



EMPLOYMENT TRIBUNALS

Claimant: Mr J W Johnson

Respondent: Key Care Support Limited

Heard at: Manchester

On: 15 and 16 January 2019

Before: Employment Judge Ross
Ms E Cadbury
Mr J Flynn

REPRESENTATION:

Claimant: In person

Respondent: Mr T Wood, Counsel

JUDGMENT having been sent to the parties on 25 January 2019 following oral reasons given at the hearing and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The nature of this claim was identified at a hearing before Employment Judge Slater, who confirmed that the claimant was not an employee within the meaning of the Employment Rights Act 1996 so he was not entitled to bring a claim for unfair dismissal, but he was covered by the wider definition of employment within the meaning of section 83(2) of the Equality Act 2010, so he was entitled to bring a claim for race discrimination. Employment Judge Slater was very careful to identify the particular claim that the claimant was able to bring, and that was the failure of the respondent to act on the claimant's complaint of being racially abused by another agency worker.
2. The Tribunal found these facts.

FACTS

3. We find that the claimant worked for the respondent as an agency worker on a zero hours contract from 9 February 2016. We find on 31 August 2017 he was transferred from their East Lancashire office to their Preston office. We find that the claimant accepted a shift at Mather Fold House, which we understand to be a residential unit, on 1 October 2017 on the night shift. After that shift Rachel Wright from the respondent contacted the claimant to ask how the shift had gone, and we find that he informed her that he did not like working at Mather Fold for three reasons:

- (1) that he had been racially abused there by an agency worker working for another agency;
- (2) he was concerned about the lack of management structure; and
- (3) that it was all agency staff working there and there were issues in relation to health and safety.

4. There was a dispute between Rachel Wright and the claimant about the extent of the conversation, and Ms Wright cannot recall the claimant raising the issue about leadership and health and safety. Furthermore, she says the claimant told her that he did not want to take the racial abuse issue any further and she says that was supported by the fact he accepted another shift at Mather Fold.

5. By contrast the claimant, whom we found to be an articulate and persuasive witness, said that he did decline further shifts at Mather Fold and he produced email evidence to the Tribunal to show that that was so. We also accept his evidence that the only reason he attended a further shift at Mather Fold on 10 October 2018 was because Mrs Walker persuaded him to do so when he came into the office with his biometric information of his evidence of status to work.

6. We prefer the claimant's recollection to that of Ms Wright and Mrs Walker. We find the claimant to be a clear and consistent witness. We also note that in relation to his conversation with Ms Wright the claimant produced a second email which referred to the permanent nature of the staff at another Home, which we find is consistent with his evidence that he had raised concerns about working at a place which was staffed purely by agency workers.

7. Accordingly, we find that the respondent knew about the claimant's allegation of racial abuse which had occurred on 1 October because he informed Ms Wright of it. We find Ms Wright worked closely with Ms Walker in the same office where there were only two of them. We find Ms Wright raised the matter of the racial complaint with Mrs Walker although Mrs Walker was unsure when Ms Wright had done that

8. We find after the claimant worked again at Mather Fold on 10 October 2017, he was contacted afterwards by Ms Wright again asking how the shift went. We rely on the email in the bundle of 11 October in relation to the voicemail. Ms Wright told us she could not recall the second conversation on 11 October, but we accept the

claimant's recollection of it where he says he did report a further incident of racial abuse at Mather Fold.

9. On 17 October 2017 following a conversation with a member of staff from Mather Fold who alleged there was a safeguarding incident on the night of 10 October which involved the claimant, Mrs Walker emailed the claimant asking for his version of events (page 20). We find the claimant responded on 19 October (pages 23 and 24) stating there were no issues or concerns with any service users on that shift but he did give details of the incident of racial abuse in writing which he had already reported verbally. In particular he said that he had been racially abused by a female member of staff from another agency. That worker stated she refused to work with black people, referring to the claimant and another worker called Liz who was also black.

10. In evidence before us Mrs Walker did not accept that this amounted to a complaint but she did agree that it was serious.

11. The Tribunal finds that any reasonable employer would have clearly identified this as a complaint requiring investigation. The Tribunal finds it is entirely unacceptable in a modern workplace that a serious concern that a worker has suffered racial abuse in the course of his working for an organisation should not be investigated.

12. We find the respondent took no action in relation to this concern other than sending the claimant's statement through to their client at Mather Fold. We find Mrs Walker did not ask the client to take any steps to actively investigate the allegation of racial abuse on their behalf.

13. The claimant stated he telephoned the respondent on an almost daily basis about his concerns, and by the end of her evidence Mrs Walker conceded he was ringing very regularly. We find that although he was primarily raising the safeguarding issue he was also raising the issue of racial abuse on a number of occasion because he believed the two matters were closely interlinked.

14. We find both Mrs Walker and Ms Wright told us that they had received no training in equal opportunities with this employer. Mrs Walker told us that she had had no training in dealing with grievances although she appeared to suggest that if a grievance was ever raised it was a matter for her to deal with. We also find that Mrs Walker appeared to suggest that the claimant's complaint of racial abuse followed the safeguarding incident. We find that her suggestion of that sequence of events is incorrect: we find that the claimant had already complained verbally of at least one incident of racial abuse before he was even aware of the safeguarding incident and indeed before it was alleged to have occurred.

15. We turn now to the email exchange in January. We find that on 29 January the claimant, who had received no further work from the respondent and no further information about his position, emailed Mrs Walker asking how the company had dealt with his complaint. She replied saying the claimant had not confirmed he wanted to make a complaint and she said, "this was a verbal conversation off the back of a conversation we had with yourself about a different matter". We find that is

factually incorrect. The claimant had by this stage provided his written concerns about the racial abuse incident (see page 24).

16. The claimant responded the next day reiterating that he had complained the morning after the incident, and he asked again what action the respondent was going to take. We find that Mrs Walker did not engage with his concerns. She asked the claimant again if he wanted to make a formal complaint. We find the claimant had clearly raised a complaint in his written document at page 24. We find Mrs Walker put the onus on the claimant to come into the branch, and there is no dispute that he did not do so.

17. There is no dispute that the respondent was eventually informed by their client that the allegation about safeguarding concerning the claimant was unfounded.

The Law

18. The relevant is section 13 of the Equality Act 2010. We remind ourselves of section 136 Equality Act and the burden of proof. We remind ourselves of the principles established by **Igen v Wong 2005 ICR 931 CA** and **Madarassy v Nomura International plc 2007 ICR 867 CA**. We must consider whether the claimant can adduce facts which could suggest discriminatory treatment. When considering this the Tribunal reminds itself that a difference in protected characteristic and a difference in treatment is not sufficient, there must be "something more" to shift the burden of proof to the respondent. If there is "something more" which shifts the burden then it is for respondent to show a non discriminatory explanation for the treatment.

Applying the law to the facts.

19. We turn to the issues identified by Employment Judge Slater:

- (1) Did the claimant make a complaint to the respondent about being racially abused by another care worker? And
- (2) Did the respondent fail to take any action in relation to that complaint?

20. We find the answer to both those questions is yes. We find the claimant did make a complaint both verbally and in writing as we have clearly explained above. We find the respondent took no action whatsoever in response to his complaint. We find failure to action a complaint amounts to less favourable treatment.

21. Having found that there was less favourable treatment we turn now to the burden of proof. We rely on the following matters which we say shift the burden of proof from the claimant to the respondent. We rely on the fact that the respondent's witnesses both agreed they had not received any training in equal opportunities and we rely on our finding that there was no equality policy produced by the respondent. We rely on our finding that Mrs Walker, who was the more senior employee, had a lack of awareness as to the agency's responsibility towards their own workers to be safe at work. We rely on our finding that when an issue in relation to racial abuse was raised it should have been investigated as a serious matter. We rely on our finding that there was no requirement for the claimant to follow some sort of further

formal procedure: it was absolutely clear from the document that he provided what the nature of the concern was and exactly what had occurred.

22. We also relied on the fact that Mrs Walker appeared to suggest that the reason why the claimant had complained of racial abuse was because he had a safeguarding complaint against him; we find this is suggestive of her mindset. We find it is a matter of fact that the claimant had already raised a concern about racial abuse with the respondent, even on their own evidence, before he was aware of any safeguarding incident. For all these reasons we find the burden of proof shifts to the respondent.

23. We remind ourselves that this is a case where there was a failure to take action by Ms Wright and Mrs Walker, namely to investigate the claimant's complaint of racial abuse. We have reminded ourselves when making these findings that there is no requirement for motive in a discrimination case. We remind ourselves discrimination may be unconscious. We remind ourselves that we must consider the mindset of the individuals involved.

24. Having found that the burden of proof has shifted to the respondent to show us a non discriminatory reason for their failure to investigate the claimant's complaint of racial abuse, we find they do not. There was no evidence of a non discriminatory reason for their failure to take action with regard to the claimant's complaints. We find there was no clear explanation as to why they had not investigated his complaint. Accordingly, his claim succeeds.

Employment Judge Ross

Date 19 March 2019

REASONS SENT TO THE PARTIES ON

22 March 2019
FOR THE TRIBUNAL OFFICE

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