpool as part of its Commercial and Operating Managers Procuring Asylum Support ('COMPASS') contract with the Home Office for the provision of accommodation, transport and related support services for asylum seekers. He had continuous employment dating back to November 2008 joining the respondent's employment on 6 September 2012 as a result of a transfer under TUPE. His employment terminated on 7 July 2017 with pay in lieu of notice by dismissal for some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

7. The respondent is an international service company. Under its COMPASS contract it is responsible for approximately 15,000 asylum seekers in the North West of England, Scotland and Northern Ireland and employs some 450 people in servicing this contract. The predecessor to the contract (known as a Target contract) expired in 2012. This did not require employees to have security clearance to work on it but the replacement COMPASS contract did at least insofar as the claimant's role was concerned in that he was someone who had authorised access to more than 1,000 individual records via the Management Information Portal. This took the form of a Counter-Terrorist Clearance ('CTC') check upon application to the Home Office. On the respondent's case, which was not challenged, the claimant was asked by it to complete the relevant CTC application forms, which from the Online Vetting Form beginning at page 158 of the bundle he seems to have done on or around 25 April 2013. The clearance process starts once the Home Office receives the completed online security questionnaire and a declaration from the individual. The Foreign and Commonwealth Office (FCOS) process the application and make a recommendation to the Home Office, who then decide whether the individual's application should be granted or not. The requirement

for security clearance is a term of the respondent's COMPASS contract with the Home Office, it being recorded at clause 9.5 at page 131 that 'the provider shall comply with the Authority's Vetting Procedures in respect of all staff employed or engaged in the provision of the services'. Whilst at clause 9.3 at page 130 it is recorded that the Authority 'shall have absolute discretion to require the removal of any person from his/her engagement in the provision of the services'.

8. In August 2016 the respondent received a KPI 10 request from UK Visas and Immigration ('UKVI') for the status of security clearances for all individuals working on the COMPASS contract. UKVI and the Home Office are the same entity and both are the respondent's customer. The information held at that point by the respondent showed that all individuals working on the contract had CTC clearance including the claimant in his case up to 24 October 2017. However, having requested from UKVI a copy of their CTC file because of concerns about the currency of its own information the respondent discovered on a comparison that 31 individuals' CTC applications had been rejected and one had been cancelled. The claimant was one of those showing as rejected. In this context 'rejected' means that the individual has either failed to activate the initial link to the CTC application, failed to complete the questionnaire within 30 days or failed to give accurate information for all fields required. This finding was of concern to the respondent as it meant for the individuals concerned it was not acting in compliance with the terms of the COMPASS contract. On 15 August 2016 according to Ms Taylor-Dayus' evidence the respondent held a meeting to discuss the reconciliation between its records and those from UKVI to understand why the differences had arisen and to agree next steps.

9. As an action point Tania Lewis (CTC Clearance Administrator) was asked by her to liaise with UKVI to cross check the respondent's data, which she did on 16 August 2016 asking that they look at the discrepancies, to which request they responded by advising that they would need the National Insurance numbers and dates of birth of the individual concerned to get their applications checked. This information was supplied on 17 August 2016. On 6 September 2016 Ms Lewis chased matters with UKVI asking for an update on the security status of the claimant and several other individuals, which saw them replying on 6 September 2016 that the claimant's CTC application had been cancelled as he had failed to access and complete the online security questionnaire.

10. On 16 September 2016 Ms Lewis emailed the claimant informing him that the respondent had been notified through an audit with UKVI that he had failed to complete the online CTC form a number of times and asking that he complete the attached forms as a matter of urgency and on 21 September 2016 she chased him up, which saw the claimant advising that he had been on holiday and asking could she resend the forms, which she did by return. The claimant subsequently made the on-line application, which according to an email from the Head of Vetting at the Home Office dated 27 September 2017 at page 281 he did twice on 3 November 2016 and 23 March 2017, although it was the respondent's understanding that it had been submitted on 19 January 2017.

Leaving the date of submission to one side the next link in this chain of events was the receipt by the respondent of an email dated 21 April 2017 from the Home Office advising that the claimant's application for CTC security level clearance had been cancelled because he had failed Home Office specific pre-employment checks concerning immigration and/or passport rules, which was the extent of the detail given because personal information was involved. It further advised that the claimant must not be offered employment in the Home Office in any post.

11. In the intervening period the claimant had a couple of issues with his immediate superiors by the names of Rob Daniels, Deputy Service Delivery Manager and Michael Le Breton, Service Delivery Manager, to whom Mr Daniels reported. The first issue concerned an opportunity to do some temporary work in Northern Ireland. On Mr Ross' evidence this arose as a large number of service users were expected to arrive in Belfast requiring settlement in circumstances where the respondent's one staff member was suspended and there was an urgent need for an extra staffing resource. This was addressed at a regular weekly team meeting on 23 November 2016, at which the claimant in common with some of his colleagues from the respondent's five sites in Liverpool was not present. On the respondent's evidence given the urgency of the situation volunteers were sought at the meeting and deployments were made to undertake the work. The next day the claimant, having been made aware of the matter, emailed Mr Daniels asking if the opportunity to do shifts there was open to everyone and if it was for specific people what the requirements were in terms of when and how long, as he had heard that staff payment was time and a half. Mr Daniels replied within minutes setting out the requirements, which clarified, among other things, that the time and a half payment was in respect of overtime and advising that it had been brought up in the preceding day's team meeting and that they currently had a full complement of staff but that if he was still interested he could put him on standby.

12. From the papers it appears that the claimant raised matters further with Mr Daniels on or around 20 December 2016 as on this date he emailed the claimant referring to the email he had previously sent and pointing out that he had clearly stated that he would put him on standby and that at no point had he said that he would be going next. In response the claimant emailed him on 21 December 2016 expressing the view that the announcing of the opportunity at the meeting and giving priority to those present was unfair to staff like him who had remained on site undertaking their duties and suggesting that it should have been emailed to everyone before selecting anyone before concluding with the comment that if he thought that he could do whatever he wanted to do he could only put his name on the standby list. Mr Daniels took exception to this comment and replied to say that he did not think he could do whatever he wanted and asked him to show the same respect he showed him especially through email before advising that they would be sending more people out there up until March 2017 and that he should be patient.

13. The claimant remained unhappy about the situation and telephoned Mr

Daniels on or about 28 December 2017 to express his upset about the decision and to say that he would like to raise it with a more senior manager, which saw Mr Daniels explaining in an email of this date that they had already selected two candidates before he had expressed interest in going to Belfast and that for the sake of continuity and smoother handovers they had opted to send the same two people over there and to keep him on standby up to the point where he was required should the two members of staff no longer wish to travel to Belfast. In relation to the claimant's wish to escalate his concerns to a higher tier of management Mr Daniels pointed out that he had copied Mr Le Breton and Mr Dorset into his email. The claimant responded that evening reiterating his dissatisfaction with the situation and claiming that being told that he would only get the opportunity if the two individuals selected no longer wished to travel was disrespectful to him before concluding by saying that he had no time to challenge the decision and that he would like his name taken off the standby list.

14. The second issue related to the claimant's private vehicle coming into contact with another employee's business vehicle on the respondent's site whilst parking. According to the documents this was first raised with him by Mr Daniels on 30 December 2016 by an email at page 219, in which he informed him that he had heard of a recent incident that day of his hitting a company vehicle causing damage to the licence plate before adding that he had not seen a report from either party and asking if a full report could be given and the details uploaded to the respondent's online health and safety recording system called Assure. In addition he advised the claimant that because of this and concerns that he now had of his suitability to drive a company vehicle he had arrangements for a RoSPA trained driver to assess his driving capabilities on Thursday 5 January 2017 at 10.00 a.m. The claimant replied the same day to say that as far as he knew he had not hit a company car but that there had been a day when he had parked his very close to Stephen Doolan's company van but there was a separation between the vehicles and there was no way that he could have damaged the other vehicle and that if there had been damage he did not think either of them would fail to report it.

15. The claimant emailed Mr Daniels further on 4 January 2017 at page 218 stating that the company should not interfere on his driving competence as he had been issued with his licence by the legally authorised agency and that he felt intimidated by its handling of the situation before advising that he would not be available for the assessment arranged for the following day as he had to visit his representative. In response Mr Daniels emailed the claimant the same day to say that he had managed to re-arrange his driving assessment to 19.00 hours and asked him to understand that this was not personal against him but that staff and service user safety on site was paramount and as they now had qualified advance drivers at their disposal whenever there is a bump he would look to utilise them in the most practical way possible. Later that day Mr Le Breton emailed the claimant to notify him of a further change in the time of his assessment to 14.00 hours, which appears to have been followed by a conversation between them in which it was made known to the claimant that he had to do the assessment as referred to by the claimant in a later email asking to be told in writing why he needed to be assessed, which was

responded to by Mr Daniels in Mr Le Breton's absence repeating the information previously given to him about the importance of on-site safety.

16. The claimant in the event declined to take the assessment notwithstanding that an assessor, Leanne Liddle (Fleet Manager) had travelled to his site to undertake it telling her that he wanted to speak to Mr Le Breton. Upon learning of this Mr Le Breton emailed the claimant on the afternoon of 5 January 2017 at page 223 pointing out that during their conversation the previous afternoon he had agreed to take the driving assessment if he changed the date and time, which he did (at least in so far as the time was concerned) of which change he had been notified and that he had wasted people's time, especially Ms Liddle's, when she had come over to Liverpool for the specific purpose of the assessment. According to the email the claimant had also told Ms Liddle that he had issues with Mr Daniels and Mr Le Breton pointed out that he had never discussed these issues when they met on 4 January 2017 and he asked him to put them in writing to him by close of business on 9 January 2017 with a view to his setting up a meeting to discuss them. The email also advised that as the claimant had not taken the driving assessment he was prohibited from driving company vehicles.

17. On 9 January 2017 the claimant emailed Simon Dorset, Service User Operations Manager, to whom Mr Le Breton reported and copied Ian McDonnell, Operations Director to say that he was seeking his help in resolving a problem that he was experiencing at work, to which Mr Dorset replied on 11 January 2017 stating that he understood that Mr Le Breton would be arranging to see him to discuss his issues as he had yet to do this with him. He also pointed that the claimant needed to follow the chain of management and not jump to senior managers and suggested that having seen the trail of emails he had copied him into the most appropriate person to deal with the issues was Mr Le Breton adding that only if he could not resolve his issues with him would he become involved.

18. Mr Le Breton arranged to meet with the claimant on 13 January 2017 but on this date he emailed Mr Le Breton to say that he was not available for it and instead asked if proof/evidence of the recent allegation made against him relating to his damaging of Mr Doolan's company vehicle could be brought to their next meeting, at which he asked if Mr Doolan and those involved in the matter could be invited. This email appeared to have gone unanswered as on 27 January 2017 the claimant emailed Mr Le Breton further in relation to his request for an inclusive meeting, to which Mr Le Breton responded on 30 January 2017 advising that he would like to meet with the claimant and his manager only, in respect of whom he appeared to be referring to Teresa Waters, who was copied into the email to discuss this issue and any others that he might have and stating that he would send him a calendar invite. In relation to the proof/evidence of the alleged incident he advised that this would be brought to the meeting.

19. This response prompted the claimant to email Mr Dorset on 2 February 2017 at page 227 stating that as he had been subjected to unwanted conduct at work comprising mobbing, bullying and harassment he had finally come to a

decision to put a formal grievance in adding that the bombshell email he got from Mr Le Breton on a day off, in which he dictated that he attend a meeting was the last straw that broke the camel's back. Mr Dorset wrote the next day to acknowledge receipt of the claimant's email but pointed out that he was due to meet with Mr Le Breton that day and advised him that he should attend that meeting and depending on the outcome he would then review how to proceed with his grievance. The claimant did not attend this arranged meeting for 3 February 2017 and emailed Mr Dorset to say that there had been a number of informal grievance meetings with Mr Le Breton but that he was still subject to unwanted conduct at work and that the purpose of his email was to let him know that he was addressing his formal grievance to MyHR feeling degraded and humiliated and having no more confidence in any informal grievance process with Mr Le Breton. MyHR is part of the respondent's shared services offering HR advice and assistance to staff and management. On 10 February 2017 the claimant contacted MyHR advising that he felt he was being bullied by his manager and that he had raised this with his manager's manager who had referred him back to his manager which was the root of the issue. In response he was sent a copy of the grievance policy and the Employee Assistant Programme to support him with his grievance action and given the name of Michelle Foreman (HR Business Partner) as a point of contact should he need further support.

20. On 16 February 2017 the claimant emailed Ms Foreman asking for help in addressing his grievance, to which she responded the next day pointing out where all the respondent's policies were to be found on the management system and advising that he should try to resolve any issues informally in the first instance. The claimant subsequently contacted Mr McDonnell sending to him a note and associated material relating to his work issue and a discussion took place around their meeting in circumstances where Mr McDonnell was under the impression that the claimant had already met with Mr Le Breton. Upon discovering that he had not he emailed him on 2 March 2017 to say that he needed to do this in the first instance adding that they needed to follow the correct procedure and escalate through the correct line management before he could discuss matters with him. By the same email, which was copied to Mr Le Breton and Mr Dorset he asked the former to arrange a meeting with the claimant.

21. The claimant made known his unhappiness about Mr McDonnell cancelling their meeting, which appeared to have been arranged for 2 March 2017 stating his course of action was to speak to a senior manager for mediation as his grievance was about Mr Le Breton and that he could not expect him to resolve the problems he was facing, to which Mr McDonnell responded saying that he took the issues very seriously but that they needed to be addressed correctly and professionally in accordance with the company's policy and procedures and that it was apparent that the correct procedure had not been followed to date pointing to the claimant's refusal to attend a number of meetings arranged by Mr Le Breton adding that he had asked him to meet with the claimant on 6 March 2017 and urging him to attend. before explaining that should the outcome not be to his satisfaction then Mr Dorset was his escalation point. Following a further email by the claimant asserting that he

had complied with the grievance procedure by addressing it first to Mr Le Breton Mr McDonnell emphasised in clear terms to him that the meeting with Mr Le Breton must happen and that he must take this opportunity to discuss his issues and ensure that appropriate minutes were taken.

22. The meeting on 6 March 2017 went ahead with Ms Waters also in attendance and on the claimant's evidence Mr Le Breton was not serious about the matter and asked him several unnecessary questions before asking him if he wanted to take his grievance to the second level to which he replied that he was fed up and was giving up. On Mr Dorset's evidence he stated that having spoken with Mr Le Breton after the meeting he was advised by him that the claimant had told him that he was happy that any issues between them had been resolved explaining that his wife had said to him that these were issues that he should not be worrying about and that he should respect his manager and that he did not wish to take the matter any further. Some time down the line on 27 June 2017 the claimant emailed Mr Le Breton asking if he could have the minutes of the grievance meeting, in response to which he stated that no minutes had been produced as he had indicated that he did not want to go any further with it which was how matters were left. There was no challenge by the claimant as to this description of the outcome at the time.

23. Returning to the events concerning the cancellation of the claimant's CTC Security Clearance application Mr Dorset was contacted by Jennifer Halliday, Contract Operations Director, on or around 25 April 2017 to be told that the claimant was no longer able to work on the COMPASS contract as to allow him to do so would bring the company into breach of the contract and he was told to suspend him until the reason why his security clearance had been cancelled could be determined.

24. The claimant was not on shift until 2 May 2017 and Mr Dorset took the time to ask the Home Office on 26 April 2017 if their concerns about the claimant would affect his normal right to work as there were other roles within the respondent's business not on the COMPASS contract to which he could be redeployed, which saw them replying on 3 May 2017 to say that the issues were purely historical and there was no problem with the claimant's residency or right to work.

25. In the meantime Mr Dorset together with Me Le Breton met with the claimant as he arrived for his shift on 2 May 2017 and handed to him a copy of the Home Office's letter dated 21 April 2017 explaining that his CTC clearance had been cancelled and that as per the terms of the COMPASS contract he was unable work on it until he obtained CTC clearance and adding that as a result the respondent had no choice but to suspend him on full pay whilst the reason for his clearance being cancelled was determined. In this connection he was told that he would need to liaise with the Home Office directly to establish why it had been cancelled and whether any appeal for reconsideration could be made as they would not communicate with the respondent in this regard. Arrangements were also made for the claimant to speak with Mr Le Breton on a weekly basis to discuss his progress with his liaison with the Home Office.

26. On 3 May 2017 Mr Dorset wrote to the claimant to confirm the decision to suspend him on full pay pending the current investigation concerning his cancelled CTC clearance application and to remind him to contact the Home Office to discuss his case with them as soon as possible as they would not divulge any personal information to the respondent. Also on this date Mr Dorset wrote further to the Home Office asking if the historical issues behind the cancellation of the claimant's CTC clearance were likely to remain or were capable of resolution between him and them, in response to which they advised that they would consider representations should he wish to make them.

27. On this same date the claimant was written to by Alastair Jackson, Deputy Head of Vetting at the Home Office, by which letter he was made aware that it was his illegal entry into the UK that had caused the cancellation of his application for CTC clearance, which saw him making representations on 4 May 2017 explaining the circumstances behind his fleeing Eritrea and that he had sought asylum as soon as he had arrived in 2005 and that he was later granted refugee status in 2007, which he submitted showed good cause for his illegal entry. He also pointed out that he was now a British citizen and that he had been working since 2008 for accommodation providers. Mr Jackson replied to these representations on 9 May 2017 informing the claimant that everyone who works for the Home Office, directly or as a contractor, is obliged to have a clean immigration record regardless of citizenship and that his history, including his illegal overstay, was not suitable for the role and explaining that this was a different decision from a citizenship consideration and with different criteria.

28. On 16 May 2017 the claimant in a telephone conversation with Mr Le Breton informed him that the reason for his CTC clearance being cancelled was because he had entered the country illegally even though he had claimed asylum immediately. He also asked if the respondent had a solicitor who could help with his case so that the issue could be sorted, in response to which Mr Le Breton stated that he would look into his request and get back to him, which saw him ringing Mr Dorset and it being agreed that the respondent's legal team was for the business and not for personal reasons, which he relayed to the claimant later that day.

29. On 2 June 2017 Mr Dorset wrote to the claimant inviting him to a formal hearing on 8 June 2017 with him and Mr Le Breton to discuss his inability to fulfil his contractual duties because of the cancellation of his CTC clearance with a representative if he so wished. By his letter he notified the claimant that a potential outcome of the meeting was his dismissal for some other substantial reason. On Mr Dorset's evidence the hearing was used to gain an update from the claimant on his efforts to resolve his issues with the Home Office and for them to explain more about the redeployment options within the company. According to the letter subsequently sent to the claimant by Mr Dorset following the hearing on 12 May 2017 at pages 245-6, which set out the history of the claimant's illegal entry into the country as advised by him it was suggested to him that it seemed likely that any appeal against his failed

CTC clearance application, in respect of which the claimant was trying to raise funds to pursue, could take several months and that he needed now to look at redeployment jobs in the company or for employment elsewhere over the next 2-3 weeks as the respondent could not keep paying him beyond a reasonable time-frame. The letter also referred to his having been advised that he would be eventually invited to a formal hearing to discuss his dismissal with notice running from any dismissal date. In relation to redeployment it advised that help with any job application could be obtained from MyHR or Mr Le Breton. Ahead of this Mr Dorset had provided the claimant with a letter dated 8 June 2017 giving him information on how to apply for other respondent jobs as a redeployment candidate including how to sign up to receive alerts in relation to new vacancies within the company.

30. Mr Dorset and Mr Le Breton met further with the claimant on 22 June 2017. According to a letter sent by Mr Dorset to the claimant dated 29 June 2017 at pages 256-7 in relation to this meeting they explored with him whether he had looked at the redeployment opportunities in the company, in response to which he explained that there were no suitable jobs in Liverpool that were not on the COMPASS contract and that he had looked at a job in Prescot but that this was a management position, which he did not feel he was qualified for and a 'lifestyle' role in a leisure centre in Bolton, which he said was too far to travel. In relation to jobs outside the respondent he advised that he had been searching online but had not been to a Job Centre and that he had made no applications since they had last met two weeks ago. He also advised that his wife had obtained an application form from Asda, which he had not completed and that he had phoned about a role with Liverpool City Council but could not find the link to the job to apply online and mentioned that he had applied for a DBS check with a view to working for Alpha taxis, with whom he had completed some H&S training. In response it was made known to him that they would have expected more activity and it was suggested that he take his CV to companies that he was interested in. In relation to progress with the Home Office the claimant reported that his solicitors had written to them. The meeting concluded with the claimant being advised that the respondent could not keep him indefinitely on suspension and that the time was near when he would be invited to a formal hearing.

31. Within a matter of days of the above meeting Mr Dorset wrote to the claimant by a letter dated 26 June 2017 inviting him to a formal hearing on 29 June 2017 with him and Mr Le Breton, in response to which he explained by an email dated 28 June 2017 that he had an appointment with his solicitor already arranged for this date and asked if the hearing could be arranged, whilst making it known that he was devastated by his current suspension and very anxious about his situation. The hearing was subsequently re-arranged to 7 July 2017, which the claimant attended with a fellow housing officer by the name of Mark Walsh.

32. The hearing notes at pages 264-270 reveal that the claimant objected at the outset to Mr Le Breton acting as note-taker stating that he felt that he could write anything down and that he felt that their past problems had not been rectified despite Mt Dorset's suggestion to the contrary. It was Mr Dorset's

evidence that he found this objection very strange as Mr Le Breton had been present at all the earlier meetings with the claimant without any issue being raised and the invitation letter had stated that he would be present at this one, which had not prompted any objection. He therefore gave the claimant the options of either consenting to Mr Le Breton acting as note-taker or his withdrawing from the hearing and a decision being taken in his absence, which saw the claimant indicating that he would carry on.

33. Matters had not moved on since the meeting on 22 June 2018 both in terms of progress with the claimant's representations to the Home Office concerning the cancellation of his application for CTC security level clearance and with his attempts to find alternative work other than that he had approached a friend who owned a restaurant, had applied to Refugee Action and passed his CV to many places. At the hearing's conclusion Mr Dorset informed the claimant that he was, with regret, to be dismissed for some other substantial reason namely his inability to fulfil his contractual duties following the cancellation of his application for CTC clearance and that he would receive 8 weeks' paid notice together with any outstanding leave entitlement as on his evidence it seemed very unlikely that the Home Office would change their mind and that the claimant would obtain CTC clearance and as he was not actively looking for a job.

34. Mr Dorset wrote to the claimant on 18 July 2017 in confirmation of his decision informing him that his last day of service with the company would be on 7 July 2017 and that his dismissal was with pay in lieu of notice. By his letter he advised him of his right appeal against his decision to Scott Ross, Operations Director, which he was required to submit in writing with reasons by no later than 24 July 2017.

35. The claimant subsequently exercised his right of appeal by writing a letter to Mr Ross dated 21 July 2017 submitting that the decision to dismiss him had been taken too soon as he was challenging the Home Office's decision through his solicitors and MP and had not yet received a final response. He also mentioned that he was aware of other members of staff who had been on suspension for several months and that he had a outstanding grievance. Mr Ross acknowledged receipt of the appeal on 25 July 2017 explaining that he had just returned from annual leave and would need some time to look into his case but would contact him in due course to arrange a meeting.

36. On 27 July 2017 Mr Ross, having first accessed the relevant documents and discussed the matter with Mr Dorset, emailed Jonathan Blackburn, COMPASS Contract & Compliance Manager at the Home Office setting out a timeline of events as understood by the respondent in relation to the claimant's CTC status. This was in response to a request from the Home Office, who had been notified of the claimant's dismissal, in circumstances where their records showed that an application in 2013 for CTC clearance in relation to him had been rejected at Pre-employment checks, which had led them to assume that he had been removed from the contract at that time. They had concerns that the respondent had ignored the negative outcome of the clearance and were looking for assurances that this was not the case

since it would be considered an extremely serious security breach. The timeline of events as supplied by Mr Ross showed that an online Home Office Vetting Nomination Form had been completed in relation to the claimant on 4 June 2013; that the respondent had been informed that the application was still in progress as at 16 June 2013 and that it had informed the Home Office on 14 January 2014 that the claimant's CTC was valid until 24 October 2017.

37. This discrepancy between the respondent's records and those at the Home Office in relation to the claimant's CTC status took some considerable time to be ironed out and it was not until 28 September 2017 that the Home Office replied definitively to the respondent to inform that the claimant had never held CTC clearance as all three of his applications, which they had as having been made on 11 March 2013, 3 November 2016 and 23 March 2017 had been cancelled due to Passport and Immigration Check failures. In relation to any action being taken against the respondent for continuing to employ the claimant without security clearance from 2013 onwards the matter was taken no further as they had no records of the 2013 clearance rejection being sent to it and the respondent had no records of it being received.

38. In so far as the claimant's appeal against his dismissal was concerned Mr Ross kept in touch with him via telephone calls and emails explaining that he was in regular discussion with the respondent's contacts at the Home Office and was awaiting information from them.

39. The claimant's appeal went ahead on 28 September 2018, the hearing notes of which are at pages 305-306. These show that he raised the issues that he had had with Mr Le Breton and Mr Daniels concerning most recently the secondment work in Northern Ireland and his having been accused of hitting a company van and spoke of his efforts to go over their heads to Mr Dorset and then Mr McDonnell only to be told to discuss them in the first instance with Mr Le Breton. On Mr Ross' evidence, which was not challenged, he had previously told the claimant during their telephone calls to submit any grievances he might have in writing to him in accordance with the respondent's grievance policy, which advice he believed he had repeated during the hearing but that the claimant never submitted anything thereafter. Mr Ross also considered that the claimant's concerns and grievances were unrelated to the issue facing him in the hearing, which was that the respondent was unable to employ him on the COMPASS contract as a result of the Home Office's action in cancelling his CTC security clearance application for having failed pre-employment checks, in circumstances where they had no knowledge of his grievance.

40. In relation to the claimant's need to find alternative employment Mr Ross asked about the time that was allowed for this, in response to which he stated that he did not want another job as the work that he did in initial accommodation was what he had experience of and was trained in. The hearing concluded with Mr Ross suggesting to the claimant that he should continue with his appeal to the Home Office and his advising him that he would continue to chase them for further information to find out if CTC clearance would be given to permit the claimant's reinstatement.

41. In order to try to secure finality to the matter the respondent submitted a business case to the Home Office on 13 October 2017 on the claimant's behalf in relation to the cancellation of his CTC clearance application at pages 315-316 asking that his continuous service be taken into consideration when reviewing his case in the light of his having worked in the role of Support Worker/Housing Officer from 2008 with no issues having been raised regarding criminal activity or security concerns. A response was subsequently received by the respondent from the Home Office on 23 October 2017 advising that they had been informed by their security teams that they would not consider a business case for the claimant and that their previous decision stood.

42. On 13 November 2017 Mr Ross wrote to the claimant to confirm his decision to uphold his dismissal at pages 326-327 advising him that he did not consider that the decision to dismiss him had been taken too soon, having previously telephoned him to let him know of the outcome verbally at which time he told him that the business case had been refused leading the claimant, on Mr Ross' evidence, to become very unhappy and to allege that it was due to the grievance that he had raised.

43. The claimant subsequently presented a claim to the Employment Tribunals on 27 November 2017, which following the granting of an application for an extension of time was responded to by the respondent on 9 January 2018.

Law

44. The relevant law for the purposes of the discrimination complaints is to be found in the Equality Act 2010 (EqA). Section 4 lists ‘race’, which includes colour, nationality and ethnic or national origins as one of the protected characteristics.

45. Section 13(1) defines direct discrimination as follows: ‘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.’ It therefore involves the requirement for a real or hypothetical comparator to whom the relevant protected characteristic does not apply and for the purposes of the comparison, pursuant to section 23(1), there must be ‘no material difference between the circumstances relating to each case’. Section 136(2) and (3) dealing with the burden of proof provides that, 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, unless A shows that he or she did not contravene the provision.

46. Section 27(1) defines victimisation as follows: ‘A person (A) victimises another person (B) if A subjects B to a detriment because – (a) B does a protected act, or (b) A believes that B has done, or may do, a protected act. Section 27(2) provides that each of the following is a protected act – (a) bringing proceedings under this Act (b) giving evidence or information in connection with proceedings under this Act (c) doing any other thing for the purposes of

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

47. In regard to time limits section 123(1) provides that proceedings on a complaint within section 120 may not be brought after the end of (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 and section 123(3) provides that for the purposes of the section – (a) conduct extending over a period is to be treated as done at the end of the period.

Conclusions

48. Applying the law to the facts as found the Tribunal considered first of all the claimant's complaint of victimisation. In order to succeed with such a complaint it is necessary for the claimant to show two things: first that he has been subjected to a detriment and secondly that he was subjected to that detriment because of a protected act. In the instant case the claimant contends that the grievance that he lodged with Mr Dorset on 2 February 2017 at page 227, which was in terms that 'he had been subjected to unwanted conduct at work, which comprises mobbing, bullying and harassment' was a protected act for the purposes of section 27(1) EqA. For completeness the use of the word 'mobbing' was clarified with him during the hearing as his referring to Mr Le Breton and Mr Daniels helping each other.

49. The difficulty for him in placing reliance on this grievance, which had at its core the manner in which the respondent had chosen to select people to undertake some shifts in Northern Ireland, which because of his non-attendance at the meeting when volunteers had been sought meant that individuals were deployed before he had the opportunity to put himself forward and his being accused of damaging a company vehicle by parking too close to it and being required as a result to undergo a driving assessment with a ROSPA trained colleague is that there is nothing in the letter of grievance itself or the many other email communications that he sent expressing his unhappiness in relation to these two issues, which it is to be noted do not form allegations of discrimination in his claim, linking the respondent's conduct with his race. As such the Tribunal was satisfied that there was nothing in these various communications from which the respondent could have inferred that the concerns which the claimant was expressing were in any sense an allegation of discrimination or otherwise a contravention of the equality legislation. We therefore concluded that the claimant had failed to show that he had done a protected act within the meaning of section 27(2) EqA.

50. As a pre-requisite for establishing a complaint of victimisation under section 27(1) EqA it follows that the detriments that he alleges that he was subjected to in relation to (i) his being required to make application for a CTC security clearance in September 2016 in order to remain working on the respondent's COMPASS contract with the Home Office (ii) his being suspended from duty, on pay, on 2 May 2017 and (iii) his having his employment terminated with effect from 7 July 2017 cannot be said to have occurred because of his having

done a protected act. However, we still proceeded to consider whether these alleged detriments were causally linked to the matters about which the claimant had complained at the end of 2016 and the early part of 2017 as referred to above in paragraph 49, in the event that we were wrong in concluding that his grievance did not satisfy the definition of a 'protected act' to be found at section 27(2) EqA.

51. Taking these in turn it is patently the case that the first detriment relating to his being asked to submit an online application for the purpose of his obtaining CTC security clearance on 16 September 2016 was not causally connected with his grievance pre-dating it, as it did, by several months and in circumstances where the catalyst for it was the discovery by the respondent that its records in relation to the claimant's CTC status, whom they believed had a clearance date until 24 October 2017 was at variance with those of the Home Office, which showed him as having previously been rejected for security clearance, which was an essential requirement for staff working on the COMPASS contract.

52. Turning to the second detriment relating to the claimant's suspension on 2 May 2017 this of course post-dates the claimant's grievance and is an act that is capable of amounting to a detriment but it is clear from the Home Office letter dated 21 April 2017 at page 237 advising of the cancellation of the claimant's CTC security clearance application because he had failed their specific pre-employment checks that the respondent was no longer in a position to employ him on the COMPASS contract as to continue to allow him to do so would place it in breach of the contract's terms. In such a situation suspension on pay was unavoidable pending the outcome of any representations to the Home Office seeking to overturn their decision, which they had indicated to Mr Dorset the claimant was free to make. Thus again we could not see any causal link between the respondent's action in suspending him and his grievance.

53. Dealing finally with the third detriment relating to the claimant's dismissal with pay in lieu of notice on 7 July 2017, which also post-dates the claimant's grievance and is an act that is capable of amounting to a detriment it was acknowledged by him, to his credit, during the hearing that the respondent could not keep him suspended on full pay indefinitely. Having regard to his inability to work any longer in his Housing Officer role because of the prohibition imposed by his lack of security clearance, which was all he really wanted to do and the relative lack of suitable alternative employment opportunities within the respondent's organisation in or around the Liverpool area combined with the uncertainty around when, and indeed if, the representations being made on behalf of the claimant to the Home Office might bear fruit it seemed to us that it was this combination of factors that was behind the respondent's decision to dismiss him at the point that it did and that its decision was not influenced in any way by his grievance, which was believed to have been put behind him. We again therefore could not see any causal link between his grievance and his dismissal.

54. In consequence we were satisfied that even in the event of the claimant's

grievance amounting to a protected act he was unable to show that he had been subjected to these alleged detriments because of it.

55. Turning in conclusion to the claimant's complaint of direct discrimination because of the protected characteristic of race and more particularly his colour this is premised on the claimant's assertion that in relation to his dismissal he was treated less favourably than a hypothetical white comparator. In the instant case we considered that having regard to the terms of section 23(1) EqA providing that 'on a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case' that the correct comparator would be an employee not sharing the claimant's protected characteristic of his colour working on the respondent's COMPASS contract with the Home Office, whom it was discovered did not have CTC security clearance as it was the claimant's lack of security clearance that militated against his continued employment.

56. In the absence of any evidence whatsoever being adduced by the claimant that such a comparator had or would have been retained on the contract and our being satisfied that his dismissal was purely for the reason that it was ascertained that he did not have clearance as essentially required to work on any Home Office contract in circumstances where there was limited scope to redeploy him we concluded that the claimant had failed to establish facts capable of showing both a difference in treatment and a discriminatory reason for the treatment in relation to his dismissal from which we could find, in the absence of any other explanation, that he had been discriminated against by the respondent in deciding to dismiss him. We were fortified in this belief by the unchallenged written evidence of Mr Ross, whom we found to be a credible witness, that he had recently dealt with an appeal on a similar issue involving a white British male whose CTC clearance had been refused by the Home Office, which had also resulted in his dismissal.

57. Accordingly whilst we had the upmost sympathy for the claimant as someone who had worked diligently in the field of the initial accommodating of asylum seekers with the respondent and his previous employers for a number of years without any issues or concerns as to his being a security risk, we concluded that his complaints of direct discrimination and victimisation were not well-founded.

Employment Judge Wardle

Date 20 January 2019

JUDGMENT, REASONS & BOOKLET SENT TO THE PARTIES ON

24 January 2019

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS