EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4100156/2017

Held at Glasgow on 27 to 30 November 2017; 19 to 23 February 2018 & 3 to 5 September 2018

Employment Judge: Frances Eccles
Members: Mr Donald Frew
Mr Peter O'Hagan

Mr S Sikorski	**Claimant** **Represented by:** **Ms K MacLennan - Lay Representative**
Department of Work & Pensions	**Respondent** **Represented by:** **Dr A Gibson - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The **unanimous** Judgment of the Employment Tribunal is that the claim of (i) direct discrimination under Section 13 of the Equality Act 2010; (ii) harassment under Section 26 of the Equality Act 2010 & (iii) victimisation under Section 27 of the Equality Act 2010 shall be dismissed.

REASONS

BACKGROUND

1 The claim was presented on 22 January 2017. The claimant complained of direct race discrimination, harassment and victimisation. The claim was resisted. In their response, accepted on 21 February 2017, the respondent denied having discriminated against the claimant. The respondent identified the preliminary issue of time bar in response to the claim of direct race discrimination. The claimant sought to amend his claim to add a claim of unfair dismissal for a reason that related to political affiliation and a contract claim.

The claimant's application to amend was considered at a preliminary hearing held on 17 July 2017. The application was refused.

2 The case was listed for a hearing to consider the claims of direct race discrimination, harassment and victimisation. The Tribunal considered liability only with remedy, if appropriate, reserved for a further hearing. The claimant gave evidence and called Susan McGhee, Customer Service Leader; Andrew Weir, Continuous Improvement Manager; Gary McDonald, former Security Guard with G4S & Frank Hunter, trade union representative with PCS to give evidence. The respondent called Gail Crawford, Higher Executive Officer; Janice McGregor, Executive Officer; Peter Glen, Business Manager; Karen Pritchett, Universal Credit Coach Worker and former Floor Manager & Stefan Brooks, Work Coach Manager to give evidence. The Tribunal also heard evidence from Rosina Hynes, Social Media Manager in relation to the transmission of Karen Pritchett's evidence by video link. The parties provided the Tribunal with a Joint Bundle to which documents were added during the hearing (P116 –121). The parties provided the Tribunal with written submissions. The claimant was represented by Ms K MacLennan, Lay Representative. The respondent was represented by Dr A Gibson, Solicitor.

3 On the first day of the hearing concerns were raised by Dr Gibson about written submissions made on behalf of the claimant and lodged with the Tribunal in advance of the hearing. Dr Gibson disputed allegations against him of making discriminatory remarks to the claimant at an earlier stage in the proceedings. The Employment Judge consulted her notes of the Preliminary Hearing held on 30 May 2017 at which the remarks were said to have been made. The Employment Judge confirmed that she had recorded Dr Gibson as misquoting a remark allegedly made by Gary McDonald and that she had no record of Dr Gibson directing any discriminatory remarks at the claimant. When giving his evidence, the claimant raised concerns about being cross-examined by Dr Gibson. The Tribunal was informed that the claimant felt very anxious and was concerned that his evidence might be compromised by the stress of being cross examined by Dr Gibson. The Tribunal considered its obligation to give effect to the overriding objective and the right of both parties

to a fair hearing. It considered whether any adjustments were required to facilitate the effective participation of the claimant in the proceedings. Before the claimant had completed his evidence in chief, Ms MacLennan confirmed that the claimant was no longer opposed to Dr Gibson cross-examining him and no adjustments were sought. On 4 September 2018 the claimant applied for strike out of the response on the grounds that the manner in which the proceedings were being conducted on behalf of the respondent was scandalous, unreasonable and vexatious in terms of Rule 37(1)(b) of the Rules of Procedure 2013. The application was refused.

FINDINGS IN FACT

4 The Tribunal found the following material facts to be admitted or proved; the claimant is of Polish nationality. The respondent is a government department responsible for welfare, work and pensions. The claimant's employment with the respondent began on 1 August 2016. He was employed as an Executive Officer Band C. His probationary period was due to end on 31 January 2017. The claimant was based at the respondent's job centre in Hamilton ("the job centre"). He was the only Polish national employed in the job centre. The building in which the job centre is based, Cameronian House, is also occupied by the Procurator Fiscal Service. At the time of the claimant's employment, security services at Cameronian House were provided by Trillium, a property management company. Trillium contracted with G4S to provide security guards at various locations including Cameronian House.

5 In accordance with their public-sector equality duty the respondent provides contractors, including Trillium, with Guidance on Diversity and Equality Requirements ("Guidance") (P121). The respondent's Guidance (P121) identifies the respondent's legal requirements as follows;

"**Legal requirements**

As a public authority the Department, when delivering our services and carrying out our functions, must have 'due regard' to the three aims of the Equality Duty:

- *eliminate unlawful direct or indirect discrimination, harassment and victimisation and other conduct prohibited by the Act.*
- *advance equality of opportunity between people who share a protected characteristic and those who do not; and*
- *foster good relations between people who share a protected characteristic and those who do not work.*

These requirements also apply to any function that is contracted out to external organisations to deliver on our behalf e.g. provision of training preparing people for work or provision of services delivered to DWP staff.

Contractors must recognise the responsibilities that DWP has and are required to comply with all equality legislation when delivering DWP contracts. Contractors are also expected to use all reasonable endeavours (to a level to meet the legislative requirements) to ensure that when procuring sub-contractors, they also cooperate with DWP in satisfying the requirements.

Contractors must recognise that, as a public authority, DWP must be proactive – DWP must not only deal with the consequences of discrimination, they must take all necessary steps to prevent discrimination happening in the first place and take the opportunity to actively promote equality.

All contractors and sub-contractors must be aware of the DWP policy in this area".

6 The respondent's Guidance (P121) also identifies the responsibilities of contractors in relation to diversity and equality.

7 On 3 August 2017 the claimant was receiving induction training. The training had been arranged by his line manager, Janice McGregor. The claimant was job shadowing Karen Pritchett who had been given responsibility to train the claimant that day while acting as a Floor Manager. Karen Pritchett had recently applied for promotion from band B to band C. She had been placed on a reserve list for a promoted post. Karen Pritchett is a very experienced employee having worked for the respondent for around 25 years. She had been based at the job centre for around 14 years. She is now working in Cambuslang in a promoted post.

8 The claimant job shadowed Karen Pritchett for most of the day. At around 4pm, the claimant and Karen Pritchett were working in the job centre's reception area. Karen Pritchett, through conversation with the claimant, was aware of the claimant's Polish nationality and how he had met his partner, Kate MacLellan. Gary McDonald, one of five G4S security guards allocated to Cameronian House, was working in the job centre's reception area in accordance with the shift arranged by G4S for that day. The reception area was open plan. The claimant and Karen Pritchett were greeting customers and answering general enquiries. Gary McDonald was providing security services in accordance with instructions from G4S. They were standing by the front desk situated in the reception area. Gary McDonald asked the claimant where he was from. The claimant answered "*Stonehouse*". Karen Pritchett said to the claimant "*He meant originally*". The claimant replied, "*I'm Polish*". Gary McDonald remarked "*British people can't find jobs because of you fuckers*". The claimant was taken aback by the remark. He was upset. He felt humiliated. Karen Pritchett did not challenge Gary McDonald for making the remark. She did not react. This upset the claimant. Gary McDonald began to ask the claimant about his personal life. The claimant felt uncomfortable. He felt obliged to respond to Gary McDonald's questions. Gary McDonald asked the claimant whether he had a wife. The claimant replied that he had a girlfriend. Gary McDonald asked the claimant if his girlfriend was Polish and whether she was "*tall and blond*". The claimant explained that his partner is Scottish. Gary McDonald asked the claimant what his girlfriend does. The claimant replied that his girlfriend is an English teacher. Karen Pritchett

commented "*That's how they met*". Karen Pritchett and Gary McDonald continued to talk to each other. Gary McDonald asked the claimant "*How did you pay her?*" and "*Did you get your money back?*" The claimant felt embarrassed and upset by Gary McDonald's questions and remarks about his partner.

9 The claimant was permitted to move around the job centre. At around 4.30pm the claimant went over to Janice McGregor's desk. She asked the claimant about his day. The claimant appeared withdrawn and reluctant to talk. Janice McGregor felt concerned and encouraged the claimant to tell her what was troubling him. The claimant told her that that the security guard had made the remark ""*British people can't find jobs because of you fuckers*". Janice McGregor was shocked. Karen Pritchett approached Janice McGregor's desk. Janice McGregor asked Karen Pritchett what had happened. Karen Pritchett replied that Gary McDonald "*didn't mean it".* She sought to dismiss what Gary McDonald had said to the claimant and suggested that he had not intended to cause offence. Karen Pritchett's response upset the claimant. Janice McGregor felt concerned for the claimant and suggested that he might want to leave for the day. The claimant left the job centre and went home.

10 The claimant was unable to stop thinking about the incident at work. He could not sleep. He had no appetite. He felt unable to attend work on 4 August 2016. Janice McGregor contacted the claimant by telephone. The claimant informed her that he felt too upset to attend work. Janice McGregor sought to reassure the claimant that the incident was unacceptable and should not have taken place. The claimant felt reassured. Janice McGregor informed her line manager, Gail Crawford that while the claimant had been job shadowing Karen Pritchett the previous day Gary McDonald had made a racist remark.

11 The claimant returned to work on 5 August 2016. He met with Janice McGregor and Gail Crawford. They were both concerned about the incident and anxious to meet with the claimant. He described Gary McDonald's conduct on 3 August 2016 and expressed disappointment that Karen Pritchett had not intervened. Gail Crawford sympathised with the claimant and

described the situation as totally unacceptable. She sought to reassure the claimant that she would contact Trillium and request that Gary McDonald did not return to the job centre and would speak to Karen Pritchett informally about the incident. Gail Crawford explained to the claimant that without him making a formal complaint she could only request and not insist that Gary McDonald did not return to the job centre. When asked by Gail Crawford, the claimant confirmed that he did not wish to make a formal complaint against Karen Pritchett. Gail Crawford sought to reassure the claimant that he would be fully supported should he decide to make a formal complaint against either Gary McDonald or Karen Pritchett. The claimant confirmed that he did not wish to make a formal complaint. Gail Crawford confirmed that she would speak to Karen Pritchett about how inappropriate behaviour should not be tolerated. The claimant felt reassured.

12 Gail Crawford spoke to Karen Pritchett informally about the claimant's account of the incident. Karen Pritchett denied having participated in the incident. She denied having heard anything. Gail Crawford reminded Karen Pritchett about challenging discriminatory behaviour and advised her to seek help from management if she felt unable to intervene. The claimant was reluctant to work with Karen Pritchett following the incident on 3 August 2016. He felt let down by her response to Gary McDonald's behaviour towards him. Karen Pritchett kept her distance from the claimant.

13 Following her meeting with the claimant, Gail Crawford contacted Pat McDonald of G4S to report the incident. She requested that Gary McDonald did not return to the job centre. The respondent does not have authority to discipline or otherwise sanction employees of G4S. Pat McDonald agreed with Gail Crawford that Gary McDonald should no longer be allocated to work at the job centre.

14 On 17 August 2016, the claimant noticed Gary McDonald working in the job centre. He immediately informed Gail Crawford and Janice McGregor. He expressed shock and disappointment that Gary McDonald was in the job centre. Gail Crawford and Janice McGregor were taken aback given the assurances they had received previously from G4S. The claimant felt let down

by his line managers and humiliated in front of Gary McDonald. Gail Crawford was concerned for the claimant and contacted Pat McDonald of G4S. Pat McDonald explained that Gary McDonald had been posted to the job centre as a number of other employees were unwell and his options for providing cover that day were limited. Gail Crawford explained to the claimant that she had only been able to request that Gary McDonald did not work at the job centre as he was a contractor and the claimant had not raised a formal complaint against him. The claimant agreed to make a formal complaint. Gary McDonald remained in the job centre for the rest of the day. The claimant felt embarrassed and upset. He informed Gail Crawford and Janice McGregor that he felt unable to work in the same place as Gary McDonald and would have to go home. The claimant was allowed to go home.

15 Gail Crawford contacted Mike Gargaro of Trillium later that day to confirm that the claimant wished to make a formal complaint about Gary McDonald. She followed up their discussion by e mail on 18 August 2016 (P12/114) as follows;

"As discussed on the telephone yesterday a member of our staff Szymon Sikorski wishes to make a formal complaint against a member of G4S staff Gary MacDonald. I should be grateful if you would take the necessary steps to start this process.

In the meantime because of the nature of the allegations we must insist that Gary MacDonald is not posted to the Hamilton site and should be grateful if you could confirm that this will be the case as soon as possible".

16 Mike Gargaro informed Neil Booth of G4S that the claimant wished to make a formal complaint against Gary McDonald. Neil Booth wrote to Gail Crawford by e mail later that day (P12/112) as follows;

"I have received the email that you sent to Mike, I was informed there was an issue whilst I was on annual leave. Please be rest assured I am taking this extremely seriously and will be taking this forward through our investigatory process. Once you receive the formal complaint from Szymon Sikorski please

can you forward on to me as I will need to take it forward. Also as part of the process if Szymon is willing to agree I would like out a Q&A with him and any other staff members that may have witnessed the issue, with your permission.

Also please be assured that Gary will not be allocated to the site whilst this is investigated and he will be posted elsewhere.

Please accept my apologies for this issue. If you have any questions or wish to discuss please do not hesitate to contact me. I have left a message for you at the JCP."

Neil Booth subsequently visited the job centre to interview the claimant. Karen Pritchett declined to meet with him.

17 The claimant returned to work on 18 August 2016. He delivered a letter to Gail Crawford dated 17 August 2016 (P11/109-111) in the following terms;

"**Grievance by S. Sikorski with reference to Harassment, Equality Act (2010) section 26.1**

The Equality Act 2010, section 26, states that I am protected against harassment at work related to my protected characteristic of race.

Harassment is defined in the Act as unwanted conduct related to a relevant protected characteristic, and has the purpose of effect of:

- *Violating my dignity, or*
- *Creating an intimidating, hostile, degrading, humiliating or offensive environment for me.*

On August 3rd 2016 at Hamilton Job Centre the following conversation took place.

Security guard: "Where you from?"

S. Sikorski: "Stonehouse."

Karen: "He meant originally…"

S. Sikorski: "I'm Polish."

Security guard: "British people can't find jobs because of you fuckers."

S. Sikorski was shocked and declined to respond to the above comment. The conversation continued to include comedic observations about a Polish person's speaking Scots language, suggestions that he learns how to swear in Scots, derogatory remarks about all Polish women being "tall and blonde" and sexual innuendos about his girlfriend. Full details of the conversation can be supplied on request. It is my understanding that the incident was recorded on the company's CCTV.

Please note that – as advised by the Equality Advisory Service on 17/08/16 – harassment can include verbal or written conduct including "race-based jokes" and "rumours about your personal life".

I have tried resolving this matter through numerous meetings with my line manager on August 3rd, August 6 and August 17th. However, I am not satisfied with the outcome. Consequently, I would like to formally raise my concerns through a grievance in accordance with the company's grievance procedure. The reason for this is to investigate the concerns that I have raised, with a view to resolving these then as soon as possible.

I understand that a grievance meeting will be arranged in which we can discuss this matter and try to resolve these concerns. I also understand my right to be accompanied in this meeting by a trade union representative.

I look forward to receiving your response in writing within 14 days from the receipt of this letter or in line with the company's grievance procedure."

Gail Crawford informed the claimant of the undertaking from G4S that Gary McDonald would not be posted to the job centre until there had been a full

investigation into the incident. She passed the claimant's letter (P11/109-111) to Janice McGregor.

18 On 19 August 2016 Janice McGregor contacted the respondent's HR department by e mail (P13/116) seeking advice and providing them with a copy of the claimant's letter (P11/109-111). Gail Crawford spoke to HR on 22 August 2016 and was informed by Carol Dunse of HR (P15/119) that the situation she had described was for G4S to address under their disciplinary procedures. Carol Dunse confirmed that an investigation by G4S was the correct route as the subject of the complaint was a G4S member of staff. She confirmed her advice to Gail Crawford by e mail later that day as follows;

"Thank you for your time just now.

I explained that the situation you described was for G4S to address under their disciplinary procedures.

You told me that you had already contacted G4S manager to explain that you had received the complaint and that they had agreed to investigate the matter. I confirmed that this would be the correct route as the subject of the complaint was a G4S member of staff. If it had been agreed that DWP investigate, then G4S management would still make the decision based on the DWP investigation findings.

We discussed how the complainant and the witness would need to make themselves available for the G4S investigation.

I hope our brief conversation and the summary above prove helpful. Should you have any further questions, please do not hesitate to contact us using the reference number above."

19 Later that day Gail Crawford contacted Mike Gargaro by e mail (P14/ 117) in which she included an extract from the claimant's letter (P11/109-111). She described the claimant's letter (P11/109-111) as his "*formal complaint*". She requested that G4S "*investigate this matter as swiftly as possible*". She

confirmed that she had spoken to the claimant and that he was happy to be questioned by G4S if necessary. Gary McDonald left the employment of G4S before an investigation into the allegations against him had been completed.

20 Gail Crawford and Janice McGregor met with the claimant and his trade union representative Frank Hunter on 31 August 2016. Gail Crawford explained that the purpose of the meeting was to discuss the complaint made by the claimant in his letter of 17 August 2016 about Gary McDonald and a member of staff, Karen Pritchett. The claimant described Gary McDonald and Karen Pritchett laughing at his accent. Gail Crawford questioned the claimant about who had made the derogatory comments. The claimant confirmed that they were made solely by Gary McDonald. The claimant referred to Gary McDonald's appearance in the job centre on 17 August 2016. Gail Crawford sought to reassure the claimant that she had sent a request to G4S that Gary McDonald should not be allocated to work at the job centre and that G4S had confirmed the position in writing. Gail Crawford confirmed that the formal procedure was now underway with G4S and that she was waiting for an update. The claimant confirmed that he did not require any other support to be put in place and that there were no outstanding issues. It was agreed to adjourn the meeting pending conclusion of the G4S procedure and to keep each other informed of any developments.

21 Janice McGregor had a routine meeting with the claimant on 2 September 2016 to discuss his work, training and performance (P17/122-123). During the meeting, Janice McGregor mentioned the possibility of Karen Pritchett being involved in the claimant's future training to which the claimant expressed some reservations. Janice McGregor was concerned about the claimant's reluctance to work with Karen Pritchett. She sought to reassure the claimant that Karen Pritchett is an experienced trainer and mentioned that at their meeting on 31 August 2016 he had not complained about Karen Pritchett's involvement in the conversation on 3 August 2016. The claimant explained that he had been avoiding Karen Pritchett and wanted to keep it that way. He complained about Karen Pritchett failing to approach him since the incident on 3 August 2016. Janice McGregor suggested that this may be due to a

request on his part that they did not work together. She offered the claimant mediation with Karen Pritchett. She was keen that they should be able to work together. The claimant agreed that mediation was a good idea but did not feel ready to participate as Karen Pritchett had not approached him since the incident. The claimant described feeling uncomfortable about Karen Pritchett failing to gain promotion but having to train him. Janice McGregor sought to reassure the claimant that Karen Pritchett would act professionally when training him and other new employees. They agreed to wait until the outcome of his complaint about the incident before deciding how to move forward.

22 The claimant wrote to the respondent on 4 September 2016 objecting to minutes of the meeting on 31 August 2016. In his letter (P32/152 – 154) (incorrectly dated 4 October 2016) the claimant stated that in his "*original grievance letter of 17/08/16*" his complaint "*also includes the behaviour and participation of DWP staff member Ms K. Pritchett in the incident on 04/08/16*". The claimant wrote;

"Ms Pritchett's comments on 04/08/16 (sic) included "He meant originally" as a prompt to Mr McDonald. Ms. Pritchett also laughed at Mr Sikorski on several occasions throughout the context of the conversation. She also physically aligned herself with Mr McDonald – physically isolating Mr Sikorski. She later – in the presence of Janice McGregor – dismissed the conversation as a "joke"; "he didn't mean it".

It is worth noting that legally racism is defined as including jokes, body language and facial expressions amongst other behaviours. The Equality Advisory Service supports Mr. S. Sikorski on this point."

In his letter (P32/152-153) the claimant requested CCTV footage of the incident and copies of all reports regarding the initial management of the incident from 4 to 17 August 2016. The claimant expressed concern that a page of his letter of 17 August 2016 (P11/109-111) had been left in the job centre's photocopier on 31 August 2016. He referred to his meeting with Janice McGregor on 2 September 2016 at which he claimed to have been

informed that Karen Pritchett would conduct his training in the future. The claimant stated that he was "*of the hope that this grievance can be satisfactorily resolved within the workplace. However, failing this, it shall proceed to a tribunal*".

23 Gail Crawford wrote to the claimant on 5 September 2016 (P18/124) inviting him to a meeting to discuss the issues raised in his letter of 4 September 2016 (P32/152-154) as follows;

"I would like to invite you to a meeting to discuss this letter regarding your grievance and the issues therein. The purpose of the meeting is to consider the particular objections raised in the letter and to discuss how we will take these forward."

The letter concluded with the respondent's standard wording in letters concerned with confidentiality of investigations as follows;

"*You are required to respect the confidentiality of the investigation and must not discuss the investigation with anyone other than your companion. Any breach of confidentiality could lead to disciplinary action."*

24 On 5 September 2016 Gail Crawford contacted Mike Gargaro by email (P19/125) with a request that G4S make available the CCTV footage for 3 August 2016. Mike Gargaro informed Gail Crawford later that day that there was the possibility that the CCTV footage was no longer available as it was not their practice to retain footage for longer than 30 days. The CCTV footage was not made available to the respondent by either Trillium or G4S.

25 Gail Crawford and Janice McGregor met with the claimant on 6 September 2016. The claimant was accompanied by Frank Hunter, his trade union representative. Peter Glen, Business Manager attended to take minutes. Gail Crawford explained that she had arranged the meeting to discuss issues raised in the claimant's letter of 4 September 2016 (P32/152-154). She explained that the minutes of the meeting on 31 August 2016 had still to be

finalised and agreed. The claimant agreed with Gail Crawford that his letter (P11/109-111) had not included a complaint against Karen Pritchett. He agreed that the minutes of the meeting on 31 August 2016 should be amended to record that all the derogatory comments came from Gary McDonald after Karen Pritchett made the comment about where he came from "*originally*". Gail Crawford observed that there was no mention in the claimant's letter of 17 August 2016 (P11/109-111) or the minutes of the meeting of 31 August 2016 to Karen Pritchett having aligned herself with Gary McDonald. The meeting was adjourned at the claimant's request to allow him to discuss matters with Frank Hunter in private. When the meeting was reconvened, agreement was reached on amendments to the minutes of the meeting of 31 August 2016. Gail Crawford confirmed that G4S had informed her that the CCTV footage requested by the claimant was no longer available. Gail Crawford informed Frank Hunter that the request for the CCTV footage was made on receipt of the claimant's letter of 4 September 2016. Gail Crawford explained that until recently the formal complaint had been treated as against G4S and the respondent did not have any formal reports to provide to the claimant.

26 The claimant raised concerns about his letter of 17 August 2016 (P11/109-111) being left in a photocopier in the staff area of the job centre. Gail Crawford apologised and confirmed there was no reasonable excuse for this oversight. The claimant confirmed that he did not wish to make a formal complaint about this matter. Gail Crawford advised the claimant that if he wished to make a formal complaint against Karen Pritchett he should lodge a grievance in accordance with the respondent's grievance procedure (P109/377-387). The claimant confirmed that he did now wish to lodge a grievance. Gail Crawford showed the claimant where to find the respondent's grievance procedure (P109/377-387) on their intranet. While they were looking at the grievance procedure (P109/377-387) Gail Crawford mistakenly observed that the claimant was out with the 30-day period for lodging a grievance. She had failed to appreciate that the 30-day period referred to working days.

27 In addition to their grievance procedure (P109/377-387) the respondent informs employees of their rights and obligations in relation to harassment, discrimination and dignity in the workplace during employee induction and at regular intervals during employment. The respondent has a policy on "How to: Recognise Bullying, Harassment and Discrimination" (P111/400-402). Employees are made aware that discriminatory conduct is unacceptable and can result in disciplinary proceedings. They have guidance and information for employees – "Equality and You" – (P118) that explains to employees what they need to do to avoid discrimination and promote equality in the workplace including an awareness of and keeping up to date with the relevant legislation and requirements of the Equality Act 2010. The respondent emphasises to employees its commitment to equality and diversity in the workforce at annual reviews and when agreeing performance objectives with employees. The respondent provides training on equality and diversity including unconscious bias. They display posters in the workplace to raise awareness of equality and diversity issues.

28 Gail Crawford contacted HR by email on 8 September 2016 (P26/138) requesting assistance with a grievance by the claimant against Karen Pritchett. She provided HR with a copy of her "*timeline of events for a grievance involving members of our staff and G4S*" (P24/133 – 135). She requested HR's initial thoughts on anything she should have done or should do and on what support HR could offer going forward. Joanne Singer from the respondent's HR replied by e mail (P27/139) later that day as follows;

"Happy to share my initial thoughts –

Although Szymon may be disappointed that Karen did not interject, I do not believe there are reasonable grounds for him to raise a grievance against her. While it might have been helpful if she had intervened, I don't think it was her place to do this and I can imagine she may not have felt comfortable doing so given the nature of the comments being made by the security guard. I appreciate Szymon may feel disappointed or let down by Karen's perceived lack of support, but unless she instigated or was involved in the verbal abuse

I don't think there are grounds for him to raise a grievance against her. As you point out, he is also outside of the 30 days window and I cannot see any reason why he delayed his decision to submit the second grievance. What are his reasons for deciding now that he wants to pursue a grievance against her?

I'm also concerned from reading the notes that Szymon was offered the option to pursue formal action against Karen. I don't think this was appropriate, for reasons set out above, but furthermore as the policy intent is to resolve disputes/issues informally before moving to the formal process I think this should have been explored fully before advising him he could pursue formal action.

Ultimately as Szymon is raising this grievance outside of the 30 days timescales, I do not think he is able to pursue this. If you think there is a need to consider this grievance despite it being outside of the timescales, I would strongly recommend you contact CSHR Casework for advice. My recommendation would be that instead of a grievance, if Szymon remains concerned about Karen's behavior his LM should try and resolve this informally by acting as a mediator and facilitating an honest conversation between the two of them."

29 The introduction to the respondent's Grievance Procedure (P109/377-387) provides as follows;

"1.1 An employee's ability to raise a grievance is unrestricted. This document describes the most suitable way for an employee to raise a grievance and indicates the most appropriate resolution route. This include complaints about harassment, discrimination and bullying. It should be read in conjunction with the 'Grievance Policy'.

1.2 This procedure must be followed to ensure that the statutory code of practice laid down by the Advisory, Conciliation and Arbitration Service (ACAS) is adhered to.

1.3 The 'Grievance Advice' contains guidance for use throughout the process and support is available through the following 'How to' guides:

- *Use Mediation to resolve conflict*
- *Decide the best route for resolving a grievance*
- *Recognise and deal with vexatious and malicious grievances*
- *Recognise harassment, discrimination and bullying*
- *Investigate discipline and grievance cases*
- *Hold a discipline or grievance meeting*

1.4 All actions in this procedure should normally be taken within the set times. However, it is recognised that this is not always possible due to the complexity of the case or circumstances such as working patterns, shift working, annual leave, public holidays and/or employee absence or disability, in which case all actions should be taken as soon as reasonably possible. The reasons for any delay should be recorded.

1.5 If the employee requires any reasonable adjustments to enable them to attend meetings or deal with correspondence, they should inform the manager accordingly. Managers will need to put adjustments in place before taking action.

1.6 Employees cannot invoke this policy to raise concerns about Departmental policies.

1.7 This policy assumes that employees have not reacted too quickly to situations as often things can look different after calm reflection, or when considered in the context of one's total experience at work.

1.8 DWP has a zero tolerance policy to harassment, discrimination and bullying and takes all allegations seriously whether they are one of the characteristics protected by law ((e.g. age, race, sex, disability, sexual

orientation, gender identity) or not. Managers should read the How to Recognise harassment discrimination and bullying if an employee's grievance indicates that harassment, discrimination and bullying may be an issue."

30 Section 2 of the respondent's Grievance procedure (P109/377-387) identifies three "*routes down which an employee can resolve their grievance*" as follows;

- *Employee action*
- *Manager Action*
- *Management Investigation*

The routes are not meant to be sequential and "*the most appropriate route should be used depending on the type of grievance*". Section 2.4 of the respondent's Grievance procedure (P109/377-387) provides; "*All cases of Harassment, Discrimination and Bullying must be dealt with by Management Investigation*". Management Investigation is described at Section 5 of the Grievance procedure (P109/377-387) as follows;

5.1 Management Investigation means enquiring into the complaint, giving notice of meetings and recording the discussions before reaching a decision. (Employees have a right to be accompanied by a colleague or trade union representative to meetings).

5.2 Complaints dealt with by Management Investigation often involve more people, take longer, and may increase the risk of long-term damage to relationships. Due to this, the Management Investigation procedures should be applied only when it is justified and is the best way of proceeding. A manager does not need to take action via the Management Investigation process to change a decision, this can be done under Manager Action and it is preferable for the decision to be changed under Manager Action wherever possible.

5.3 Employees are expected wherever possible to progress their issue using the Employee Action or Manager Action procedures. Managers are required to engage constructively with employees to ensure the Employee Action and Manager Action procedures are meaningful and effective. Should the issue remain unresolved and, upon further reflection, the employee believes it is reasonable to do so, employees may have their grievance dealt with under the Management Investigation procedure.

5.4 For complaints to be dealt with by Management Investigation, they normally need to be about the relationship between the employee and the Department, and may potentially fall under the jurisdiction of an Employment Tribunal. Examples include:

- *allegations of harassment, discrimination or bullying*
- *terms and conditions such as pay or allowances, holiday pay and entitlement to carry forward*
- *equal pay*
- *unauthorised deduction from wage*
- *redundancy section, or*
- *any other grievance relating to a breach of the complainant's contract (in cases where it is alleged that the employer has acted unreasonably this may amount to a breach of contract); and/or*
- *failing to act or deliberately failing to act which results in an unlawful detriment concerned with being a health and safety representative, rights relating to the Working Time Directive, exercising legal entitlement for time off for studying or training, whistleblowing, exercising legal entitlement of request to take flexible working, or time off for family and domestic reasons; and/or*
- *a grievance relating to pregnancy or maternity leave; and/or*
- *rights in relation to trade union membership and activities.*

- *grievances relating to final end of year performance ratings.*

5.5 This is not meant to be a complete list but indicative of the type of case which would normally be appropriate for a Management Investigation.

5.6 Even though a grievance may satisfy the criteria for Management Investigation, it should be resolved by Employee Action or Manager Action if it is possible to do so satisfactorily.

Requesting a Management Investigation

5.7 If the grievance is appropriate for Management Investigation, the employee must:

- *raise the complaint on form G1 after a period of reflection but within 30 working days of the event or issue taking place*
- *be clear about the grounds for the grievance and the specific issue they want resolving*
- *describe what they have done so far to resolve the complaint themselves through Employee Action or Manager Action – if the employee has not taken these courses of action they should explain why*
- *stick to the facts*
- *avoid using language which might be considered insulting or abusive*
- *state what outcome is being sought*

5.8 If the grievance is a complaint of harassment discrimination or bullying by the line manager, the G1 form should be sent to the countersigning manager. In such cases a different, independent manager will always undertake the Management Investigation.

5.9 Employees will be allowed a reasonable amount of official time to prepare their case and get advice and support from a trade union representative or work colleague.

Receiving the request for a Management Investigation

5.10 Where consideration indicates that the complaint can be resolved by Employee Action or Manager Action, the manager should meet with the employee to discuss the complaint and make a decision to resolve the issue. This action normally concludes the matter.

*5.11 Where Employee Action or Manager Action is not appropriate (or has not resolved the issue **and** para 4.3 above has been considered), the manager must decide on a course of enquiry. There are two possible courses:*

- ***Harassment, discrimination and bullying** in all cases of alleged harassment, discrimination and bullying, the manager's first step is to telephone the HR Mediation & Investigation Service (tel XXXXX XXXXXX) for advice. HRMIS will advise on mediation or other possible courses of action. If HRMIS accept the case for investigation, they will discuss the referral process with the manager. They will then investigate the matter and make a decision on whether the complaint is upheld or not upheld. The manager, who must not be the subject of the complaint, will then review the resulting report with the employee and initiate any further action.*
- ***Other grievances –** in all other grievance cases the manager will investigate and be the Decision Maker. If, exceptionally, the line manager cannot undertake the investigation (e.g. because they cannot currently devote the time), an independent investigator of an equivalent or higher grade will be appointed and they will undertake the investigation and provide a report. This is a matter for local decision.*

5.12 Managers must Inform an HR expert – (Tel: XXXX XXX XXXX) that a grievance has been received if the subject of the complaint is a TU

representative and the grievance relates to their TU duties. CS HR Casework will offer advice on the handling of the complaint."

25. Section 5 of the respondent's Grievance Procedure (P109/377-387) further provides as follows;

Meeting the employee

5.16 The manager should invite the employee to a meeting to discuss general grievances and any harassment, discrimination and bullying cases not accepted for investigation by the HR Mediation & Investigation Service. An invitation to this meeting should normally be issued within five working days of receipt of the grievance. The purpose of this meeting is for the manager to understand fully the details of the grievance.

5.17 At this meeting, the manager, as Decision Maker, will assess the complaint, and, where possible, make a decision and inform the employee of that decision. If all the required evidence has been presented but the Decision Maker needs more time to reflect on the issues, they may close the meeting and give their decision in writing afterwards. They may, for example, need to seek advice or read relevant policies or ensure adherence to the standards for decision making in the HR Decision Makers Guide. The decision should be confirmed in writing within 5 working days of the meeting (not counting the day of the meeting) and the employee informed of their right of appeal.

However, in many cases, the meeting will have to be adjourned before the decision can be taken to either:

- *Allow the employee time to reflect and decide a different course of action, and/or*
- *Allow time for the manager, as Decision Maker, to undertake a speedy investigation during which witnesses would be interviewed or give statements.*

5.18 If the adjournment will take longer than 5 working days, not counting the day of the initial meeting, the manager, as Decision Maker, should inform the employee when they can expect a decision and the reason for the delay."

30. Section 6 of the respondent's Grievance Procedure (P109/377-387) provides as follows;

6. Harassment, discrimination and bullying

6.1 Line managers should read the guide How to Recognise harassment discrimination and bullying. Cases of harassment, discrimination and bullying must always be initially discussed with the HR Mediation and Investigation Service (HRMIS) by ringing (tele 01324 591 552).

6.2 The HR Mediation & Investigation Service (HRMIS) will assume responsibility for investigating and deciding cases where the issue is complex, severe or highly sensitive and which could involve serious or gross misconduct. In such cases the manager who contacted the HRMIS will be asked to complete the referral form.

6.3 HRMIS will interview all employees relevant to the grievance including witnesses where appropriate. At the end of the investigation, HRMIS will send copies of the investigation report, along with witness statements or other relevant material, to the referring manager".

31 On 11 September 2016 the claimant submitted a G1 form to the respondent (P28/141-147). He completed Section 2 of the G1 form - "*Raising a Harassment, Discrimination or Bullying grievance*". He identified the date of the incident as 3 August 2016 and the location as the job centre. He identified G4S Security Guard – G. McDonald as the "*names of others present*". He confirmed that he had requested CCTV footage but had been told that it was unavailable. He stated that he had considered mediation but it had not been offered. In response to the question about how he felt his complaint could be resolved, the claimant responded, "*do not work directly with Karen Pritchett*"

& "*I would like her to formally apologise*". The outcome the claimant sought was "*Do not work directly with Karen Pritchett*". The claimant confirmed that he had previously attempted to resolve the issue through contact with Gail Crawford. He confirmed that Gail Crawford had suggested that he request a Management Investigation. The claimant attached a copy of his letter of 17 August 2016 (P11/109-111) to his G1 form (P28/141 – 147).

32 The amended minutes of the meeting of 31 August 2016 were sent to the claimant and signed by him, Gail Crawford, and Peter Glen on 13 September 2016 (P16/120-121). The minutes of the meeting held on 6 September 2016 (P22/130-131) were signed at the same time.

33 On 18 September 2016 the claimant wrote to Gail Crawford (P29/148) thanking her for an offer of mediation with Karen Pritchett as part of his grievance raised on 13 September 2016 (P28/141-147). He confirmed that he was happy to engage in mediation. He requested Gail Crawford's report to date on Karen Pritchett's involvement in the incident on 3 August 2016. Gail Crawford passed the claimant's letter to Peter Glen who by now had management responsibility for the claimant.

34 The claimant's partner, Ms MacLennan wrote to Gail Crawford on 20 September 2016 (P30/149-150) requesting that, in the absence of a report, Karen Pritchett "*volunteered a statement into her actions*" on 3 August 2016. The claimant suggested that this "*would facilitate honest and informed discussion in the mediation process*". Ms MacLellan requested information about the proposed mediator and arrangements for the mediation. In her letter (P30/149-150) she wrote;

"Mr Sikorski also wishes to draw your attention to his earlier point: "ACAS has advised that it would be helpful if Ms Crawford provide her specific reasons why Ms Pritchett was not included in the original grievance when her conduct was highlighted in Mr Sikorski's grievance letter of 17/08/16."

35 The claimant's G1 form (P28/141- 145) was referred to Peter Glen as the claimant's line manager. Peter Glen decided that Manager Action in terms of Section 5.10 of the respondent's Grievance Procedure (P109/377-387) may be appropriate to resolve the claimant's grievance. He understood that the claimant was positive about the possibility of an informal resolution to his grievance and had agreed to mediation. He met with the claimant and confirmed that he would arrange a mediation at which he would be the mediator. Peter Glen is not a trained mediator. The claimant was accompanied by Frank Hunter at the mediation on 28 September 2016. Karen Pritchett was also accompanied by her trade union representative. Both the claimant and Karen Pritchett confirmed in writing that the mediation would be confidential. The claimant was anxious that Karen Pritchett apologise to him for her part in the incident on 3 August 2016. Karen Pritchett was very nervous. She understood that the claimant was accusing her of having racially abused him. She read from a statement. It did not contain an apology for participating in discriminatory behaviour. The claimant was disappointed. He sought to discuss the incident. Karen Pritchett became defensive. Voices were raised. The claimant became distressed. He left the mediation. No notes were kept of the mediation.

36 Peter Glen was about to go on holiday. He was disappointed that the mediation had been unsuccessful. He was keen to progress the claimant's grievance. He decided that it was appropriate to contact HR (HRMIS) about mediation in terms of Section 5.11 of the respondent's grievance procedure (P109/377-387). He was anxious to avoid delay. Peter Glen instructed Andrew Weir, Continuous Improvement Manager to contact HRMIS in his absence for advice on proceeding with the claimant's grievance. Andrew Weir contacted Carol Dunse of HR on 30 September 2016. He explained that Peter Glen wished to resolve an issue between the claimant and Karen Pritchett. He referred to the issue as an allegation regarding race. Carol Dunse wrote to Andrew Weir by e mail (P31/151) as follows;

"*From what you told me it would appear that the G4S issue is resolved but the complaint about the MOS has been submitted.*

I understand that they both agreed to meet to try and resolve the matter but it was felt that this was not successful.

I explained that it is still possible that mediation by HRMIS (HR Mediation and Investigation Service) could help, particularly as the complainant states that it is an apology that they are wanting and I explained how mediation could help both parties establish shared understanding about what happened and the impact of their action on others."

37 Carol Dunse of HR offered to speak to the claimant and Karen Pritchett about mediation to explain what would be involved and to provide reassurance about the proposed approach. In the event that either party did not agree to mediation, Carol Dunse advised as follows;

"Should either party not agree to mediation then local investigation into the complaint would be necessary. We discussed the impact and possible outcome of this and the risk of the timescales being considered by the investigation manager. We agreed that it is possible that Peter may have more understanding about the possible concerns from the complainant and you confirmed that you would discuss on their return."

38 The claimant informed Peter Glen on 4 October 2016 that he was not interested in participating in any further mediation. Susan McGhee, Customer Service Leader made arrangements for a local investigation as advised by HR. She asked Stefan Brooks, a Work Coach based in East Kilbride to investigate the claimant's Grievance (P28/141-145). Susan McGhee understood that the grievance would be investigated by local management. Stefan Brooks was identified as an appropriate Manager to conduct the investigation based on his management experience and location in another job centre. He was provided with a copy of the claimant's G1 form (P28/141-144) and the claimant's letter of 17 August 2016 (P11/109-111). He noted that the claimant's preferred resolution to his complaint was "*do not work directly with Karen Pritchett*" & "*I would like her to formally apologise*". He understood that this remained the claimant's preferred resolution.

39 The claimant was absent from work with stress from 14 to 28 October 2016 (P34/157). He was prescribed medication for depression. Peter Glen kept in regular contact with the claimant (P36/159-160). The claimant agreed to a referral to Occupational Health who produced a report on 28 October 2016 (P40/167- 168) suggesting;

"You may wish to consider if there is need to give training on Equality and Diversity to the rest of your team.

On his return you may wish to consider a meeting to discuss the issues raised by Mr Sikorski, resolution of the issues raised is likely to result in a sustained return to work."

40 The claimant returned to work on 2 November 2016. He had been absent from work for 11 days and had therefore exceeded his "trigger point" of 4 days in terms of the respondent's attendance policy (P108). Peter Glen wrote to the claimant on 22 November 2016 (P43/171) inviting him to an Attendance Review Meeting to discuss his level of sickness absence and what could be done to improve it.

41 Stefan Brooks invited the claimant to attend a meeting by letter dated 18 November 2016 (P42/170) as follows;

"I would like to invite you to a meeting to discuss your complaint. The purpose of the meeting is to consider the particular circumstances of your complaint. A decision will be made following the meeting. You should be prepared to present to me any points and evidence you feel should be taken into consideration when reaching my decision."

Stefan Brook's letter (P42/170) contained the respondent's standard wording regarding confidentiality of investigations.

42 The claimant attended a meeting with Stefan Brooks on 24 November 2016. He was accompanied by Frank Hunter. Margaret Earl attended as a note

taker. Stefan Brooks requested that the claimant explain to him what had happened and provide his version of events. He wanted to understand the claimant's position. The claimant questioned Stefan Brooks about the Grievance procedure. He asked Stefan Brooks whether he was both investigator and decision maker. He asked Stefan Brooks who had appointed him. He asked Stefan Brooks which of his grievances was being considered. Stefan Brooks confirmed that he had been appointed by Susan McGhee and that he was considering the claimant's grievance against Karen Pritchett. He asked the claimant to tell him about the incident. He suggested that they "*take a step back*" to allow him to consider the grievance submitted by the claimant. The claimant questioned Stefan Brooks about how the respondent had classified his grievance in terms of 5.11 of the Grievance procedure (P109/377-387) and whether it was as a complaint of "*harassment, bullying and discrimination*" or "*other*". Stefan Brooks explained his understanding that the grievance was being dealt with by local management under "*other*" and asked Frank Hunter if they were "*moving down another route*". Frank Hunter stated that there were "*definitely elements of harassment, bullying and discrimination*" in the Grievance. Stefan Brooks offered to check the position with HR.

43 The claimant questioned how much Stefan Brooks knew about his grievance. He questioned whether Stefan Brooks was taking his grievance seriously. Stefan Brooks was taken aback by the claimant's questions and sought to reassure him that he recognised the importance of his grievance. Stefan Brooks explained his understanding of the grievance that the claimant felt unable to work with Karen Pritchett and wanted an apology. He requested an opportunity to look at the papers and take advice as the meeting appeared to be moving in a "*different direction*". The claimant and Frank Hunter questioned Stefan Brooks as to why the grievance had not been classified as "*harassment, bullying and discrimination*". They referred Stefan Brooks to letters from the claimant from which Frank Hunter stated there could be no doubt that the incident related to "*harassment, bullying and discrimination*". The claimant and Frank Hunter questioned whether Stefan Brooks had seen

all the documents. Stefan Brooks confirmed that he would look at the procedure and seek advice.

44 The claimant referred to the standard wording in the letter from Stefan Brooks (P42/170) about confidentiality of the investigation. He asked Stefan Brooks what action the respondent would take in response to a grievance letter being left in a photocopier. Stefan Brooks confirmed that this was a separate issue and not pertinent to the claimant's grievance. Stefan Brooks confirmed that he could not discuss G4S employees as he was concerned purely with a grievance against Karen Pritchett.

45 Stefan Brooks requested a delay to allow him to reach a decision and to take advice on the issues raised by the claimant about the Grievance procedure. The claimant said that he would not attend any further meetings and was opposed to an adjournment. The claimant stated that he was on medication, considered the respondent to be responsible for harassment, bullying and discrimination and that his grievance had not been handled properly. Stefan Brooks offered to reconvene the meeting on 30 November 2016.

46 The claimant also met with Peter Glen on 24 November 2016 to discuss his attendance. Having taken advice from HR, Peter Glen decided that the normal outcome of a written warning was not appropriate given the claimant's absence from work was due to workplace stress and his grievance was outstanding. Peter Glen confirmed the outcome of their meeting to the claimant on 2 December 2016 (P50/183) that he had decided not to give the claimant a written warning.

47 The claimant was absent from work from 25 November 2016. He did not attend the reconvened meeting with Stefan Brooks on 30 November 2016. Stefan Brooks attempted to contact the claimant by telephone. The claimant requested that "*all communication be made in writing for legal purposes*". (P52/186). Stefan Brooks contacted HR for assistance (P47/177-178). He explained to HR that the case had been referred to HRMIS who had passed it back for management investigation after which he had been appointed to

investigate. He explained that he had held a meeting with the claimant which was adjourned, the claimant had said that he did not want to attend any further meetings and was now absent on sick leave. By e mail of 30 November 2016 (P47/177-178) HR advised as follows;

"Summary of Discussion:

From the information you provided we discussed that you should endeavor to hold the meeting with this member of staff as this is the best way of getting an accurate idea of what happened. You should offer to rearrange the meeting with this member of staff and ensure that they are aware that this can be held at a neutral location if they feel as though they cannot come into work. You could also offer to hold this meeting over the phone or give them an opportunity to provide a written submission to you. If the member of staff refuses to comply with any of these options then you will have to proceed with the process based on the information which you already have.

We also discussed that you should consider seeking an OHS referral for this member of staff as this could suggest any reasonable adjustments or suggestions as to the capability of the member of staff to take part in the process".

48 HR subsequently advised Stefan Brooks by e mail dated 5 December 2016 (P54/189) that he would be unable to reach a decision without meeting with Karen Pritchett as the subject of the claimant's complaint.

49 The claimant remained absent from work until 9 December 2016 with work related stress (P45/174). Peter Glen kept in regular contact with the claimant (P57/201 – 202). The claimant agreed to a referral to Occupational Health who produced a report on 9 December 2016 (P55/194-195). Occupational Health made the following suggestion;

"***Capability for work***

Mr Syzmon is planning to return on the 12th December due to risk of losing employment. In my opinion he will remain emotionally vulnerable and therefore to help support a return to work I would suggest that an open meeting is held with management to discuss perceived work issues and develop an action plan to address as anxieties are likely to continue whilst perceived work issues continue.

I am aware that Mr Szymon is currently a trainee work coach without a case load and would suggest that he is not allocated a case load until perceived work issues have been resolved and symptoms improve".

The claimant returned to work on 12 December 2016. The claimant had been absent from work for a further 11 days and had therefore exceeded his "trigger point" of 4 days in terms of the respondent's attendance policy (P108). Peter Glen wrote to the claimant on 12 December 2016 (P58/205) inviting him to an Attendance Review Meeting to discuss his level of sickness absence and what could be done to improve it.

50 Stefan Brooks contacted the claimant and Frank Hunter on 13 December 2016 about the possibility of reconvening their meeting (P59/206). He suggested they meet on 22 December 2016. Peter Glen met with the claimant on 21 December 2016. The claimant attended the meeting with Frank Hunter as his trade union representative. The claimant explained that his stress was of the same nature as before but exacerbated by the on-going investigation and complexity of his outstanding grievance. Frank Hunter explained that the claimant's condition was also exacerbated by the meetings and Stefan Brooks' presence in the office which caused the claimant to feel that he was being watched. Peter Glen sought to reassure the claimant that he was available to provide him with support and facilitate his attendance at work. Frank Hunter stated that the same mitigating circumstances applied to the claimant's most recent absence. Peter Glen sought to explain that each absence had to be looked at separately and "*it can't be a carte blanche across*

the piece". Having obtained advice from HR (P66/221), Peter Glen decided to issue the claimant with a written warning on 23 December 2016 (P67223) as follows;

"We met to discuss your sickness absence which is causing concern.

During the period 14/10/2016 to 9/12/2016 you have been absent due to sickness for 22 days.

I have outlined what you needed to do to improve your attendance at work.

We also discussed whether there were any other factors affecting your attendance. You talked about the problems you are having due to work place stress and that these problems are currently being dealt with under an ongoing Grievance case. You have pointed out that the investigating officer for the grievance is working very close with you causing stress and I have agreed to look at the situation. You have asked for a specific lunch hour to feel more included within the office and I have agreed for this to be the case.

We talked about the confidential support and advice that your GP and the Employee Assistance Programme may be able to give you to deal with these problems. The Employee Assistance Programme Helpline number is 0800 652 3304.

I have decided to issue you with a written warning and must advise you that your attendance, conduct and performance will all be closely monitored until the end of your probation period from which is currently 28/2/2017 but could change if your probation period were to be extended.

I have to advise you that during this period, your contract of employment may be terminated if you have any further sickness absence. Your contract of employment may also be terminated if your conduct or performance is unsatisfactory during this period."

Peter Glen prepared a written record of the attendance management meeting (P62/210 -211).

51 The claimant did not attend the meeting with Stefan Brooks on 22 December 2016. Frank Hunter provided Stefan Brooks with a written statement from the claimant (P64/213 – 219). Stefan Brooks contacted Karen Pritchett to interview her about the incident on 3 August 2016. Karen Pritchett was unwilling to meet with Stefan Brooks and agreed to answer questions over the telephone on 12 January 2017 accompanied by a representative, Sandra McDowell. Stefan Brooks prepared a transcript of their discussion (P71/228-229) as follows;

"***Stefan****: During a conversation between Szymon and Gary McDonald (G4s Employee) Szymon said that he was from Stonehouse, did you make a reply to either Szymon or the G4s Employee?*

Karen*: yes, I said to Szymon that he means where are you from originally.*

Stefan*: do you recall the G4s Employee saying "British people can't get jobs because of you" which Szymon said was directed at him.*

Karen*: I don't recall that or any further conversation as I was dealing with customers at the front door.*

Stefan*: do you recall separating yourself (moving away) from Szymon during any discussion that day? Szymon stated that both you and G4s Employee stood apart from him.*

Karen*: no*

Stefan*: where you aware of the incident between Szymon and the G4s Employee?*

Karen*: no.*

***Stefan**: when did you become aware of the incident between Szymon and the G4s employee?*

***Karen**: the next day when Szymon's Line Manager discussed it with me. (I believe Szymon was absent from work the following day).*

***Stefan**: concluded the call by thanking Karen for her time".*

52 Stefan Brooks did not conduct any further interviews. He decided to reject the claimant's grievance. He wrote to the claimant on 19 January 2017 (P76/239) confirming his decision as follows;

"I am writing about our grievance meeting on 24th of November 16 where we discussed your grievance about Karen Pritchett.

The main reasons for your grievance were Karen's comments and actions on the 3rd of August 16 which you allege made you feel humiliated.

Having considered all the facts available to me in the attached documents,

My decision is to not to uphold your grievance.

The basis for the decision is that your allegation has not been corroborated by an Independent witness. Karen Pritchett's recollection states that she does not recall saying anything offensive to you as she was dealing with customers. On that basis and without evidence other than your statement I am unable to uphold your grievance".

The claimant was informed of his right to appeal against Stefan Brook's decision. He was provided with notes of their meetings (P44/172-173 & P65/220). The letter contained the respondent's standard wording in letters concerned with confidentiality of investigations.

53 The claimant was absent from work from 4 to 7 January 2017 with stress at work (P68/225). The claimant attended a meeting with Peter Glen on 16

January 2017 (P72/230) to discuss his third period of absence during his probationary period. Frank Hunter attended the meeting with the claimant. The claimant's probation period was due to end on 31 January 2017. Peter Glen was keen to encourage the claimant to complete his probationary period and move to a permanent contract with the respondent. He was concerned about how further absence from work by the claimant might affect completion of his probationary period. He informed the claimant that in all likelihood his probationary period would be extended. He described a third period of sickness within a probationary period as a "*serious situation*". Following the meeting, Peter Glen took advice from HR (P73/231-232). Peter Glen informed HR that he was considering whether it was appropriate to refer the case to a decision maker to consider dismissal for failure to meet the required standard of attendance during a probationary period. He was advised by HR (P73/231-232) that if special circumstances did not apply a referral to a decision maker would be consistent with the respondent's attendance policy (P108/348-376). The claimant was absent from work on 19 January 2017.

54 On 20 January 2017 the claimant attended a Back to Work meeting with Peter Glen. Following the meeting Peter Glen raised with the claimant an incident that had been reported to him on 18 January 2017. Peter Glen explained to the claimant that he had received a report from two other employees about the claimant walking out of a training presentation to take a tea break. He informed the claimant that his behaviour had been described as unprofessional. The claimant explained that before leaving the presentation he had discussed his entitlement to a tea break with the trainer. Peter Glen accepted the claimant's explanation and understood that the matter was at an end. Later that day the claimant informed Peter Glen that he felt unwell and was going home. He handed Peter Glen a G1 form relating to their earlier discussion. Peter Glen sought to reassure the claimant that he was not accusing him of wrong doing but had been reporting to him the concerns of other employees. The claimant agreed to reflect on whether he wished to pursue a grievance and it was agreed that they would discuss the matter further on his return to work. Peter Glen informed the claimant that he did not

wish to discourage him from pursuing a grievance. He handed the G1 form back to the claimant.

55 On 23 January 2017 Peter Glen completed a referral to a decision maker (P81/245 – 247). He was advised by HR later that day that he might wish to consider extending the claimant's probationary period to allow him to demonstrate ability to meet the required standard of attendance. The claimant was absent from work on 25 & 26 January 2017. On 27 January 2017 the claimant contacted Peter Glen by e mail (P88/255) requesting a written decision following his attendance management meeting on 16 January 2017. The claimant was absent from work on 30 & 31 January 2017.

56 The claimant resigned from the respondent's employment by letter dated 1 February 2017 (P96/274-275) in the following terms;

"Dear DWP,

"Enthusiastic about the job applied for and throughout all the examples he gave. Good and strong evidence for each example. Had prepared well and fully understood the competency. Showed great potential in all areas."

This positive comment comes from an interviewing panel accepting myself for an Executive Officer position, starting on 01/08/2016 at Hamilton Job Centre.

I was full of hope that this was going to be the career I was looking forward to and working towards through years of education and self-determination.

When starting my new career as a Civil Servant at Hamilton Job Centre, I was prepared to perform to my best abilities in a professional and respectful manner, therefore utilising all my skills and knowledge to serve and help people of Scotland.

On my third day at my new job brought me a true shock when I was racially and sexually harassed by two of my work colleagues.

I felt ashamed, humiliated, detached and stressed. Later on I could not come back to work, as I was distressed and full of fear that Hamilton Job Centre does not welcome Polish employees.

Sadly, my fear of being persona non grata at Hamilton JCP soon proved to be the terrible reality. After my complaint about the incident on the 03/08/17, my work situation drastically changed. I suffered victimisation, a series of unfair decisions, countless manager meetings, threats, false accusations, persecution, humiliation, stress and depression. I felt that my line managers acted against me because I am Polish and because I am defending my dignity.

The individuals that abused me on the 03/08/16 did not face any consequences that I know about.

The "great potential in all areas" mentioned by the interviewing panel when giving me the job has been obliterated by the fact I am Polish. I tried my best to be a good Civil Servant, but I can't change where I am from.

It is with deep regret I have to inform you that I am unable to continue my employment with Department of Work and Pensions due to the affect on my health from DWP's actions.

I wish to resign the position with immediate effect."

57 At the same time as resigning, the claimant submitted a G1 form to the respondent (P92/260 – 263) seeking an HR investigation into the job centre. As the claimant left the job centre, there was a minor altercation between the claimant and one of the employees who had reported his behavior to Peter Glen during which the claimant said "*See you in court*". No procedure was followed in response to the G1 form (P92/260 – 263) as the claimant, having resigned, was no longer in the respondent's employment.

ISSUES

58 The issues to be determined by the Tribunal were identified as follows;

(i) Did Karen Pritchett and/or Gary McDonald make the remarks attributed to them and behave in the manner alleged on 3 August 2016?

(ii) If so, did they treat the claimant less favourably than they treat or would treat others because of the protected characteristic of race?

(ii) If the claimant was treated less favourably by Gary McDonald because of race, is the respondent liable for the actions of Gary McDonald as an employee of G4S?

(iv) If the claimant was treated less favorably because of his race, is his claim for direct discrimination time barred as it was not brought within three months of the conduct to which the complaint relates and it is not just and equitable to extend the time for bringing the claim?

(v) Did Gary McDonald and/or Karen Pritchett engage in unwanted conduct related to the claimant's race which had the purpose or effect of violating his dignity or, creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

(v) If the claimant was treated less favourably because of his race and/or harassed by Karen Pritchett, can the respondent show that they took all reasonable steps to prevent their employees from treating the claimant less favourably because of his race and/or harassing him? &

(vi) Was the claimant subjected to a detriment by the respondent because he did a protected act?

SUBMISSIONS

CLAIMANT'S SUBMISSIONS

DIRECT DISCRIMINATION & HARRASSMENT

59 The claimant provided the Tribunal with written submissions dated 18 and 23 September 2018. What follows is a summary of the above. Ms MacLennan submitted that the claimant has established a prima facie case that he was subjected to direct discrimination and harassment by Karen Pritchett, an employee of the respondent and Gary McDonald, a G4S security guard over a 30-minute period on 3 August 2016. The discrimination and harassment, submitted Ms MacLellan, related to the claimant's protected characteristic of race (Polish). Ms MacLennan submitted that Karen Pritchett admitted a racist incident had taken place in the presence of Janice McGregor on 3 August 2016 when she dismissed the incident as a "*joke*". Karen Pritchett's conduct on its own, submitted Ms MacLellan, amounts to a violation of Sections 13 & 26 of the EA 2010. Ms MacLennan submitted that the claimant was also entitled to rely on statements said to have been made by Dr Gibson during the Tribunal proceedings to establish a prima facie case of discrimination. Referring to the case of **Igen Ltd v Wong & others 2005 ICR 931**, Ms McLellan submitted that the burden of proof has shifted to the respondent to disprove discrimination.

60 The respondent, submitted Ms MacLennan, is vicariously liable for the conduct of both Karen Pritchett and Gary McDonald. Gary McDonald may have been operating under a contractor, submitted Ms MacLennan, but his actions were directly linked to both his work and the claimant's role; the actions took place in the course of employment and on the respondent's premises. Ms MacLennan referred the Tribunal to the respondent's public-sector equality duty to "*protect and promote*" equality under Section 149 of EA 2010 and the respondent's obligations under its own policy – Guide for DWP contractors: diversity and equality requirements (P121) relating to contractors and sub-contractors.

61 The respondent's own Guide (P121), submitted Ms MacLennan, illustrates the close relationship between the respondent and G4S. In addition, submitted Ms MacLennan, Gary McDonald's alleged remark was made in the respondent's premises and was concerned with the respondent's primary function of helping people into work. Ms MacLellan described the claimant's role as concerned "*categorically with securing employment for citizens*" including British people. Gary McDonalds' job, submitted Ms MacLellan, was also inextricably linked to providing a service to job seekers by ensuring that there was an appropriate environment for people looking for employment. Likewise, submitted Ms MacLennan, Karen Pritchett's designated role with the respondent was primarily concerned with securing jobs for claimants including British people. In these circumstances, submitted Ms MacLennan, the close connection test has been met as the behaviour of Karen Pritchett and Gary McDonald was directly connected to their work. Ms MacLellan referred to the case of **Various Claimants v Barclays Bank PLC 2017 EWHC 1929 QB** which, she submitted, has extended the scope of vicarious liability to include the situation before the Tribunal.

62 Duty of care, submitted Ms McLennan, is a non-negotiable duty that cannot be delegated to a contractor and the duty of care under the contract of employment is solely between the employer and employee, in this case the respondent and claimant. Ms McLennan referred the Tribunal to both the common law duty of care and the employer's general duty to employees under Section 2 of the Health & Safety Act 1974. The respondent, submitted Ms MacLennan, had a legal duty to take all reasonable steps to protect the claimant from bullying and harassment, including risk assessments. Ms McLennan described G4S as" *well known for being a racist organisation*". She questioned what risk assessments were conducted in such circumstances. Ms McLennan referred to concern expressed by a number of charities in an open letter to the government written in September 2016 following the appointment by G4S to operate an equality advisory helpline (P405-420). Ms McLellan submitted that the respondent must have been aware of "*the track record*" of G4S and, having failed to do everything that was reasonable to

keep the claimant safe from harm, were in breach of their duty of care to the claimant.

63 Ms McLellan submitted that the present case can be distinguished from the case relied upon by the respondent of **Kemeh v Ministry of Defence 2014 EWCA Civ 91**. She described the racist abuse to which the claimant was subjected in the present case as a "*tri-party conversation*" in which, unlike **Kemeh**, two of the three participants were employees of the respondent. In addition, submitted Ms MacLennan, Karen Pritchett was an "*agent of the racist abuse*" along with Gary McDonald. Ms MacLennan submitted that in the present case, it is not possible to "*cleanly separate the dialectic triangle*" of the parts played by Karen Pritchett and Gary McDonald in the racist abuse of the claimant (illustrated at P421). Gary McDonald and Karen Pritchett jointly acted in a racist manner towards the claimant, submitted Ms MacLennan; "*setting the dynamic of two versus one*". The racist incident could only succeed, in such a way, submitted Ms MacLennan, because they both participated in the conversation.

64 It is also possible to distinguish the present case from **Kemeh**, submitted Ms McLennan, because in **Kemeh**, the claimant was able to physically remove himself from the racist abuse at any time; he was not, unlike the claimant, contractually obliged to be stationed at a particular location. The claimant, submitted Ms McLennan was contractually obliged to be stationed at the front desk where the racist incident occurred. He had been instructed to stand there by Janice McGregor, submitted Ms McLennan, as a result of which it was physically impossible for him to fully remove himself from the racist abuse. In conclusion, submitted Ms McLennan, even if the Tribunal did not find that the respondent was liable for Gary McDonald as an agent, they would still be in breach of their duty of care to the claimant at common law and under the Health & Safety Act 1974. Ms MacLellan also referred the Tribunal to Article 5 of the European Human Rights Act and Section 35 of the Reporting of Injuries, Disease and Dangerous Occurrences Regulations 2013.

65 Ms MacLennan submitted that by leaving his grievance in the communal photocopier, the respondent was in fundamental breach of the claimant's right to confidentiality and the implied term of trust and confidence. The breach of confidentiality, submitted Ms MacLennan, led to rumours circulating about the claimant and Gary McDonald, and caused the claimant to feel embarrassed and humiliated.

66 Ms MacLennan submitted that the respondent attempted to "*bury*" the claimant's grievance in an effort to conceal the incident of direct discrimination and harassment on 3 August 2016. Notwithstanding the claimant's letter of 17 August 2016 was clearly labelled grievance, submitted Ms MacLellan, the respondent "*externalised it*" as a grievance against G4S avoiding any investigation of their staff and failed to make their actions and methods clear to the claimant. Ms MacLellan submitted that failure by the respondent to explain their grievance procedure to the claimant, in particular given that he was a trainee and new to the organisation, amounted to a further breach of the implied term of trust and confidence. In addition, submitted Ms MacLellan, the claimant's grievance was misclassified as "*other*" and was not investigated properly and promptly. The decision was given on 17 January 2017, 5 months after the letter of 17 August 2016. Stefan Brooks as the grievance investigator, submitted Ms MacLellan, failed to mention or refer to the words "*racism*", "*discrimination*" or "*Polish*" while investigating or reporting the claimant's grievance. Ms McLellan referred the Tribunal to a case - **Ms C Howard v Metropolitan Police Service 2014** - in which she submitted there was a finding that a direction was made to remove all references to discrimination and harassment from a final report. There is a concerning commonality, submitted Ms MacLennan, of large public organisations attempting to avoid any reference in their records to racism.

67 As regards the procedure followed by the respondent, submitted Ms MacLellan, they failed to obtain statements from relevant witnesses and crucially, Stefan Brooks later decided against upholding the grievance due to lack of independent evidence. Similarly, submitted Ms MacLellan, the respondent failed to save the CCTV recording from 3 August 2018 which Ms

MacLellan described as crucial evidence highlighted by the claimant in his letter of 17 August 2016. The respondent, submitted Ms MacLennan, was obliged as an organ of government, under Section 149 of the EA 2010 and in accordance with Section 96 of the Crime and Disorder Act 1998 to report the incident on 3 August 2016 as a hate crime. Had they done so, submitted Ms MacLennan, the CCTV recording would have been admitted into evidence without question. Ms MacLellan noted parallels with a case - **J Davies v DWP** - in which she submitted the Tribunal emphasised the obligations of the respondent as a public body. Referring to the case of **D Blackburn v Aldi Stores Ltd UKEAT/0185/12/JOJ** - Ms MacLellan submitted that the respondent's failure to follow their own procedure also constituted a breach of the implied term of trust and confidence.

VICTIMISATION

68 In her written submissions, Ms MacLellan identified the following as acts of victimisation;

- *The holding of an excessive amount of meetings – more than 20 – regarding the Claimant's grievance.*
- *Six managers in Hamilton Job Centre were involved in the handling of the Claimant's grievance – causing additional stress and anxiety to him.*
- *Ms McGregor's suggestion that Ms Pritchett act as Mr Sikorski's trainer.*
- *Ms McGregor's 1:1 meeting with Claimant 02/09/16. Production Bundle page 122.*
- *DWP's abrasive and unprofessional mediation between Ms Pritchett and Mr Sikorski.*
- *Unfounded accusations of unprofessionalism against Claimant. Mr Glen's 'Return to Work' meeting with the Claimant of 20/01/17 included allegations that the Claimant acted "unprofessionally" on 18/1/17 by leaving a staff training session to take his medication at his allocated break time. Mr Sikorski was not pre-informed of these complaints: thus breaching*

ACAS Code paragraph 60: "Employees to be informed of the complaints against them and supporting evidence before a meeting." It is put that DWP were hunting for tenuous and unfounded reasons to vexatiously harass Mr Sikorski. The Claimant duly complained about this accusation in writing later that day. (Production Bundle page 242).

- *Mr Glen's refusal to accept the Claimant's grievance against him on 20/01/17 regarding the incident directly above. (Production bundle, page 242).*
- *Mr Glen's formal proposal to dismiss Mr Sikorski on 23/1/17 (the next working day) after Mr Sikorski attempted to file his grievance (Production bundle 245-247)*.

69 Ms MacLellan submitted that what she described as "*the malicious and insulting manner*" in which the respondent defended the claim, in particular the conduct of Dr Gibson towards herself and the claimant, caused further injury to feelings. Ms MacLellan described Dr Gibson's submissions as an attack on the claimant's character as opposed to a reasoned critique of the evidence before the Tribunal. Ms MacLellan questioned the integrity of Karen Pritchett given her conduct when appearing before the Tribunal and submitted that the Tribunal should reject Dr Gibson's characterisation of Gary McDonald as a "*squaddie*" with "*barrack room manners*" as being irrelevant to a defence to the claim of discrimination.

RESPONDENT'S SUBMISSIONS

DIRECT DISCRIMINATION

70 The respondent provided the Tribunal with written submissions dated 19 September 2018. What follows is a summary of the above. Dr Gibson on behalf of the respondent challenged the claimant's credibility. He referred to the allegations made against him as the respondent's representative of racial harassment and unreasonable conduct during the proceedings. He referred to the manner in which Gary McDonald was questioned by Ms MacLellan; the evidence of Peter Glen about the interaction between the claimant and

colleagues on his last day of work and the claimant's inconsistency in relation to whether his signature on the minutes of the meeting on 31 August 2016 (P16/120-121) was forged. The above conduct, submitted Dr Gibson, reflects poorly on the claimant; undermines his credibility and demonstrates that the accusations of harassment and victimisation levelled against the respondent have been manufactured out of one accusation of inappropriate behaviour by a G4S employee.

71 Dr Gibson submitted that the respondent was were willing to concede that something occurred at the job centre's front desk involving the claimant and Gary McDonald which caused the claimant to be upset. It is the respondent's position however, submitted Dr Gibson, that the claimant's account of what occurred thereafter has been taken out of context and has been exaggerated, distorted and manipulated by the claimant's partner in an attempt to finesse what should have been a straightforward claim against G4S. It is ironic, submitted Dr Gibson, that the respondent would have been supportive of the claimant bringing such a claim.

72 Unlike the respondent's witnesses who gave their evidence in a straightforward and honest manner, submitted Dr Gibson, the claimant's evidence came across as overly rehearsed and practised. The respondent's witnesses, submitted Dr Gibson, were happy to concede where they could have done things better such as avoiding two meetings on the same day and not leaving the claimant's letter in the photocopier. To suggest that these were acts of racial harassment and victimisation, submitted Dr Gibson, is utterly unfounded. Dr Gibson for the respondent suggested that there was an aspect of "*cry wolf*" being engaged in by the claimant. After the incident on 3 August 2016 there followed countless allegations that everyone with whom the claimant came into contact was motivated by racial malice to subject him to unwanted conduct because of his race or to victimise him. This is another reason, submitted Dr Gibson, why the Tribunal should prefer the evidence of the respondent's witnesses to that of the claimant.

73 Dr Gibson submitted that Gary McDonald's evidence, unlike of that of the claimant, was not rehearsed and lacking spontaneity. It should be borne in mind, submitted Dr Gibson, that Gary McDonald has long since left G4S. Dr Gibson described Gary McDonald as an *ex-squaddie - blunt," straight talking"* and happy to "*tell it as it was*". He did not attempt to paint a picture of a conversation which did not touch upon the claimant's race, submitted Dr Gibson. He did however deny, submitted Dr Gibson, making the remark attributed to him. The Tribunal, submitted Dr Gibson, should accept his evidence and find that the claimant had distorted the nature of his conversation with Gary McDonald. The most likely scenario, submitted Dr Gibson, is that Gary McDonald had made a genuine attempt to engage the claimant in friendly conversation which included questions as to why he had decided to move his life from Poland to Scotland. The respondent, submitted Dr Gibson did not dispute that Gary McDonald's direct and somewhat intrusive manner of questioning and his brash, "*barrack room manner*", left the claimant genuinely disconcerted and upset. Dr Gibson put this down to two completely different perceptions of the same behaviour by people from different backgrounds and having different views on life. Gary McDonald's evidence, submitted Dr Gibson, was not rehearsed. His account of the conversation was consistent with how conversations flow, how topics are explored, developed and change during the course of a conversation. His evidence, submitted Dr Gibson, rang true. The claimant's account, by contrast, was a far too neat, scripted version of the truth. Dr Gibson submitted that when weighing up the two accounts of the incident the Tribunal should find that they cannot be satisfied that Gary McDonald's actions amounted to racial harassment.

74 In relation to the evidence of Karen Pritchett, Dr Gibson submitted the Tribunal should bear in mind the immense stress the claimant's accusations have placed her under and how her evidence was impacted by stress. Dr Gibson accepted that her evidence was contradictory in places but submitted that she was very credible in her consistent denial that she had done anything wrong. This had been her position, submitted Dr Gibson since early September 2016 when she was first accused of racial harassment. Karen Pritchett, submitted

Dr Gibson, has been consistent throughout that she was present; she made one interjection along the lines of "*he means originally*". Beyond that she was not engaged in the conversation between Gary McDonald and the claimant but engaged in her job and dealing with customers. Dr Gibson submitted that Karen Pritchett's version of events is corroborated by that of Gary McDonald who had no reason or motivation to lie about what Karen Pritchett was doing on the day in question.

75 Dr Gibson submitted that the respondent cannot be held liable for anything alleged to have been done by Gary McDonald as he was not their employee or an agent acting with their authority. Dr Gibson referred to the lack of any averments in the claimant's case of Gary McDonald being an agent of the respondent acting with their authority. In the event the Tribunal was unwilling to accept his submission that agency did not form part of the claim, Dr Gibson referred the Tribunal to the case of **Kemeh v Ministry of Defence 2014 ICR 625 CA**. In the case of **Kemeh,** an employee of a catering company contracted by the Ministry of Defence to provide catering services had racially abused a soldier stationed in the Falklands. The Court of Appeal upheld the EAT's decision that whatever the precise scope of the agency concept in Section 32(2) of the Race Relations Act 1976 (predecessor of Section 109(2) of EA 2010) the catering company employee did not fall within it; while the fact that someone was employed by A would not automatically prevent him being an agent of B, the limited degree of control over the catering company's employee on the part of the Ministry of Defence came nowhere near constituting an authorisation to allow her to act on its behalf with respect to third parties. There was therefore no error of law on the part of the EAT in finding that the respondent could not be liable for the act of discrimination by the catering company's employee. The case of **Kemeh**, submitted Dr Gibson, is binding on the Tribunal.

76 Applying **Kemeh** to the present case, Dr Gibson submitted that Gary McDonald was also engaged in his job of assisting his employer – G4S - to fulfil a contract they had with a third party. Gary McDonald was working at the job centre because G4S had contracted with Trillium to provide security

guards in the job centre. Gary McDonald would not have been in the job centre, submitted Dr Gibson, but for the fact the Procurator Fiscal and the respondent are government agencies requiring the services of security guards. As in the case of **Kemeh**, submitted Dr Gibson, the Tribunal would err in law if they found that Section 109(2) of EA 2010 applied in such limited circumstances. The facts of the present case come nowhere near constituting an agent acting for a principal, with the authority of the principal, submitted Dr Gibson. As in **Kemeh**, submitted Dr Gibson, the limited degree of control over the G4S employee on the part of the respondent came nowhere near constituting an authorisation to allow Gary McDonald to act on the respondent's behalf with respect to third parties.

77 The facts of the case, submitted Dr Gibson, support a finding that the respondent had very limited control over Gary McDonald which did not extend beyond seeking compliance by contractors with their policy on matters of equality and diversity. While the respondent was also entitled to notify G4S of complaints made and request that they be dealt with, submitted Dr Gibson, they had no authority or locus to discipline Gary McDonald; hear a grievance brought against him or implement any outcome to a grievance or to impose any disciplinary sanction. Dr Gibson submitted that in the present case the respondent was even further removed from control over Gary McDonald than the scenario in **Kemeh** by the fact that Gary McDonald was at the job centre by dint of a contractual relationship between G4S and Trillium as opposed to the respondent. The respondent had no say whatsoever in whether it was G4S or any other security company which carried out the function provided by Gary McDonald. It is debatable submitted Dr Gibson, whether the respondent's policy (P121) even applied to G4S or whether G4S might be governed by an alternative policy issued by Trillium. It was Trillium's responsibility, submitted Dr Gibson, to make sure that their contractor complied with their responsibilities with respect to matters of equality and diversity. There was no evidence submitted Dr Gibson in this case to show that the duties Gary McDonald was obliged to undertake as an employee of G4S were also performed as an agent for the respondent.

78 Dr Gibson submitted that the Tribunal is not concerned with whether the respondent is vicariously liable for the acts of Gary McDonald at common law. The Tribunal, submitted Dr Gibson, is concerned with the statutory test set out at Section 109(2) of the Equality Act 2010. In any event, submitted Dr Gibson the relationship between Gary McDonald and the respondent did not meet the common law test of vicarious liability. Dr Gibson described the claimant's argument that **Kemeh** can be distinguished from the present case as Karen Pritchett was engaged in racial harassment with Gary McDonald as "*nonsensical*". The alleged involvement of an employee of the respondent acting in conjunction with Gary McDonald does not, submitted Dr Gibson, create a relationship of agent and principal between Gary McDonald and the respondent. Karen Pritchett was not asked to exercise any control over Gary McDonald. The claimant, submitted Dr Gibson, has failed to satisfy the legal test set out in Section 109(2) of the EA 2010. Dr Gibson referred the Tribunal to paragraphs 71 & 72 in the case of **Kemeh** where the Court of Appeal rejected the idea that a degree of integration with the principal's employees and a degree of proximity to them could result in liability. Similarly, submitted Dr Gibson, the Tribunal is not dealing with an "*acting in concert*" situation.

79 Dr Gibson submitted that the Tribunal should also reject any argument advanced by the claimant that because the respondent has a policy as part of their duty to fulfil the public-sector equality duty providing guidance (P121) to contractors on diversity and equality issues that they are liable for the actions of Gary McDonald. The existence of a policy, which is a reasonable step to prevent harassment and is indicative of the limited control of the respondent, cannot submitted Dr Gibson establish a relationship of principal and agent. Dr Gibson referred to the case of **Unite the Union v Nailard 2017 ICR 121** which, he submitted, highlights the relevance to the limited degree of control of the respondent over G4S employees in terms of their disciplinary code of conduct to the issue of liability. The respondent in this case submitted Dr Gibson had no power to discipline Gary McDonald which, he submitted, is a crucial factor in this case. It follows, submitted Dr Gibson, that any findings in fact the Tribunal makes as regards what Gary McDonald did or did not do

on 3 August 2016 cannot be used to establish a case that the respondent directly discriminated or harassed the claimant.

80 Dr Gibson submitted that in any event the claim for direct discrimination is time barred. The alleged act of direct discrimination occurred on 3 August 2016 and the claimant approached ACAS about early conciliation on 25 November 2016. Dr Gibson submitted that it would not be just and equitable for the Tribunal to extend the time for presentation of the claim. He referred the Tribunal to the authorities of **Bexley Community Centre trading as Leisurelink v Robertson 2003 EWCA Civ 576; British Coal Corporation v Keeble 1997 IRLR 336 and CPS v Marshall 1998 IRLR 494**. In relation to the factors to be considered by the Tribunal, Dr Gibson submitted that there appears to be no particular reason for the delay in bringing the claim other than tardiness; the claimant was clearly not ignorant of his right to raise a direct discrimination claim from to at least 17 August 2016; the claimant did not wait until all internal procedures and processes were out of the way before he raised his claim and had contacted ACAS on 25 November 2016 when still an employee of the respondent. No evidence has been provided, submitted Dr Gibson, to explain the delay. As regards the extent to which the cogency of the evidence is likely to be affected by the delay, Dr Gibson calculated the claim to be time barred by 3 weeks which, he submitted, is in addition to the 3 month period before the respondent was put on notice of a claim and able to take steps to defend proceedings such as obtain statements from those accused of direct discrimination. The claimant, submitted Dr Gibson, knew of the possibility to taking legal action at a very early stage. He indicated in his letter of 4 September 2016 that he would "*proceed to a Tribunal*". He waited until 25 November 2016 before putting matters into action. He did not act promptly. It is clear from the evidence before the Tribunal, submitted Dr Gibson, and in particular the article from the Herald Newspaper (P116) that the claimant contacted a number of lawyers albeit he claimed that they did not wish to take on his case because the respondent would "*hire some of the best lawyers in Scotland*". Dr Gibson submitted that such a statement was "*completely incredible*". It would appear that the claimant did have legal advice from a very early stage and it was reasonable for him to get legal advice when

the alleged incident occurred. In all the circumstances, submitted Dr Gibson, the claim of direct discrimination should be struck out on the grounds of time bar.

TIMEBAR

81 Even if the Tribunal was to find that the respondent was liable for the conduct of Gary McDonald and that the claim was not time barred, submitted Dr Gibson, the claim for direct discrimination should fail. The respondent, submitted Dr Gibson, struggles to identify the "*unfavourable treatment*" of the respondent by the claimant on 3 August 2016. The case is articulated, submitted Dr Gibson by the claimant as one of "*unwanted conduct*" as opposed to unfavourable treatment. It must be the case, submitted Dr Gibson, that Parliament intended that the two terms be distinguished from one another otherwise they would have simply used the same wording in both Sections 13 and 26 of the EA Act 2010. "Unwanted conduct" is what the claimant claims Gary McDonald and Karen Pritchett subjected him to on 3 August 2016. "Unfavourable treatment", submitted Dr Gibson, means something entirely different and even taking the claimant's case at its highest there was still no unfavourable treatment.

HARASSMENT

82 Dr Gibson referred the Tribunal to the specification by the claimant of the unwanted conduct about which he complains (28 to 34 of the joint bundle) and which, he submitted, along with the claimant's ET1 (pages 14 to 26) should be treated as the limit of his claim of harassment. Any additional alleged acts of unwanted conduct, submitted Dr Gibson, which the claimant seeks to introduce should be disregarded by the Tribunal.

83 Dr Gibson made submissions about each of the alleged acts of unwanted conduct identified in the claimant's written pleadings referred to above. The respondent did not dispute that if made the remark "*English people can't get jobs because of you fuckers*" amounts to unwanted conduct relating to the claimant's race in terms of section 26 of the EA 2010. Dr Gibson submitted that the Tribunal should not make such a finding in fact. For the reasons given

above, Dr Gibson submitted, that the Tribunal should accept the evidence of Gary McDonald as blunt, direct and truthful. He referred to the manner in which Gary McDonald was cross-examined by Ms MacLellan, in particular the irrelevant reference to his family. He submitted that the claimant was guilty of snobbery and hypersensitivity when conversing with someone who was not "*hamstrung by middle class sensibilities*".

84 Dr Gibson referred the Tribunal to the case of **Richmond Pharmacology v Dhaliwal 2009 IRLR 336** and in particular the EAT's observation;

"*While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct… it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase*"

For the Tribunal to find that Gary McDonald engaged in conduct tantamount to racial harassment of the claimant would, submitted Dr Gibson, encourage such a culture and the imposition of legal liability in respect of every unfortunate phrase.

85 Dr Gibson submitted that the respondent is content that the Tribunal find that Karen Pritchett made the remark "*He meant originally*". This finding in fact however is not sufficient, submitted Dr Gibson, to amount to unwanted conduct related to the claimant's race which had the purpose or effect of harassing the claimant. Dr Gibson referred the Tribunal back to the observation of the EAT in **Richmond Pharmacy**. The allegation against Karen Pritchett that she laughed at and mocked the claimant's accent and use of the Scots language should be treated with extreme caution, submitted Dr Gibson. It was not an allegation made by the claimant until the meeting on 31 August 2016 when he alluded to conduct of this sort, submitted Dr Gibson. Karen Pritchett's evidence that she did not hear the alleged remark made by Gary McDonald is credible, submitted Dr Gibson. It is inconsistent with her role as "*front of house*" on 3 August 2016. It should also be borne in mind, submitted Dr Gibson, that the claimant's evidence that he was in an "*isolated area*" which he was "*unable to leave*" lacks credibility given that the incident

is said to have occurred in the job centre's reception area which at the time was busy and open plan. The Tribunal, submitted Dr Gibson, should also have regard to the evidence of Gary McDonald in relation to Karen Pritchett's involvement in their conversation. Gary McDonald has no reason to support Karen Pritchett, submitted Dr Gibson, and nothing to gain from lying about her lack of involvement in the conversation he was having with the claimant. The Tribunal should accept his evidence that he was having a conversation with the claimant and that Karen Pritchett was only in the general vicinity assisting customers.

86 The Tribunal should also have regard, submitted Dr Gibson, to the claimant's actions following the alleged incident. The claimant did not make an accusation against Karen Pritchett to Janice McGregor. Janice McGregor did not corroborate the claimant's account that Karen Pritchett said that it was "*a joke*". The Tribunal should consider why the claimant did not inform Janice McGregor immediately following the incident of Karen Pritchett's involvement. The fact that he did not refer to Karen Pritchett's alleged involvement supports the respondent's position that she did not make the alleged remarks, submitted Dr Gibson. Likewise, submitted Dr Gibson, there was no accusation directed at Karen Pritchett on 5 August 2016 when the claimant met with Janice McGregor and Gail Crawford. There was no accusation made at that time of her laughing, mocking or isolating him. The claimant initially declined to raise formal action against Karen Pritchett. There is no evidence to support the claimant's position submitted Dr Gibson that Janice McGregor, Gail Crawford and Karen Pritchett sought to protect each other from the allegations of the type directed at Karen Pritchett. The allegation made by the claimant after the alleged incident was one of being felt let down by Karen Pritchett in respect of which he did not wish to raise formal action. The respondent, submitted Dr Gibson, has no difficulty with the claimant's position in that regard. He probably did feel that Karen Pritchett should have intervened but since then, submitted Dr Gibson, he has sought to embellish and exaggerate his claim and lie about the extent of her involvement.

87 It is of significance submitted Dr Gibson that the claimant's letter of 17 August 2016 makes no complaint alluding to Karen Pritchett laughing at and mocking him because of his accent and use of the Scots language. This is despite, submitted Dr Gibson, the claimant seeking to argue that the above letter should have been taken as a grievance against Karen Pritchett when first submitted. Dr Gibson also referred the Tribunal to the claimant having signed as true and accurate the note of the meeting held on 6 September 2016 (page 130) which records; "*G noted the first point that S's original complaint included Karen Pritchett but it was agreed that although the letter of 17/8 did not the one of 04/09 did. S agreed this*." The claimant, submitted Dr Gibson, has therefore accepted that his letter of 17 August 2016 was not a complaint about Karen Pritchett.

88 Similarly, at the meeting on 31 August 2016, submitted Dr Gibson, there was no suggestion made by either the claimant or his trade union representative that the complaint in the letter of 17 August 2016 concerned alleged derogatory comments made by anyone other than Gary McDonald. Dr Gibson submitted that the claimant, at the instigation of Ms MacLellan, sought to add to his original complaint the remark made by Karen Pritchett. Is it not telling, submitted Dr Gibson, that the only part of the record of the meeting that the claimant seeks to amend is the part "*that utterly blows out of the window*" his case of racial harassment by Karen Pritchett on 3 August 2016. The amendment as an attempt after the event to claim that the comment "*he meant originally*" amounts to a derogatory comment when it is no more, submitted Dr Gibson, than an innocent clarification of a question.

89 At the meeting on 2 September 2016, the claimant confirms, submitted Dr Gibson, that he had previously stated that Karen Pritchett "*had not participated in the conversations*". It is only when the claimant was informed that he would be expected to work with Karen Pritchett as part of a team some 5 weeks after the alleged incident that he changed his position, submitted Dr Gibson, making false and exaggerated accusations against her which go beyond his issue over her failure to intervene. While he has had an issue with Karen Pritchett not intervening, it is not until 11 September 2016 submitted Dr

Gibson that the claimant brings a grievance. The letter of dated 4 October 2016 (P32/152-154) is an attempt, submitted Dr Gibson, by Ms MacLellan to retrospectively create a situation which did not occur on 3 August 2016. The accusation of referring to the incident as a joke appears for the first time in this letter, submitted Dr Gibson, and from which point Ms MacLellan is "*orchestrating a claim against the respondent*". Dr Gibson submitted that the letter of 17 August 2016 cannot reasonably be read as amounting to a complaint about Karen Pritchett particularly in the context of the claimant's indication at the meeting of 5 August 2016 that he did not wish to raise a formal complaint against her. The letter of 17 August 2016, submitted Dr Gibson, was triggered by the claimant seeing Gary McDonald back in the workplace and was unrelated to Karen Pritchett with whom he had continued to work for over a fortnight since the incident without complaint. The claimant adopted a confrontational rather than a conciliatory stance against the respondent resulting in what Dr Gibson described as a series of ludicrous accusations against his managers. The claimant's conduct in this respect has more to do with his partner, Ms MacLellan, than the claimant himself submitted Dr Gibson. In any event, submitted Dr Gibson, to take the claimant's case at his highest and to find that Karen Pritchett did everything that is alleged, does not amount to unwanted conduct relating to the claimant's race amounting to harassment in terms of Section 26 of the EA 2010.

90 In relation to any other unwanted conduct complained about by the claimant, Dr Gibson submitted that the claimant's credibility "*goes out the window*" and it is abundantly clear that from around September 2016 that it is Ms MacLellan who has sought to manufacture a case against the respondent and ended up making the claimant look like the boy who "cried wolf". The claims against the respondent's employees and the managers who sought to assist the claimant should be rejected in their entirety submitted Dr Gibson. Not only should the allegations be rejected, the Tribunal should consider the actions of the claimant in making baseless, spiteful and vindictive accusations when assessing the credibility of the accusations against Gary McDonald and Karen Pritchett. There is no evidence, submitted Dr Gibson, of any of the claimant's

line managers and senior colleagues having done anything that relates to his race; they were simply doing their job by trying to assist him.

91 Dr Gibson referred the Tribunal to passages of evidence in support of the respondent's position that the claimant has failed to prove his claim of race discrimination. As regards the incident on 3 August, Dr Gibson submitted that when giving her evidence Janice McGregor could not recall the word "joke" being used by Karen Pritchett. She did not recall the claimant saying anything about Karen Pritchett. In response to the complaint that the respondent failed to report the matter to the Police, Dr Gibson submitted that this is not unwanted conduct and in any event the claimant did not at any time ask that the incident was reported. It is of relevance, submitted Dr Gibson, that at no time has the claimant reported the matter to the Police. On 5 August 2016 the claimant did not even want to pursue the matter as an internal complaint submitted Dr Gibson. There is no evidence whatsoever, submitted Dr Gibson, that not reporting the incident to the Police related to the claimant's race.

92 Dr Gibson invited the Tribunal to accept the respondent's explanation in respect of the CCTV footage. It was not until the letter of 4 September 2016 that a specific request was made for the CCTV recording. A request was made by Janice Crawford through Mike Gargaro on 5 September for the CCTV footage. The Tribunal should reject any suggestion in these circumstances that Janice McGregor was attempting to "*conceal racism*" as alleged by the claimant. It is nonsense, submitted Dr Gibson, to suggest that the respondent was devious enough to wait until 30 days had passed before requesting CCTV footage. There was no evidence that deletion of the CCTV footage and not requesting it before 17 August 2016 related to the claimant's race. The claimant simply did not ask for it until it was too late. The respondent has no control over the CCTV footage.

93 As regards misclassification of the grievance as unwanted conduct, Dr Gibson submitted that this was a further attempt by the claimant's partner to manufacture a claim. It was premised upon a misunderstanding of the respondent's policy by the claimant. The policy is not confusing as submitted

Dr Gibson. There was no misclassification of the claimant's grievance and certainly no deliberate misclassification of the grievance because it related to an allegation of racial harassment, submitted Dr Gibson. There was no unwanted conduct.

94 Dr Gibson submitted that the respondent did not make it "*extremely difficult*" for the claimant to raise a grievance against Karen Pritchett. The Tribunal should reject his evidence that he intended the letter of 17 August 2016 to be such a grievance. The first occasion on which he definitively stated that he wished to raise a grievance against Karen Pritchett was on 6 September 2016 submitted Dr Gibson. Once he raised a grievance against Karen Pritchett on 11 September 2016 it was dealt with by the respondent. There was no unwanted conduct submitted Dr Gibson on the part of the respondent not to include Karen Pritchett in a grievance that the claimant simply had not raised. The grievance was dealt with appropriately. It was not possible to use their grievance procedure, submitted Dr Gibson, in connection with the complaint against Gary McDonald as it is concerned with internal issues. The contractors concerned had been notified of the complaint concerning Gary McDonald. As regards Gary McDonald's return to the office on 17 August 2016, Dr Gibson submitted that this was not conduct done by the respondent. It was done by G4S. The claimant at this point had not raised a formal grievance. All that the respondent could do was to request that Gary McDonald did not return to site and his return on 17 August 2016 submitted Dr Gibson was completely out with their control. If it was unwanted conduct submitted Dr Gibson it was not of the respondent's doing. Dr Gibson submitted that it is possible to surmise that but for Gary McDonald returning to the job centre on 17 August 2016 no complaints, grievance, resignation or for that matter the Tribunal proceedings would have ever come to pass. It was not in the respondent's interest to see Gary McDonald return to the job centre.

95 In relation to the issue of whether the respondent took all reasonable steps to prevent their employees from doing any discriminatory act or from doing anything of that description, Dr Gibson referred the Tribunal to the case of

Canniffe v East Riding of Yorkshire Council 2000 IRLR 555. In terms of the two-stage approach in the above case, Dr Gibson submitted that the Tribunal has had sight of the respondent's various procedures including the Grievance procedure which he submitted enable employees who feel aggrieved to raise a complaint and for issues to be resolved or addressed which arise from a grievance. The Tribunal, submitted Dr Gibson, has also had sight of the respondent's Equality and You – a Guide to Employees' Policy document. It is inconceivable, submitted Dr Gibson, that the respondent as a large government department would not have robust policies and procedures in place to deal with issues of discrimination, to demonstrate that they take matters of discrimination very seriously when such issues arise that they are addressed appropriately. The respondent's witnesses, submitted Dr Gibson, have given evidence about training and knowledge cascading that seeks to ensure that employees are prevented from doing any discriminatory act or from doing anything of that description. Dr Gibson submitted that there are serious disciplinary penalties for those who do commit discriminatory acts and the respondent's employees are told what is expected of them and how seriously any contravention will be taken. In particular, submitted Dr Gibson, Susan McGhee gave evidence about the respondent's zero tolerance approach to racism and how this would be covered at the induction of any new staff and revisited at least on an annual basis. Dr Gibson referred to posters on the walls in respect of discriminatory issues, in the public foyer and staff areas. Dr Gibson also referred to the evidence of Andrew Weir about employees being obliged to sign an undertaking that they understand the issues of equality and diversity on an annual basis, online training, awareness campaigns and support provided to employees. Dr Gibson submitted that the Tribunal should accept the evidence of the respondent's witness in particular that of Andrew Weir as regards the extent to which the respondent takes the issue of equality and diversity very seriously in relation to employees and service users. There was also the evidence about training received by Karen Pritchett, Janice McGregor and Gail Crawford in this area, submitted Dr Gibson.

96 There is nothing more, submitted Dr Gibson, that the respondent could have done that would have been reasonably practicable to prevent its employees from committing discriminatory acts. Not only do they have a policy on equality for staff, submitted Dr Gibson, but also a policy on how they expect their contractors to behave. As regards G4S, Dr Gibson submitted the respondent took all reasonable steps to ensure that the parties on their premises should not abuse staff. The respondent, submitted Dr Gibson, requires contractors such as G4S to have policies in place to ensure that their employees are equality aware. Should the Tribunal find therefore that either Gary McDonald or Karen Pritchett engaged in unwanted conduct for which the respondent is liable Dr Gibson invited the Tribunal to find that they took all reasonable steps in numerous ways to prevent this from happening and that there was nothing more they could have reasonably done prior to 3 August 2016 to prevent either Gary McDonald or Karen Pritchett from engaging in unwanted conduct related to the claimant's race. The respondent should not be held liable for the actions of either Gary McDonald or Karen Pritchett, submitted Dr Gibson.

VICTIMISATION

97 On the issue of whether the respondent victimised the claimant in terms of Section 27 of the EA 2010, Dr Gibson submitted that the claimant has failed to prove on the balance of probability that the respondent has subjected him to a detriment because he did a protected act. The assertions made by the claimant in his pleadings and his evidence illustrate, submitted Dr Gibson, that the claimant has not been subjected to any detriment because he did a protected act. The respondent, submitted Dr Gibson, did everything they possibly could to address the claimant's allegations. For example, submitted Dr Gibson, it simply was not the case that the respondent wished the claimant to be trained by an alleged racist member of staff. Janice McGregor had mentioned that it might be Karen Pritchett who would cover the role as the claimant's trainer. Once it was known that the claimant wished to raise a grievance against Karen Pritchett, the respondent agreed that she would not be involved in training the claimant. None of this, submitted Dr Gibson, amounted to detrimental treatment. In any event submitted Dr Gibson the

reference to Karen Pritchett in the context of the claimant being trained in no way related to him having made a protected act.

98 As regards the complaint that the claimant was subjected to an excessive number of grievance meetings, Dr Gibson submitted that eight meetings regarding a complaint about an external subcontractor employee and the grievance about a member of the respondent's staff was not excessive. The meetings were held to discuss a grievance. Surely it would have been worse, submitted Dr Gibson, for the respondent to have failed to meet with the claimant to discuss his concerns. The meeting on 6 September 2016 was at the claimant's request. He was not present at the meeting on 22 December 2016. The meetings on 5 and 17 August 2016 were not formal meetings. The first was an initial meeting and the second was impromptu to deal with the event that had occurred that day. The respondent, submitted Dr Gibson, is entitled to question the basis on which it can be argued that holding such meetings was treating the claimant badly. In the event the Tribunal finds that there was an excessive number of grievance meetings, Dr Gibson submitted there is no evidence to support an accusation that this was because the claimant did a protected act. Any suggestion that they were held to discourage the claimant from making his allegations or to deliberately place him under stress because he had made the allegations was, submitted Dr Gibson, simply nonsense. Similarly, the Tribunal should reject the claimant's evidence about the alleged conduct of the respondent's mangers at the meetings and in particular that of Gail Crawford and Peter Glen. Frank Turner did not recall Peter Glen being particularly aggressive and there was no evidence that he had raised any concerns about the conduct of management which one would assume would be the case had he witnessed such behaviour. The claimant's allegations of inappropriate conduct by management at meetings is a further example of the claimant's embellishment of his claim by Ms MacLellan, submitted Dr Gibson.

99 It is simply wrong, submitted Dr Gibson, that there was only one meeting held on the subject of the grievance. Dr Gibson reminded the Tribunal that Karen Pritchett was in attendance at the mediation meeting on 28 September 2016.

It is also unclear submitted Dr Gibson how the telephone call between Stefan Brooks and Karen Pritchett can amount to subjecting the claimant to a detriment, unless it is to the extent of the investigation which is being criticised, something which is not pled. In any event, submitted Dr Gibson, there is no evidence that Stefan Brooks held only one meeting with Karen Pritchett because the claimant did a protected act.

100 Dr Gibson submitted that the claimant was happy at the time to accept the explanation that leaving his confidential grievance letter in a photocopier was an innocent mistake. He did not wish to raise a formal complaint. It is disingenuous of the claimant, submitted Dr Gibson, to now seek to claim before the Tribunal that this was done with deliberate intent or with any malice because he had done a protected act. There is no evidence of a detriment. With regards to a breach of confidentiality this was described by Dr Gibson as one of "the silliest accusations levelled at the respondent". The letters sent to the claimant were on template form. The sentence complained about by the claimant was the standard clause in the respondent's pro- forma letter. It was not a threat, but an instruction followed by a warning to make sure that the employee in question was left in no doubt of his responsibilities and the potential consequences if he did not meet those responsibilities. The senders of the letters did not draft the offending sentence, submitted Dr Gibson. The Tribunal should reject any suggestion that sending the letters amounted to the claimant being subjected to a detriment because he had done a protected act. This is another example, submitted Dr Gibson, of the claimant manufacturing a claim.

101 There is no coherent basis for saying that all of the managers in the job centre were involved in the claimant's grievance, submitted Dr Gibson, or that the management involvement that did take place was because the claimant had done a protected act. The involvement of each of the managers was entirely appropriate, submitted Dr Gibson, in accordance with the respondent's internal procedures and done with the intention of progressing the claimant's complaint. There was no detriment.

102 The Tribunal should also reject, submitted Dr Gibson, the claimant's suggestion that arranging an informal mediation to which the claimant agreed was an act of victimisation. While the respondent did not doubt that the process was stressful to the claimant, this is not sufficient to establish detrimental treatment. Dr Gibson submitted there was no evidence from the claimant's trade union representative of any concerns about the conduct of the mediation by Peter Glen. As regards the allegations which relate to the sickness absence process, these acts were done because the claimant was off sick from work. Any member of staff off sick regardless of the reason for that sickness absence will be treated in the same way, submitted Dr Gibson. The sickness absence process was followed in accordance with the respondent's policy. Similarly, Peter Glen had a duty to seek to investigate a complaint made by two colleagues against the claimant about his conduct. It was not Peter Glen who made these accusations. He was not a witness to the conduct. There was no evidence that either of the colleagues who raised concerns about the claimant's conduct knew anything about his complaints against Gary McDonald and Karen Pritchett.

103 Dr Gibson also questioned how delay in resolving the grievance amounted to subjecting the claimant to a detriment because he had brought a grievance. The respondent had provided an explanation for any delay. A grievance form was submitted on 11 September 2016 and the decision issued on 15 January 2017. This is 4 months from start to finish and not 5 as suggested by the claimant, submitted Dr Gibson. The principal reason for the delay, submitted Dr Gibson, was the claimant's sickness absence. As for the claimant's allegation that he was subjected to a detriment by the respondent because he was not informed of the outcome of the complaint against Gary McDonald, Dr Gibson submitted that the claimant was told unequivocally that Gary McDonald would not be returning to the job centre regardless of the outcome of the respondent's investigation. The outcome of any disciplinary proceedings is not a matter which would be shared with the respondent, Gary McDonald being a G4S employee. It was a matter which was outside the control of the respondent submitted Dr Gibson and Gary McDonald had left the employment of G4S before the conclusion of any investigation. In any

event, there is no evidence submitted Dr Gibson that this alleged detriment was because the claimant did a protected act.

104 In response to any allegation that the respondent did not investigate the grievance lodged against Peter Glen or the job centre, Dr Gibson submitted, that the respondent is not obliged to investigate the grievance of a former employee. To bring a grievance against Peter Glen that he had made the accusations that were in fact reported to him, submitted Dr Gibson, is to distort the truth. The respondent did not discipline Karen Pritchett because they were not satisfied on the balance of probabilities that the claimant's grievance could be upheld. The decision not to discipline Karen Pritchett, as with all the other acts complained of by the claimant, submitted Dr Gibson, had nothing to do with the claimant having done a protected act.

NOTES ON EVIDENCE

105 Central to this case was the question of what took place between the claimant, Gary McDonald and Karen Pritchett on 3 August 2016. It was not in dispute that something had occurred which upset the claimant. The claimant sought to show that he was subjected to discriminatory conduct by both Gary McDonald and Karen Pritchett in the form of verbal abuse including derogatory remarks about his partner and spoken English. The respondent submitted that the claimant's account of events was exaggerated and deliberately distorted to strengthen his claim. It was the claimant's evidence that the incident on 3 August 2016 began with Gary McDonald enquiring about where he came from. The respondent did not seek to challenge a finding that in response to his reply "*Stonehouse*", Karen Pritchett said "*He meant originally*". This was consistent with the claimant's evidence and accepted by the Tribunal. The response from Gary McDonald on being told by the claimant that he was from Poland was however very much in dispute. Gary McDonald did not deny that he entered into conversation with the claimant during which he questioned him about why Polish people came to Scotland looking for work and why they did not stay in Poland for work. He described feeling unhappy

about his own work. The respondent sought to show that while Gary McDonald might have expressed himself in robust terms – describing him as a "*typical ex squaddie with barrack room manners*" - it did not follow that he made the remarks attributed to him. On balance the Tribunal preferred the claimant's evidence that the remark "*British people can't find jobs because of you fuckers*" was made by Gary McDonald. It was consistent with the evidence of Janice McGregor, to whom the claimant had first reported the incident. Janice McGregor recalled that the claimant appeared upset and had to be encouraged to tell her what was troubling him. She had been concerned about the claimant's demeanor and that something untoward had occurred. This was inconsistent with the claimant having fabricated the remark made by Gary McDonald after the event, as submitted by the respondent. The respondent's witnesses supported the claimant's evidence that Gary McDonald had made a discriminatory remark. They did not seek to show that the remark was something other than "*British people can't get jobs because of you fuckers*". Gail Crawford recalled being told by Janice McGregor the following day that the claimant had been the subject of a "*racist remark*" by Gary McDonald. She gave evidence that following their meeting on 5 August 2016 she advised the claimant that Gary McDonald's behaviour was "*totally unacceptable*". This was on the basis that the remark complained of by the claimant was racist.

106 Karen Pritchett denied any knowledge of the alleged exchange. While the Tribunal did not doubt that she was very anxious and stressed about the proceedings, and arrangements were made to allow her to give her evidence by video link to avoid having to attend the hearing in person, the Tribunal found her evidence to be unsatisfactory. She denied knowing anything about the claimant's nationality before he was questioned by Gary McDonald or playing any part in the conversation between the claimant and Gary McDonald. This was despite having told Stefan Brooks that she said to the claimant "*he meant originally*". She denied having had any discussion about the incident with her line manager. This was inconsistent with the evidence of Janice McGregor about their exchange on the day of the incident and Gail Crawford's evidence of speaking to her about the incident and the importance

of challenging discriminatory behaviour. The Tribunal accepted the claimant's evidence that Karen Pritchett had sought to down play the incident. It did not find however that she had used the word "*joke*" to describe remarks made by Gary McDonald. This was not the evidence of Janice McGregor who in all other respects had a clear recollection of events on the day of the incident. The Tribunal did not doubt that the claimant had been upset by Karen Pritchett's response to the incident. The Tribunal was persuaded that had Karen Pritchett used the word "*joke*" to describe the incident that it would have been mentioned by the claimant before 4 September 2016 at one of the various opportunities he had to describe what was concerning him and that Janice McGregor would have recalled Karen Pritchett using it. Similarly, the Tribunal was not persuaded that Karen Pritchett had taken part in mocking or laughing at the claimant's spoken English. It was not something that the claimant had mentioned when first questioned after the incident or in his letter of 17 August 2016 (P11/109-111). While it was not in dispute that the claimant sought to avoid contact with Karen Pritchett following the incident, the Tribunal found that this was because of her failure to intervene and support the claimant in response to Gary McDonald's conduct and not because she had been involved in mocking or laughing at him as claimed.

107 The evidence of Karen Pritchett in relation to the mediation with Peter Glen was also unreliable. She could not recall reading from a statement or what she had said to the claimant. Her evidence was very defensive. The Tribunal found that her obvious extreme discomfort and anxiety about being accused of any involvement in the incident on 3 August 2016 was consistent with the respondent's position that they take issues of equality and diversity in the workplace very seriously and that employees, including Karen Pritchett, were aware of the potentially adverse consequences of discriminatory conduct.

108 While the Tribunal found that, with the passage of time, the claimant had exaggerated the length and extent of his exchange with Gary McDonald on 3 August 2016 it was persuaded that on balance Gary McDonald did question him about his partner in an intrusive and derogatory manner, firstly because he thought that his partner was Polish and on learning that she was Scottish,

because the claimant was Polish. The claimant's evidence in this respect was persuasive and consistent with his conduct following the incident. His evidence about how his managers had reacted to the incident on 3 August 2016 and responded to his concerns however was less persuasive. The Tribunal did not accept the claimant's evidence that he was in an "*isolated*" part of the job centre and he was "*trapped*" while Gary McDonald verbally abused him. The Tribunal found that on balance the claimant was able to move freely around the job centre. It found that while the reception area was open plan, the layout did not make it impossible for the alleged exchange to have taken place without being overheard by others as suggested by the respondent.

109 Frank Hunter, the claimant's trade union representative, who attended the meeting on 31 August 2016 did not challenge the accuracy of the respondent's record of the meeting (P16/120-121) and agreed when questioned in cross examination that the claimant did not indicate at that meeting that he wished to bring a formal complaint against Karen Pritchett. The Tribunal found that when the incident came to their attention and they were made aware by the claimant that he wished to pursue a grievance against Karen Pritchett, members of the respondent's management sought to support the claimant and resolve what they understood to be a workplace dispute.

110 It was not in dispute that Janice McGregor had encouraged the claimant to tell her about his day and what seemed to be bothering him. The Tribunal accepted her evidence that she was shocked by what the claimant told her and took steps to report the incident to her line manager, Gail Crawford. It was also not in dispute that Gail Crawford, after meeting with the claimant, contacted G4S and requested that Gary McDonald did not return to the job centre. The Tribunal found that Janice McGregor and Gail Crawford were both sympathetic to the claimant's position and anxious to support him. The Tribunal was not persuaded that either of them sought to protect Karen Pritchett from criticism. The Tribunal found that when the incident was first reported to them, they were entitled to proceed on the basis that the claimant

did not wish to make a formal complaint against either Gary McDonald or Karen Pritchett. Notwithstanding this, Gail Crawford took steps to contact G4S and speak to Karen Pritchett about the incident. This was consistent with her having a genuine concern to support the claimant as opposed to seeking to "bury" the incident as claimed. The Tribunal found that Gail Crawford informed the claimant of the G1 form process and accepted her explanation that she made a genuine mistake over the time scale for making a grievance. The Tribunal did not find that she sought to dissuade the claimant from making a grievance. The Tribunal was not persuaded that before their receipt of the claimant's letter of 4 September 2016 (P32/152-153) either Janice McGregor or Gail Crawford knew or ought reasonably to have known that the claimant wished to purse a grievance against Karen Pritchett. The Tribunal accepted Janice McGregor's evidence about her meeting with the claimant on 2 September 2016. While the Tribunal did not doubt, and it was not in dispute, that the claimant and Karen Pritchett had been avoiding each other since the incident, the Tribunal did not accept the claimant's evidence that Janice McGregor sought to force him to work with Karen Pritchett. The Tribunal accepted Janice McGregor's explanation that she was aware of a tension between the claimant and Karen Pritchett but not that the claimant had lodged a grievance. The Tribunal accepted her evidence that she sought to reassure the claimant that Karen Pritchett was an experienced trainer with whom he might have further contact. It was not in dispute that on learning that the claimant had brought a grievance against Karen Pritchett, no arrangements were made for the claimant to receive further training from her.

111 The claimant tended to exaggerate the conduct of management and how they responded to his complaints. This undermined his credibility. He claimed to have been the subject of rumours after his letter was left in the photocopier. There was no evidence to support this. He claimed to have been required to attend an excessive number of meetings, which during the course of his evidence ranged from between 20 to 30. It was unclear which of the meetings were thought to be unnecessary or deliberately arranged out of malice on the part of management as claimed. The respondent acknowledged that holding two meetings on 24 November 2016 was unfortunate, but the Tribunal was

unable to find from the evidence before it that this was done to cause the claimant additional stress because of his grievance. At one stage in the proceedings, the claimant denied having signed minutes of a meeting (P16/120-121) and claimed that his signature had been forged. He did not pursue this point, which was inconsistent with the paper apart to his ET1, which again undermined his credibility in relation to the treatment he claimed to have received from the respondent following the incident on 3 August 2016. He described being "*repeatedly interrogated by four different managers*". He described Gail Crawford speaking to him in an "*aggressive manner*" in particular at the meeting on 6 September 2016 and of generally "*feeling at war*" with his managers. The evidence before the Tribunal did not support the claimant's recollection of his interaction with management. It was inconsistent with the evidence of others who observed the interaction including that of Frank Hunter who had attended meetings with the claimant, including the meeting of 6 September 2016, in a representative capacity. The Tribunal was also not persuaded that the claimant's managers had deliberately failed to obtain CCTV footage. From the evidence before it, the Tribunal was satisfied that CCTV was the responsibility of G4S whom Gail Crawford contacted but was unable to obtain the footage sought by the claimant. The Tribunal did not find that there was any deliberate delay on the part of Gail Crawford to request the CCTV footage or that as claimed there had been an attempt to "destroy" evidence that would support the claimant's grievance. Similarly, the Tribunal accepted the evidence of the respondent's witnesses that there had been no difference in treatment of the claimant by the inclusion in letters to him about his grievance of a paragraph warning him about the possible consequences of failing to keep matters confidential. The Tribunal did not agree with the claimant that this was a sanction directed at him personally as opposed to a standard warning included in letters from the respondent about the confidentiality of investigations. The Tribunal was also not persuaded that the lack of any disciplinary action in response to the claimant's letter being left in a photocopier illustrated lack of consistency on the part of the respondent.

112 The Tribunal accepted the evidence of Peter Glen that he was keen and initially confident that he would be able to successfully resolve the dispute

between the claimant and Karen Pritchett. He began with an informal approach – what was described as an "informal mediation". While his approach was unsuccessful, the Tribunal was persuaded that he was supportive of the claimant and was willing to accept in his evidence that the claimant had been entitled to view his approach as "*not really getting anywhere*". The Tribunal was not persuaded that by pursuing an informal approach Peter Glen was attempting to avoid addressing the alleged conduct of Karen Pritchett. He displayed an understanding of the claimant's concerns and agreed "*fully*" with the claimant that Karen Pritchett's statement at the mediation did not "*come across in any shape or form as an apology*". This was inconsistent with the claimant's position that management as a whole were motivated to "*bury*" his grievance and protect Karen Pritchett. The Tribunal was also not persuaded that Peter Glen, or any other managers deliberately failed to follow the respondent's grievance procedure. There was evidence of his managers contacting HR at regular intervals for advice on how to respond to his concerns. There was no evidence to support a finding that they deliberately failed to follow advice from HR or misapply the grievance procedure to the claimant's detriment. Susan McGhee was a particularly impressive witness. She had a detailed understanding of the relevant procedures and impressed the Tribunal as a Manager who sought to apply a "zero tolerance" to complaints of race discrimination by employees or service users.

113 Andrew Weir also gave credible evidence that the steps taken to progress the claimant's grievance were in accordance with the respondent's procedures and that given the nature of the claimant's complaint it was considered appropriate that he should seek to progress the claimant's grievance in the absence of Peter Glen. His involvement in the matter was limited. It was put to him however that he was involved in an attempted "cover up" of the allegation made by the claimant of race discrimination. He denied this, and the Tribunal accepted his evidence that he had acted in accordance with his understanding of the respondent's procedures by contacting HR on behalf of Peter Glen following the lack of success with the "informal mediation".

114 It was not in dispute that the respondent has policies and procedures in place concerned with equality and diversity. The respondent's witnesses described the emphasis placed on equality and diversity during induction, annual updates, performance reviews, awareness initiatives and training on related subjects such as unconscious bias. The claimant sought to challenge the extent to which individual managers were aware of the policies and procedure and how the respondent complied with them when responding to his complaint of race discrimination. While the Tribunal accepted that the managers from whom it heard evidence were unable to describe policies and procedures in detail or recall specific provisions of the relevant legal provisions when challenged in cross examination, it was satisfied that they all had a good working knowledge and understanding of the right of employees not to be subjected to discriminatory acts and the respondent's obligation to take all reasonable steps to protect employees from being discriminated against in the workplace. Susan McGhee in particular impressed the Tribunal as having an objective and practical approach to complaints of the type made by the claimant. She described with authority the process following receipt of a G1 form and that from her experience the involvement of HR in recommending mediation or the involvement of local management to resolve grievances.

115 It was not in dispute that the experience amongst the claimant's managers of dealing with complaints of race discrimination was not extensive. Stefan Brooks struggled to explain why, when questioning Karen Pritchett, he did not quote the exact remark said to have been made by Gary McDonald. From his evidence, the Tribunal was satisfied that he had received adequate training during his employment to understand the obligation on the respondent to protect employees from discrimination. While the manner in which he investigated the claimant's, grievance may have lacked accuracy and thoroughness, the Tribunal was not persuaded from his evidence that the procedure followed or the manner in which he questioned Karen Pritchett was because the complaint was of race discrimination. The Tribunal accepted his evidence that it was not a deliberate attempt to down play the discriminatory

nature of the remark. The Tribunal did not find that he had, sought to "*sweep the complaint under the carpet*" as claimed by the claimant.

116 In addition to his management role in seeking to resolve the claimant's grievance, Peter Glen was also concerned with managing the claimant's attendance at work. The Tribunal found that his attempts to resolve the claimant's grievance were motivated by a desire to help the claimant complete his probationary period and progress to permanent employment with the respondent. The Tribunal accepted his evidence, and it was not challenged, that he sympathised with the claimant's disappointment over Karen Pritchett's inability to fully engage in mediation and acknowledge her part in the incident. The Tribunal did not find that Peter Glen had been "*abrasive and unprofessional*" as submitted by the claimant. It was not supported by the evidence of the claimant's witness, Frank Hunter who had attended meetings and the mediation with the claimant. He had no recollection of Peter Glen behaving in the manner described by the claimant and accepted that it was behaviour that he would have challenged.

117 The Tribunal also accepted the evidence of Peter Glen that he sought to encourage the claimant back to work in accordance with the respondent's absence management policies and that again this was motivated by a desire to help the claimant complete his probationary period. Overall, the evidence before the Tribunal was consistent with Peter Glen having sought to support the claimant during their meetings to discuss his absences. The Tribunal did not find that Peter Glen failed to follow advice from HR or that he had advised the claimant that he "*must attend (work) no matter what*". The Tribunal also accepted Peter Glen's evidence that he raised the issue of the complaint against the claimant because he considered it appropriate to seek an explanation for potentially unacceptable behaviour by an employee. The Tribunal found that he accepted the claimant's explanation and was genuinely surprised when later that day the claimant presented him with a grievance. It was not in dispute that he suggested to the claimant that he may wish to consider whether this was an appropriate course of action. The Tribunal did not find however that it was his intention to prevent the claimant from lodging

a grievance or took steps to have the claimant dismissed in anticipation of a grievance being brought against him.

DISCUSSION & DELIBERATIONS

DIRECT DISCRIMINATION

118 The claimant complained of direct race discrimination. In terms of Section 13(1) of the Equality Act 2010 ("EA Act 2010");

"*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 is the claimant's position that he was treated less favourably because of his Polish nationality. In terms of Section 9(1)(b) of the EA 2010, nationality is included within the meaning of race. Race is a protected characteristic for the purposes of protection under the EA 2010.

119 The Tribunal was persuaded that the claimant was treated less favourably by Gary McDonald because of his race. The Tribunal was persuaded from the evidence before it that on 3 August 2016 Gary McDonald, on learning that the claimant was Polish, made the remark "*British people can't get jobs because of you fuckers*" followed by derogatory remarks about the claimant's partner, initially because he thought that she was Polish and on learning that she was Scottish, because the claimant was Polish. In terms of Section 23(1) of EA 2010, for comparison purposes there must be "*no material difference between the circumstances relating to each case*". The Tribunal was satisfied that a new recruit, shadowing Karen Pritchett in reception but of British nationality would not have been subjected to the remark "*British people can't get jobs because of you fuckers*" or the derogatory remarks made about the claimant's partner. Gary McDonald's motive for making the remark is not a relevant consideration. He may not have intended to cause offence. The Tribunal was satisfied however that he made the remark because the claimant is Polish. Likewise, the derogatory remarks were made about the claimant and his

partner because the claimant is Polish. The Tribunal was satisfied that Gary McDonald would not have made the same remarks to a British person in the same circumstances as the claimant and that accordingly the claimant was treated less favourably because of his race.

120 The Tribunal was not persuaded that the comment made by Karen Pritchett amounted to less favourable treatment. The remark "*he meant originally*" was unfortunate and the Tribunal does not doubt that Karen Pritchett regrets her involvement in the conversation on 3 August 2016. The Tribunal was not persuaded however that her remark amounted to less favourable treatment because the claimant is Polish. The Tribunal considered the remark in the context of the discussion between the claimant, Karen Pritchett and Gary McDonald. The Tribunal was satisfied that while the remark was made because Karen Pritchett knew that the claimant was "originally" from Poland and not from Stonehouse, it was something that she was equally likely to have said to anyone else who she knew was not from Stonehouse "originally", whether from Poland or elsewhere. The Tribunal did not find that the remark made by Karen Pritchett was less favourable treatment because of race. The Tribunal was not persuaded that Karen Pritchett had made any derogatory remarks about the claimant's partner. The Tribunal was also not persuaded that the claimant could rely upon the alleged conduct of Dr Gibson to show discrimination by the respondent. As referred to above, the Tribunal was not satisfied that Dr Gibson had made the remarks alleged by Ms MacLellan or that it should draw any adverse inference from the alleged conduct of the respondent's representative.

121 As an employee of the respondent, the claimant was entitled under Section 39(2)(d) of EA 2010 to not be discriminated against by being subjected to a detriment. The respondent did not dispute that if the Tribunal found that the remark "*British people can't get jobs because of you fuckers*" or similar had been made to the claimant that it amounted to unwanted conduct. They questioned whether it was also a detriment for the purposes of establishing less favourable treatment. In terms of Section 212 of the EA Act 2010; "*detriment" does not, subject to subsection (5), include conduct which*

amounts to harassment". The Tribunal was satisfied that in all the circumstances the conduct of Gary McDonald on 3 August 2016 about which the claimant complained did amount to a detriment, in particular the remark "*British people can't get jobs because of you fuckers*" and could be relied upon by the claimant to establish his claim of direct discrimination. The remarks made by Gary McDonald to the claimant were offensive and caused the claimant distress and humiliation.

122 In terms of Section 109(1) of EA 2010;

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

It was not in dispute that Gary McDonald was not an employee of the respondent. They were not his employer. He was employed by G4S. Sections 109(2) & (3) of EA 2010 provide that;

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

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

123 The respondent submitted that Gary McDonald was not their agent as he was employed by G4S who provided security services for Trillium, the respondent's property management company. The respondent referred the Tribunal to the case of **Kemeh v Ministry of Defence 2014 EWCA Civ 91** in which the person who was alleged to have racially abused an MoD employee was employed to provide catering services in the MoD's kitchen by a sub-contractor of the MoD's facilities management company. The Court of Appeal found that there was no evidence that the alleged discriminator was an agent of the MoD in the sense that they were acting on the MoD's behalf. Lord Justice Elias observed (at paragraph 40) that it may be that "*ultimately the MoD would have the right to veto (the discriminator's) presence, at least for*

good reason. But that limited degree of control comes nowhere near constituting an authorisation by the MoD to allow (the discriminator) to act on its behalf with respect to third parties". The MoD was not found to be liable for the racial abuse of the sub-contractor's employee. There are clear similarities with the present case. The respondent submitted that as in **Kemeh** there was no contract in this case to create the relationship of principal and agent between them and Gary McDonald. In addition, Gary McDonald was not subject to their direction and there was very limited, if any, integration with the respondent's employees. The Tribunal accepted the respondent's submission in this respect. The Tribunal was not persuaded that the respondent was liable for the acts of Gary McDonald. The evidence before the Tribunal did not establish sufficient control and direction by the respondent to create an agency relationship. It is not enough to show that he was providing security services for the benefit of the claimant's employer. Gary McDonald was under the direction of G4S. The respondent did not have a contract with G4S. The respondent could only request that Gary McDonald did not return to the job centre. This was no more than the limited degree of control identified in the case of **Kemeh**.

124 The Tribunal did not agree with the claimant's submission that it was possible to distinguish the present claim from **Kemeh** on the grounds that the claimant was unable to remove himself from the reception area of the job centre where the incident occurred. While the Tribunal recognised that having only just started working with the respondent and while undergoing training the claimant was reluctant to move away from the reception area, it did not find that he was contractually obliged to remain there. Even if this had been the case, the Tribunal was not persuaded that it would have created a relationship of principal and agency between the respondent and Gary McDonald. The claimant submitted that in the present case there was a sufficiently close connection between Gary McDonald and the respondent to establish vicarious liability on the part of the respondent for the actions of Gary McDonald. The claimant referred the Tribunal to the case of **Various Claimants v Barclays Bank PLC** in which a bank was found to be vicariously liable for the conduct of a doctor who was alleged to have sexually assaulted

prospective employees during medical examinations carried out at the request of the bank. Mrs Justice Davies sitting in the High Court (Queen's Bench Division) concluded that on the facts of the case (i) the relationship between the doctor and the bank was employment or "akin to employment" & (ii) the wrongdoing of the doctor was sufficiently closely connected with that employment or quasi employment. The claimant submitted that given the nature of his work and the extent to which he was integrated into the respondent's organisation, Gary McDonald was in effect an agent of the respondent. The Tribunal was not persuaded that in this case the facts supported a finding that there was a relationship of principal and agent resulting in the respondent being potentially liable for the conduct of Gary McDonald. The Tribunal was not persuaded that the respondent's Guidance (P121) issued to contractors was evidence of such a relationship between the respondent and Gary McDonald. Gary McDonald was employed by a sub-contractor of the respondent's property management company. His work was unrelated to providing welfare, work and pension services. The Tribunal did not accept the claimant's submission that because the discriminatory remark was made on the respondent's premises and concerned with work (in the most general sense) that a relationship was created between Gary McDonald and the respondent in terms of which the respondent was liable for Gary McDonald's actions. Similarly, the Tribunal was not persuaded that because Karen Pritchett and Gary McDonald both worked in the job centre to facilitate, either directly or indirectly, the respondent's business that there was a sufficiently close connection to make the respondent liable for the actions of Gary McDonald. Gary McDonald's work was not, as described by the claimant, "*inextricably linked*" to the service provided by the respondent. The respondent did not control how Gary McDonald did his work as a security guard. This was the responsibility of G4S with whom the respondent did not have a contractual relationship.

125 The Tribunal was also not persuaded that the present case could be distinguished from **Kemeh** because of what the claimant described as the "*tri-party conversation*" between the claimant, Karen Pritchett and Gary McDonald. As referred to above, the Tribunal did not find that Karen Pritchett

had treated the claimant less favourably because of his race during the incident on 3 August 2016. If there had been a finding of direct discrimination by Karen Pritchett, the Tribunal was still not persuaded that this would have resulted in the respondent being liable for Gary McDonald's part in the conversation. The interaction between Gary McDonald, Karen Pritchett and the claimant did not create a relationship of principal and agent between the respondent and Gary McDonald.

126 In all the circumstances, the Tribunal was not satisfied that the respondent can be found liable for the acts of Gary McDonald and accordingly the claim of direct discrimination against the respondent has been dismissed.

TIME BAR

127 The respondent submitted that in any event the claim of direct discrimination is time barred as the act about which the claimant complained occurred more than three months before the claimant contacted ACAS to engage in pre-claim conciliation. In terms of Section 123(1) of the EA Act 2010 a claim of direct discrimination must be presented to the Tribunal within the period of three months beginning with the act complained of or such other period as the Tribunal thinks is just and equitable. In this case, the act complained of occurred on 3 August 2016. The claimant was obliged to contact ACAS before presenting his claim to obtain an early conciliation certificate. The claimant contacted ACAS on 25 November 2016. The Tribunal calculated that to be in time the claim should have been presented by 2 November 2016. The early conciliation certificate was issued on 25 December 2016. The claim was presented to the Tribunal on 22 January 2017. The claim was therefore presented out of time.

128 Having found that the respondent is not liable for the acts of Gary McDonald, the Tribunal was not required to consider whether the claim should be dismissed for being out of time. For the sake of completeness however, the Tribunal went on to consider whether in terms of Section 123(1) of the EA 2010 it was just and equitable to extend the time for presenting the claim to 22 January 2017. In all the circumstances the Tribunal was satisfied that it

would have exercised its discretion and found that it was just and equitable to extend the time for presenting the claim of direct discrimination. When reaching its decision, the Tribunal took into account the fact that since the date of the alleged act of discrimination the claimant has been unwell for periods of time with stress and anxiety. While he was aware of his right to bring a claim to the Tribunal, he was unsuccessful in obtaining legal representation. Frank Hunter gave evidence that the claimant did not discuss with him the possibility of obtaining trade union assistance to present a claim. The Tribunal had regard to the prejudice to the respondent of allowing the claim to be considered out with the time limit. The Tribunal recognised the importance to the respondent of legal certainty. There was the inevitable inconvenience and additional expense of having to defend the claim of direct discrimination. The Tribunal was not persuaded however that the claimant's delay in presenting his claim had caused the respondent any material prejudice. The respondent's witnesses did not complain to any significant extent about the passage of time having adversely affected their recollection of events or that documents had been lost as a result of any delay in bringing the claim. The claimant was satisfied however that the claimant would have suffered prejudice had the Tribunal decided that it did not have jurisdiction to consider his claim of direct discrimination. He would have been denied the opportunity to have his grievance about the manner in which he was treated on 3 August 2016 considered by the Tribunal. In all the circumstances, having weighed up the relative prejudice that extending the time limit for presenting the claim would cause to the respondent on the one hand and to the claimant on the other, the Tribunal was satisfied that it would have been just and equitable to extend the time limit to 22 January 2017.

HARRASSMENT

129 Section 26(1) of EA 2010 provides that;

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

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

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

(i) Violating B's dignity, or

(ii) *Creating an intimidating, hostile, degrading, humiliating or offensive environment for B*"

Section 40 of EA 2010 provides that an employer must not harass an employee.

130 In addition to the incident on 3 August 2016, the claimant sought to show that Karen Pritchett's alleged remark that it was a "joke"; the lack of police involvement; deletion of CCTV footage; misclassification of his grievance; failure to include Karen Pritchett in the original grievance and Gary McDonald's reappearance at the job centre on 17 August 2016 were acts of unwanted conduct amounting to harassment.

131 As referred to above, the Tribunal was persuaded that the conduct of Gary McDonald towards the claimant on 3 August 2016 amounted to a detriment for the purposes of establishing direct discrimination. The Tribunal did not therefore, given the terms of Section 212 of the EA 2010, consider whether his conduct also amounted to harassment. The claimant sought to show that the conduct of Karen Pritchett amounted to harassment. While the Tribunal did not doubt that Karen Pritchett sought to dismiss what Gary McDonald had said to the claimant and suggest that he had not intended to cause offence, for the reasons given above, it did not find that she had used the word "*joke*" to describe the incident. The claimant had been left feeling upset by the remarks of Gary McDonald. Karen Pritchett had heard the remarks and was a colleague of the claimant from whom he was entitled to expect some support. Her conduct was unwanted by the claimant to the extent that she failed to intervene and challenge Gary McDonald's behaviour. Her conduct related to race to the extent that it was her response to discriminatory remarks concerning Polish nationals about which the claimant complained. The Tribunal was not persuaded however that Karen Pritchett's failure to intervene and subsequent attempt to down play the incident had the purpose or effect

of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

132 In terms of Section 26(4) of EA 2010, when deciding whether conduct amounts to harassment, it must take into account; (a) the perception of the claimant; (b) the other circumstances of the case & (c) whether it is reasonable for the conduct to have that effect. The Tribunal did not doubt that the claimant had been offended by the remarks made by Gary McDonald and that he was entitled to feel offended. The Tribunal reminded itself however that it was not Karen Pritchett but Gary McDonald who had made the discriminatory remarks. The Tribunal was not persuaded that in all the circumstances of the case that Karen Pritchett's conduct violated the claimant's dignity. The Tribunal did not doubt that the claimant felt let down by Karen Pritchett and was upset by her failure to support him in response to Gary McDonald's offensive remarks. Again however, the Tribunal was not persuaded that in all the circumstances that Karen Pritchett's conduct had created an environment for the claimant that could be described as intimidating, hostile, degrading, humiliating or offensive. She had failed to challenge the discriminatory behaviour of a third party. She had failed to offer support. She had ill-advisedly sought to down play the incident. The Tribunal recognised that this caused the claimant upset. Her conduct however was transitory and not repeated. The claimant did not complain about her conduct until after Gary McDonald's reappearance in the job centre. He had received support from management in the meantime in response to the incident. In all the circumstances her conduct to did not create an environment that was intimidating, hostile, degrading, humiliating or offensive amounting to harassment.

133 The Tribunal was also not persuaded that the conduct of management following the incident on 3 August 2016 amounted to harassment. The Tribunal was not persuaded that the respondent's management failed to respond to the conduct of Gary McDonald or take steps to protect the claimant from any repetition of such conduct. They complained about his conduct to G4S. They sought a reassurance that he would not return to the job centre.

They offered to support the claimant should he decide to complain about Gary McDonald to G4S. They did not fail to act in response to the conduct of Gary McDonald. They were not responsible for Gary McDonald's return to the job centre on 17 August 2016. They were not responsible for deletion of the CCTV footage. The Tribunal was also not persuaded that the respondent had harassed the claimant by not reporting the incident to the Police. The Tribunal was not persuaded that this was their responsibility or something that the claimant had wanted them to do at the time of the incident. The Tribunal was also not persuaded that the respondent "*misclassified*" the claimant's grievance or deliberately failed to treat his complaint about the incident on 3 August 2016 as a grievance against Karen Pritchett. The Tribunal was not persuaded that the managers involved in the claimant's grievance had failed to comply with the grievance procedure (P109/377-387) or that there had been a deliberate attempt to avoid the possibility of a finding of discrimination in the respondent's workplace. In any event, the Tribunal was not persuaded that any departure from the grievance procedure (P109/377-387) related to the claimant's nationality. The respondent's managers had sought to resolve the claimant's grievance with Karen Pritchett to allow him to complete his probationary period. The Tribunal did not find that any informal approach at the early stages of the procedure or at any following stage related to the claimant's nationality.

134 In all the circumstances, the Tribunal was not satisfied that the respondent had harassed the claimant and accordingly the claim of harassment against the respondent is dismissed. The claimant submitted that by failing to prevent Karen Pritchett from harassing him, the respondent, as her employer, was not only in breach of the EA 2010 but also its common law duty of care and various statutory duties including those under the Health & Safety Act 1974. The claim was brought under the EA 2010. The additional legislation identified by the claimant is outside the jurisdiction of the Tribunal. The claimant also referred the Tribunal to his Convention rights under the Human Rights Act 1998. There was no free-standing claim in this respect and the Tribunal had regard to its obligation to interpret domestic legislation in such a way as to be compatible with the claimant's Convention rights.

135 As their employee, the respondent is potentially liable for the acts of Karen Pritchett including harassment of the claimant under the EA 2010. In terms of Section 109(4) of EA 2010 an employer can defend a claim of discrimination by showing that they took all reasonable steps to prevent an employee from doing a discriminatory act. The respondent argued that they had taken all reasonable steps to protect their employees, including the claimant, from being subjected to discriminatory acts in the workplace.

136 For the sake of completeness, and should the conclusions reached by the Tribunal about the claim of harassment be wrong, consideration was given to the respondent's statutory defence under Section 109(4) of EA 2010. The Tribunal had regard to the case of **Canniffe v East Riding of Yorkshire Council 2000 IRLR 555** and the two stage approach of firstly considering whether the respondent took any steps at all to prevent their employees from doing the act or acts complained of and secondly, whether the Tribunal considers that there were any further steps that the respondent could have taken that would have been reasonably practicable. The Tribunal was satisfied that the respondent had in place policies and training on discrimination, harassment and diversity which applied to employees and third parties. In addition to their grievance procedure (P109/377-387) the respondent informs employees of their rights and obligations in relation to harassment, discrimination and dignity in the workplace during employee induction and at regular intervals during employment. The respondent has a policy on "How to: Recognise Bullying, Harassment and Discrimination" (P111/400-402). Employees are made aware that discriminatory conduct is unacceptable and can result in disciplinary proceedings. They have guidance and information for employees – "Equality and You" – (P118) that explains to employees what they need to do to avoid discrimination and promote equality in the workplace including an awareness of and keeping up to date with the relevant legislation and requirements of the Equality Act 2010. The Tribunal was satisfied that the respondent's employees including Karen Pritchett were aware of the above policies and appreciated the importance of respecting the dignity of others in the workplace. The Tribunal did not expect the

respondent's witnesses to be able to recall the relevant policies in exact terms and was satisfied that the respondent's employees from whom the Tribunal heard evidence understood the purpose of the respondent's policies on equality and diversity in the workplace and about which they received regular reminders. In this context, it was not in accordance with the respondent's policies for Karen Pritchett to fail to support the claimant by not reporting Gary McDonald's conduct to her line manager. Karen Pritchett's obvious discomfort and distress at being involved in the proceedings supported the respondent's position that she would have been aware at the time of the incident that discriminatory conduct of the type she witnessed involving Gary McDonald was unacceptable to the respondent and if done by an employee capable of resulting in disciplinary action. In all the circumstances, the Tribunal was satisfied that the respondent had taken all reasonable steps to prevent their employees from doing discriminatory acts including acts of harassment.

137 The claimant submitted that the respondent had failed to take all reasonable steps to protect him from harassment by G4S employees. The claimant submitted that G4S had a reputation for being a "racist organisation" which should have increased the respondent's awareness of the need to take steps to avoid harassment of their own employees. Whether G4S is a "racist organisation" was not an issue to be determined by the Tribunal. No such finding was made by the Tribunal. The Tribunal found in any event that the respondent took all reasonable steps to inform contractors, including Trillium, about its public-sector equality duty.

VICTIMISATION

138 In terms of his claim of victimisation, the claimant sought to show that he was subjected by the respondent to a number of detriments because he brought a grievance. Section 27(1) of EA 2010 provides that;

"*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".

139 Although the timing of his complaint against Gary McDonald and in particular his grievance against Karen Pritchett were the subject of disagreement, it was not in dispute that the claimant had done a protected act by making allegations of race discrimination against Gary McDonald and Karen Pritchett. In his submissions the claimant referred to a breach of his right to confidentiality and to cases concerned with a breach of the implied term of trust and confidence. As referred to above, the claimant's application to add a claim of unfair dismissal was refused. The issue of whether the respondent was in breach of the implied term of trust and confidence was not therefore an issue to be determined by the Tribunal. The claim was considered under the EA 2010.

140 The claimant identified a number of alleged acts by the respondent to which he claimed to have been subjected because he had alleged race discrimination in contravention of EA 2010. The Tribunal was satisfied that the claimant's managers initially understood that the claimant only wished to complain about the conduct of Gary McDonald and that while he was upset about her reaction to the discriminatory comment he did not wish to pursue a grievance against Karen Pritchett. It was at this time that the claimant met with Janice McGregor and the possibility of Karen Pritchett being involved in further training was raised. The Tribunal did not find that this was an act of victimisation on the part of Janice McGregor. The issue was raised because Janice McGregor wished to keep the claimant informed about future contact with Karen Pritchett and to seek to assure him about her ability as a trainer. The issue was raised not in the context of the claimant having indicated that he intended to bring a grievance against Karen Pritchett. The Tribunal was not persuaded that in these circumstances the claimant was subjected to a detriment or that the subject of Karen Pritchett potentially training the claimant was raised because the claimant had made or intended to make a complaint of race discrimination. Janice McGregor noted the claimant's concerns and there was no evidence that he received any further training from Karen Pritchett.

141 The Tribunal was not persuaded that the respondent subjected the claimant to an excessive number of grievance meetings. The claimant's managers wished to resolve the dispute between the claimant and Karen Pritchett. The meetings were held in an attempt to resolve the dispute and the number of meetings was not in all the circumstances excessive. Stefan Brooks and Peter Glen expressed regret that the claimant had been asked to attend two meetings on 24 November 2016. They acknowledged that this would have been stressful for the claimant and should, with hindsight, have been avoided. The Tribunal did not find however that the meetings were arranged in this way because the claimant had complained of race discrimination. They were arranged by different managers to deal with separate issues - the claimant's grievance and his attendance at work. They were not arranged on the same day to cause the claimant additional stress because of his complaint of race discrimination. Similarly, the Tribunal was not persuaded that any delays in the procedure were because the claimant had complained of race discrimination. The time taken to deal with the claimant's grievance was due to a number of factors including the respondent's initial attempts at an informal approach to dispute resolution and the claimant's absences from work.

142 The Tribunal accepted the respondent's explanation that leaving the claimant's G1 form in the office photocopier was an oversight. The Tribunal was not persuaded that this was done because the claimant had complained about race discrimination. The Tribunal was also not persuaded that the respondent had, as submitted by the claimant, attempted to "*bury*", "*externalise*" or "*misclassify*" the claimant's grievance because it contained an allegation of race discrimination by an employee. The Tribunal also accepted the respondent's explanation that reference to breach of confidentiality in letters to the claimant was standard practice and not something to which the claimant was subjected because of his grievance. The Tribunal was also not persuaded that the respondent's application of their attendance policy (P108) to the claimant's absences from work was more severe or intimidating because he had brought a grievance about race discrimination. It was not in dispute that meetings about attendance at work and letters about absence

can be stressful but in the case of the claimant the Tribunal was not persuaded that they were made more stressful by the respondent or to the claimant's detriment because he had brought a grievance complaining of race discrimination. Peter Glen sought to encourage the claimant to return to work. The Tribunal did not find however that he said to the claimant "*You must attend (work) no matter what*" or was otherwise aggressive towards him.

143 Once it became apparent to the claimant's managers at the meeting on 6 September 2016 that he wanted to pursue a grievance against Karen Pritchett, the Tribunal was satisfied that they responded by providing appropriate levels of assistance and support. The Tribunal was not persuaded that Gail Crawford deliberately sought to mislead the claimant about the 30-day timescale for lodging a grievance. The Tribunal accepted her explanation that this was a mistake on her part. Similarly, the Tribunal was not persuaded that the claimant's managers failed to follow the respondent's grievance procedure (P109/377-387) because he had complained of race discrimination. The Tribunal found that overall the claimant's managers sought to support the claimant through the grievance procedure and initially resolve informally what they understood to be a break down in relations between two employees. The Tribunal found that the number of meetings arranged by the claimant's managers and the number of managers involved was indicative of the level of support with which the respondent sought to provide the claimant and the seriousness with which they took the matter. They were not acts of victimisation.

144 Part of the informal attempt to resolve the claimant's grievance was the mediation arranged and conducted by Peter Glen. It was not in dispute that the mediation was unsuccessful. Peter Glen readily accepted that the claimant was entitled to be disappointed with Karen Pritchett's inability to fully engage in mediation and acknowledge her part in the incident. It was not in dispute that the mediation was a stressful event for all concerned, in particular the claimant. The Tribunal did not find however that Peter Glen had been "*abrasive and unprofessional*" as described by the claimant. The Tribunal found that Peter Glen had sought to resolve the claimant's grievance

informally. When mediation failed he did not delay in arranging for further steps to be taken in terms of the grievance procedure (P109/377-387) which involved offering the claimant mediation through HRMIS and a management investigation. The Tribunal found that the various managers involved in the claimant's grievance procedure (P109/377-387) sought advice from HR at regular intervals. They sought to follow the Grievance procedure (P109/377-387). While they may not have followed the Grievance procedure (P109/377-387) in accordance with the claimant's interpretation and the outcome may not have been as sought by the claimant, the Tribunal did not find that any steps taken by the respondent to deal with the claimant's grievance were because the claimant had complained of race discrimination by Karen Pritchett.

145 The Tribunal agreed with the claimant that the investigation by Stefan Brooks into the incident on 3 August 2016 was flawed to the extent that he failed to accurately put to Karen Pritchett the alleged remark by Gary McDonald by omitting the word "*fuckers*", something which he struggled to explain. On balance however, the Tribunal did not find that Stefan Brooks made the above omission or for that matter decided not to uphold the grievance because it was concerned with alleged acts of discrimination. The Tribunal found that the claimant's grievance was not upheld because Stefan Brooks was not satisfied that the claimant's version of events had been corroborated. The Tribunal was not persuaded that his decision not to interview Gary McDonald was because the claimant had complained about Karen Pritchett. Stefan Brooks was considering the alleged conduct of Karen Pritchett. He did not have any authority over the actions of Gary McDonald or the authority to insist that Gary McDonald provide him with a statement. In all the circumstances, the Tribunal was not persuaded that his decision not to uphold the claimant's grievance related to the claimant having complained of race discrimination.

146 Similarly, the Tribunal was not persuaded that the respondent had failed to obtain CCTV footage or report the incident to the Police because the claimant had complained of race discrimination. The Tribunal was satisfied that the respondent was unable to obtain CCTV footage from either Trillium or G4S.

There was no evidence to show that the respondent's reason for not providing CCTV footage – they were informed that it would have been deleted in accordance with the data controller's practice – was inaccurate or otherwise misleading. Likewise, the respondent's explanation that they did not report the incident to the Police because they considered this to be a matter for the claimant was accepted by the Tribunal. In all the circumstances, not reporting the incident to the Police did not show that the respondent in anyway sought to "*bury*" the incident as alleged by the claimant.

147 The claimant referred to additional complaints of alleged victimisation in his written submissions. They involved interaction between the claimant and Peter Glen shortly before the claimant resigned from his employment with the respondent. Notwithstanding the respondent's objections, the Tribunal decided it should consider the additional complaints. The first was concerned with Peter Glen notifying the claimant on 20 January 2017 about a complaint made against him of unprofessional behaviour. There was no evidence to suggest that Peter Glen had made up or was exaggerating the complaint as reported to him in order to victimise the claimant. The Tribunal also found that once the claimant provided an explanation it was accepted by Peter Glen and the matter was, as far as Peter Glen was concerned, closed. In these circumstances the Tribunal was not persuaded that the claimant had been subjected to a detriment by Peter Glen or had raised the issue of a complaint from other employees because he had complained about race discrimination. Similarly, the Tribunal was not persuaded that Peter Glen refused to accept a grievance against him because the claimant had previously complained about race discrimination. The Tribunal found that Peter Glen had serious concerns about the claimant's attendance at work. He was anxious to facilitate the claimant's return to work. He wanted the claimant to consider whether another grievance would improve the position. He was already in the process of referring the claimant's case to a decision maker to consider whether his employment should be terminated for failing to meet attendance requirements. Peter Glen was not the decision maker and the claimant was not dismissed. The Tribunal was not persuaded that either the act of suggesting that the claimant take time to reflect before lodging a further

grievance or referring his case to a decision maker because of his level of attendance were acts of victimisation. The Tribunal was not persuaded that either act was done by Peter Glen because the claimant had complained about race discrimination.

148 In all the circumstances the Tribunal was not persuaded that the claimant was subjected to detrimental treatment by the respondent for alleging race discrimination and accordingly the claim of victimisation against the respondent has been dismissed.

149 In addition to the claims under the above headings, the claimant made reference to the respondent's obligation to comply with their public-sector equality duty. The claimant is correct that the respondent is under both a general (Section 149 of EA 2010) duty and specific duties under the Specific Duties Regulations but these do not confer a cause of action on the claimant before the Tribunal. The Tribunal did however have regard to the steps taken by the respondent to comply with its public-sector equality duty when determining the issues before the it and as part of the evidential background to the claim.

CONCLUSION

150 In all the circumstances the Tribunal was not persuaded that the respondent was liable for direct discrimination, harassment or victimisation of the claimant and accordingly the claims have been dismissed.

Employment Judge: F Eccles
Date of Judgment: 20 December 2018
Entered in register : 21 December 2018
and copied to parties