Case No: 3307305/2018

EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr M Truett	v	Services Machinery & Trucks Limited

Heard at: Bury St Edmunds

On: 3 & 4 April 2019

Before: Employment Judge Warren

Members: Miss Feavearyear and Mr Smith.

Appearances:
For the Claimant: In person.
For the Respondent: Ms A Rokad, Counsel.

JUDGMENT having been sent to the parties on 25 April 2019 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

The Issues

1. Mr Truett's complaints are of direct race discrimination and harassment. Mr Truett describes his ethnicity as Black British. He says that he was dismissed because of his race; an act of direct race discrimination. He also complains that the process followed leading up to his dismissal was unfair and that was because of his race, in particular he complains that a quiet chat in respect of each incident would have sufficed, that a warning would have been an appropriate sanction, that he was not allowed to gather witness evidence and that it had not been necessary to suspend him.

2. Mr Truett makes the following further allegations which may be categorised as either direct discrimination or harassment. Firstly, that on 2 May 2017, a Mr Darren Ansell whom he managed called him a "black bastard". Secondly, that in July 2017

at the respondent's Horsham premises, somebody known as Melvin Edwards told him to watch out for

the area manager, Mr Teague, because, "he doesn't like people of colour". Thirdly, in January 2018 he says that he saw Mr Teague in the toilets who said to him, "I don't bite" and as he did so, made a monkey noise and monkey gestures with his hands. Fourthly at a date, time, and place unspecified, someone had remarked after a telephone conversation, "I don't believe that guy was black because he didn't speak with an accent" which he says was reflective of an underlying culture in the respondent's business. Fifthly, that at a date, time and place unspecified. Mr Teague ignored him and gave him dirty looks whenever they had interactions. Sixthly, that a colleague called Mr Hosker told him that his ethnicity would hold him back from progressing in the business. These allegations are denied.

3. I should note at this point the respondent sought to rely upon the statutory defence in closing submissions and sought to produce documents in support, which we would not allow. The defence had not been pleaded, we had not heard evidence from the respondent's witnesses pertaining to the statutory defence and producing evidence and documentation after evidence is closed and before closing submissions is too late.

Evidence

4. We had before us a witness statement from Mr Truett. He also produced an email from a Jessica Foxworthy dated 1 April 2019, she is his exgirlfriend. It is a very short email. It is not signed and dated and Ms Foxworthy was not here to give evidence.

5. From the respondent we had witness statements from: Mr Teague, the dismissing officer; Mr Lane, who had managed the claimant before Mr Teague and Mr Allbert, who heard the appeal against dismissal.

6. We had before us a cast list and chronology prepared by Ms Rokad, for which we are grateful and her written closing submissions, which were helpful.

7. We also had a bundle of documents, properly paginated and indexed, running to page number 103. I have already indicated that we did not permit some documents produced late to go into the bundle, notably the documents pertaining to the statutory defence. There was some controversy, in that Mr Truett said in evidence in respect of the document at page 39A, he had not seen it until he opened that page whilst he was giving evidence during cross examination. The respondent has produced email correspondence which shows that document was sent to him by email on 15 March 2019 at 08:43.

The Law

8. The relevant law is set out in the Equality Act 2010.

9. Race is one of a number of protected characteristics identified at s.4.
10. Race is defined at s.9 and includes colour, nationality, ethnic and national origins.

Direct Discrimination

11. Mr Truett says that he was directly discriminated against because of his race. Direct discrimination is defined at s.13(1):

> "A person (A) discriminates against another (B) if, because of a protected characteristic (A) treats (B) less favourably than (A) treats or would treat others".

12. Section 23 provides that in making comparisons under section 13, there must be no material difference between the circumstances of the claimant and the comparator. The comparator may be an actual person identified as being in the same circumstances as the claimant, but not having her protected characteristic, or it may be a hypothetical comparator, constructed by the Tribunal for the purpose of the comparison exercise. The employee must show that he/she has been treated less favourably than that real comparator was treated or the hypothetical comparator would have been treated.

13. How does one determine whether any particular less favourable treatment was, "because of" a protected characteristic? Under the previous legislation, the term used to proscribe direct discrimination was, "on the ground of" the particular protected characteristic. In the Court of Appeal, Lord Justice Underhill confirmed in Onu v Akwiwu and Taiwo v Olaigbe [2014] IRLR 448 at paragraph 40 that there was no difference in meaning between, "because of" and "on the grounds of".

14. As Lord Justice Underhill explained in Onu v Akwiwu and Taiwo v Olaigbe, what constitutes the grounds or reason for treatment will vary depending on the type of case. He referred to the paradigm case in which a rule or criterion that is inherently based on the protected characteristic is applied. There are other cases, not involving the application of discriminatory criterion, where the protected characteristic has operated in the discriminator's mind in leading him to act in the manner complained of. The leading authority on the latter is Nagarajan v London Regional Transport [1999] IRLR 572 and in particular, the speech of Lord Nicholls of Birkenhead, (I quote from paragraphs 13 and 17):

> "…in every case it is necessary to enquire why the complainant received less favourable treatment. This is the crucial question. Was it on grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job? Save in obvious cases, answering the crucial question will call for some consideration of the mental processes of the alleged discriminator…

> I turn to the question of subconscious motivation. All human beings have preconceptions, beliefs, attitudes and prejudices on many subjects. It is part of our make-up. Moreover, we do not always recognise our own prejudices. Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did. It goes without saying that in order to justify such an inference the tribunal must first make findings of primary fact from which the inference may properly be drawn."

15. The protected characteristic does not have to be the only, nor even the main, reason for the treatment complained of, but it must be an effective cause. Lord Nicholls in Nagarajan referred to it being suffice if it was a, "significant influence":

> "Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out."

16. Section 39(2)(c) proscribes an employer from discriminating against an employee by dismissing the employee or, at (d) by subjecting the employee to any other detriment.

17. Detriment was defined in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285; the Tribunal has to find that by reason of the act or acts complained of, a reasonable worker would or might take the view that he or she had been disadvantaged in the circumstances in which he or she had thereafter to work.

Harassment

18. Harassment is defined at s.26:

> "(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…

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are—

…

race;

…

We will refer to that henceforth as the proscribed environment.

19. The conduct complained of that is said to give rise to the proscribed environment must be related to the protected characteristic. That means the Tribunal must look at the context in which the conduct occurred. It also means that general bullying and harassment, in the colloquial sense, is not protected by the Equality Act; protection from such behaviour only arises if it is related in some way to the protected characteristic. See Warby v Wunda Group Plc UKEAT/0434/11/CEA.

20. The EAT gave some helpful guidance in the case of Richmond Pharmacology v Dhaliwal [2009] IRLR 336. It is a case relating to race discrimination, but his comments apply to cases of harassment in respect of any of the proscribed grounds.

> "We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. Whilst it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred). It is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."

21. Those sentiments were reinforced by Sir Patrick Elias in Grant v Her Majesty's Land Registry [2011] EWCA Civ 769. Of the words, "intimidating, hostile, degrading, humiliating or offensive" he said that Employment Tribunals, "should

not cheapen" the significance of those words, they are an important control to prevent trivial acts causing minor upsets being caught up in the concept of harassment.

Employer's Liability for Acts of Employees and the Statutory Defence

22. Section 109(1) provides that an employer is liable for acts of discrimination, harassment and victimisation carried out by its employees in the course of employment.

23. What amounts to an act in the course of employment in the context of discrimination legislation was considered in Jones v Tower Boot Co Ltd [1997] IRLR 168 CA, where it was held that "in the course of employment" should be interpreted in the sense in which those words are employed in everyday speech and should not be restricted by references to the principles set out in case law for establishing vicarious liability in the context of other torts. The Court of Appeal said that the application of the phrase was a question of fact for each Employment Tribunal to resolve

24. Employer's though, do have a potential defence to an action seeking to hold them liable for acts of employees, that is that they took all reasonable steps to prevent the discrimination taking place, s.109(4).

Burden of Proof

25. Section 136 deals with the burden of proof:

> "(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if (A) shows that (A) did not contravene the provision."

26. The Appeal Courts guidance under the previous discrimination legislation continues to be applicable in the context of the wording as to the burden of proof that appears in the Equality Act 2010. That guidance was set out in Igen Limited v Wong and others [2005[IRLR 258. That case sets out a series of steps which we have carefully observed in the consideration of this case and we will set them out-

    26.1 It is for the Claimant to prove, on the balance of probabilities, facts from which the Tribunal could conclude, in the absence of an adequate explanation that the Respondent has committed an act of discrimination against the Claimant.

    26.2 If the Claimant does not prove such facts, he will fail.

26.3 It is important to bear in mind that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit discrimination even to themselves.

26.4 The outcome, at this stage, of the analysis by the Tribunal will, therefore, depend upon what inferences it is proper to draw from the primary facts found by the Tribunal.

26.5 At this stage the Tribunal does not have to reach a definitive determination that such facts would lead to the conclusion that there was an unlawful act of discrimination. At this stage the Tribunal is looking at the primary facts proved by the Claimant to see what inferences of secondary fact could be drawn from them.

26.6 In considering what inferences or conclusions can be drawn from the primary facts, the Tribunal must assume that there is no adequate explanation for those facts.

26.7 These inferences can include, in appropriate cases, any inferences that are just and equitable to draw from evasive or equivocal replies to questionnaires.

26.8 Likewise, the Tribunal must decide whether any provision of any relevant Code of Practice is relevant and if so to take it into account. This means that inferences may also be drawn from any failure to follow a Code of Practice.

26.9 Where the Claimant has proved facts from which conclusions could be drawn, that the Respondent has treated the Claimant less favourably on the prohibited grounds, then the burden of proof moves to the Respondent.

26.10 It is then for the Respondent to prove that it has not committed the act.

26.11 To discharge that burden of proof it is necessary for the Respondent to prove, on the balance of probabilities, that the prohibited ground in no sense whatsoever influenced the treatment of the Claimant, (remembering that the test now is whether the conduct in question was, “because of” the prohibited ground – see Onu v Akwiwu referred to above).

26.12 The above point requires the Tribunal to assess not merely whether the Respondent has provided an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that the prohibited ground was not a ground for the treatment in question.

26.13 Since the facts necessary to prove an explanation would normally be in the possession of the Respondent, the Tribunal would normally expect cogent evidence to discharge that burden of proof. In

> particular the Tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

27. This does not mean that we should only consider the Claimant's evidence at the first stage; Madarassy v Nomura International plc [2007] IRLR 246 CA is authority for the proposition that a Tribunal may consider all the evidence at the first stage in order to make findings of primary fact and assess whether there is a prima facie case; there is a difference between factual evidence and explanation.

28. Madarassy v Nomura International plc [2007] IRLR 246 CA also confirms that a mere difference in treatment is not enough, Mummery LJ stating:

> "The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination, they are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination"

29. In Denman v Commission for Equality and Human Rights and Others [2010] EWCA Civ 1279 Sedley LJ made the point though, that the something more which is needed need not be a great deal, it might for example be provided by a non-response or failure to respond, or an evasive or untruthful answer to a questionnaire or by the context in which the act has occurred. In other cases, that something more has been statistical evidence suggesting unconscious bias, inconsistent explanations or refusal to provide information.

30. In Commissioner of Police of the Metropolis v Denby UKEAT/0314/16 Kerr J said, (quoting Lord Nicholls in Shamoon) that sometimes the reason for the treatment is intertwined with whether the Claimant was treated less favourably than a comparator such that, "the decision on the reason why issue will also provide the answer to the less favourable treatment issue".

Credibility of Evidence

31. Before we come to our findings of fact, this is a case where sadly, we have to consider the credibility of evidence. We have had to analyse the evidence of the claimant, in light of the allegations which he makes. We found not credible his assertion that on his first day at work the respondent had said to him that in effect, it wanted him to manage out an individual known as Darren Ansell and yet on that first day, Mr Ansell is alleged to have called him a "Black Bastard" but Mr Truett did nothing about it.

32. Notwithstanding that it had been explained to Mr Truett at the preliminary hearing that it was important for him to provide the details of his case in his further and better particulars, he came out during the course of his oral evidence under cross examination, with more detail about some of the allegations he had not previously provided. Examples of this are as follows:

32.1 In respect of the allegation of somebody, (un-named) commenting they did not believe a person on the telephone was black because they did not have an accent, in cross examination he suddenly came out with a name, he said the list of names could be endless, then he said that no other names came to mind.

32.2 With regard to the allegation of Mr Teague giving him dirty looks and ignoring him – the further and better particulars made a plural allegation of incidents during January to April, in cross examination that seemed to become one specific incident in mid February.

32.3 He gave more detail about Mr Hosker's alleged remark: when he was speaking of going for a promotion to a new role he says that Mr Hosker said to him, "your ethnicity will hold you back". That is what he wrote in his further and better particulars. In evidence what he said was that Mr Hosker had said "Don't bother you won't get it because customers will not relate to you because you are a black guy". A very different set of words.

32.4 In further and better particulars, Mr Truett said that Mr Lane was present when Mr Hosker made that remark. In cross examination he said he was not.

32.5 During cross examination, Mr Truett started making allegations of Mr Hosker giving him dirty looks and then he began to back track, when he realised he was getting his allegations mixed up. In his further and better particulars, the claimant had said that Mr Hosker had been complicit in giving dirty looks and ignoring him, but then in cross examination, he said that they gave each other dirty looks and he was not saying this was something that was racial.

33. I asked Mr Truett why he had started the petrol engine of his company vehicle and driven it, when he knew that he had accidently put diesel in it. Most people know that that is something you should not do and certainly, given that he worked in the motor trade as he does, one would have thought he would know that. The claimant's answer to me was that he had only put £10 worth of petrol in, so there was not much in there and it was diluted. That answer caught me by surprise, I recalled seeing the invoice for the fuel, I took him to it at page 52, it shows that the amount of petrol he put in was to the value of £37.88.

34. Lastly, the respondent's documentary evidence relating to the disciplinary matters, as we shall see in due course, suggests that Mr Truett was not honest.

35. In summary, in taking all these matters into account, I am afraid we did not find Mr Truett to be a credible witness.

36. As for the respondent and its evidence, of particular note is that the respondent has not called Mr Hosker or Mr Melvin Edwards, in respect of whom key allegations were made. That was surprising. Also, we noted the

respondent has not produced statistics as to the ethnicity of its workforce, indeed what we heard today is that they are not even keeping such statistics. That perhaps might be indicative that they do not take diversity issues seriously and they do so at their peril.

Findings of fact

37. The respondent's business is vehicle repairs and the supply of parts. They have 450 employees over 9 sites. The claimant's employment with the respondent began on 1 May 2017, as a parts sales supervisor at their Duxford Depot, where there are 80 or 90 employees. The claimant was interviewed for that role, (one of 3 interviewees) chosen and appointed by the area manager, Mr Teague and the manager of Duxford, Mr Lane.

38. We are referred to the document at page 39A which I referred to earlier, (Mr Truett said he had never seen it before) in which at a business meeting minutes show Mr Teague reported as follows:

> "Interviews taking place, offer verbally accepted (Martin Truett) Martin comes from history of car sales with the last years working for GM Motors with a title of specialist parts and warranty. Martin can only be described as a highly motivated and driven leader."

39. Mr Truett's contract of employment is at page 40. I refer to that because it specifically states on the first page that he is required to work on Saturdays from 8am to 12pm. I should also note the respondent's policy on suspension to be found at page 35, which provides that suspension may be appropriate in certain circumstances while an investigation is conducted. Such circumstances including where there are allegations of gross misconduct.

40. Mr Truett says that he was the only black person working at Duxford. The respondent says that is not so, but as we have noted, they have been unable to produce statistics as to the ethnicity of their workforce. Mr Teague told us that he could think of one other black person at Duxford. Mr Allbert spoke of there being many more black people working for the respondent at other locations, he made reference to one particular person that he worked with at a very senior level in the business.

41. Mr Darren Ansell had been acting up in Mr Truett's role. On appointment, he became Mr Ansell's manager. The claimant alleges that on 2 May 2017, his second day at work, he was speaking to Mr Ansell about his behavior, during the course of which Mr Ansell called him a "black bastard". That is absolutely appalling. It is so appalling that if such words were uttered, action would have been immediately taken. In fact, this would have been the perfect opportunity for the claimant to have taken disciplinary action against Mr Ansell in accordance with the alleged express wishes of the respondent to manage Mr Ansell out. For this reason, we found the allegation not credible.

42. It is alleged that on a visit to the respondent's premises at Horsham in July 2017, the claimant was told by Mr Melvin Edwards to watch out for Mr

Teague because he does not like people of colour. The respondent refers us to a statement taken of Mr Edwards at page 100, in which he says that he would never have said such a thing. Of course, as we have noted Mr Edwards is not been here to give us that evidence himself. However, on balance and having regard to the credibility of Mr Truett's evidence, we find that that incident did not happen.

43. It is alleged that in January 2018, Mr Truett saw Mr Teague in the toilets and Mr Teague had said to him, "I don't bite" and made a monkey noise and monkey gestures with his hands. If such an incident took place, it would have been absolutely and utterly appalling, one of the worse things one could have experienced in the work place, absolutely dreadful. If Mr Teague does things like that, he has no business being a manager in a business based in the United Kingdom. That said, we find in fact, that on the balance of probability that did not take place. The claimant referred us to the evidence of his girlfriend, an email that she sent on 1 April 2019, in which she makes reference to Mr Truett having told her about something being said by someone at work. What precisely was said is not repeated. That on its own might have been corroborative evidence, but unfortunately Miss Foxworthy was not here to have her evidence tested under cross examination and oath, the document itself is not signed by her, there is no statement of truth and we can therefore only attribute to it, minimal weight.

44. Mr Truett was originally managed by Mr Lane. In January 2018, Mr Lane moved to another role and his manager, Mr Teague, stepped in to run Duxford as well as continue with his other duties.

45. On 9 February 2018, Mr Truett attended a business called Read Autos for the fitting of a replacement windscreen wiper to his company van. That became the subject of an allegation he had left those premises early in the afternoon and had gone straight home, rather than returning to work. We were referred to email traffic at page 51: on 12 February, Mr Teague asked Mr Truett what time he had made it back to Duxford? He replied that he had left the garage at about 5.15. In due course, the respondent received information that suggests that might not be correct, as we will see in due course.

46. On 14 February 2018, Mr Teague sent an email (page 49) to his supervisors, making the point that they were one supervisor down. He asked them to complete an attached spreadsheet to indicate which Saturdays they were asking not to have to work. He expressly stated that they were to discuss with him in the week leading up to a Saturday when they did not want to work, to obtain authorisation. On Saturday 17 March 2018, it was alleged that Mr Truett did not attend work and had not obtained prior authorisation by speaking to Mr Teague in the week beforehand.

47. On 7 April 2018, Mr Truett mis-fueled his company van, putting petrol in when it should have been diesel. We were referred to emails at pages 55 and 56: on 9 April Mr Truett emailed Mr Teague to say that he had accidently filled the van up with petrol instead of diesel, (he had to do that as his fuel

card had been declined, because he had purchased the wrong kind of fuel). Mr Teague replied to ask him whether he had drained the van of petrol before he used it. Mr Truett replied that he had, which is not true.

48. On 11 April 2018, a receptionist complained to Mr Teague about the way Mr Truett had spoken to her. At Mr Teague's request, she sent an email. (page 59) in which she complains of his flying into reception at pace, making a gouge in the wall as he slammed the door open and in a raised voice, demanded transport, saying that he needed a car and that she had to get him a car. She complained that his behavior towards her was unprofessional and that he ought to have been more polite.

49. This to Mr Teague was the last straw. He decided that he had to take action. He caused a letter to be written to Mr Truett on 11 April, (page 47) in which he is invited to a disciplinary hearing on 13 April. The allegations are that:

    49.1 Without authorisation, he had not worked on Saturday 17 March;

    49.2 On 9 February, he had gone home early and had mislead Mr Teague about that in email correspondence;

    49.3 On 7 April, he had put petrol into his company vehicle, but had confirmed in an email that he had drained it, and

    49.4 His inappropriate attitude and conduct towards the receptionist.

    The documentation enclosed included the disciplinary procedure, the email about working Saturdays, the email relating to the windscreen wiper, a copy of the fuel receipt for petrol, an email stating that he had drained the van of fuel and the email of complaint from the receptionist. Lastly, the letter informs Mr Truett that he is suspended from work.

50. Mr Truett attended a disciplinary hearing before Mr Teague on 13 April. The minutes are at page 60. Following that hearing, Mr Teague on 16 April spoke to an engineer who Mr Truett had told him, had advised Mr Truett that it was ok for him to drive the van and just top it up. The note of that meeting at page 54 shows that the engineer had told the claimant, "it will fuck up all your injectors and fuel system". It was clear the advice had been given that he should not be driving his vehicle after the mis-fuel until after the engine had been drained. There is a concluding sentence that as the engineer realised Mr Truett had continued driving his van, that what he should do is dilute it by topping it up with diesel, which is not of course, the same as telling him from the start that would be acceptable.

51. Mr Teague decided that the outcome of the disciplinary process should be dismissal. He wrote a letter informing Mr Truett of that dated 17 April, (page 79). The letter refers to dismissal for gross misconduct with immediate effect because of a breach of trust due to his repeated lying, misuse of company time, negligence and unprofessional verbal conduct. There is reference to his lying about the windscreen wiper and his dishonesty in respect of the mis-fuel incident.

52. Mr Truett appealed against his dismissal, (page 82). He complains that dismissal was a disproportionate sanction and unfair. The opening paragraph complains of being treated harshly and not the same way colleagues would be and that this was due to his race.

53. The appeal hearing took place on 8 May before Mr Albert, Business Solutions Director. The minutes for that are at page 86.

54. After the appeal hearing, Mr Albert spoke to a number of people mentioned by Mr Truett in connection with the appeal and allegations of race discrimination he now raised. He spoke to Mr Edwards, who Mr Truett claimed had told him to watch out for Mr Teague because he did not like people of colour. Mr Edwards denied saying that, (page 100).

55. The appeal outcome was provided in a letter dated 17 May, (page 101). The decision to dismiss is upheld.

56. There are some undated allegations by Mr Truett that we have not dealt with in the above chronological review of the facts:

    56.1 The first is the suggestion that somebody had said they did not believe a particular individual was black because they did not speak with an accent. We did not find that allegation credible and we find that those words were not said.

    56.2 There was the allegation that Mr Teague ignored Mr Truett and gave him a dirty look. We do not uphold that allegation.

    56.3 Thirdly, that a colleague, (Mr Hosker) told him that his ethnicity would hold him back from progressing in the business. As we have noted, Mr Hosker was not called as a witness as one might have expected. We were told that he is no longer employed by the respondent and had left, "under a cloud". That raises a question mark over the allegations, but on balance, we find that the words were not said. We note in particular that in the further and better particulars, Mr Truett had said Mr Lane was present when the comment was alleged to have been made but then in evidence, said that he was not.

Conclusions

57. We consider first of all the process followed. The respondent followed what overall, was a fair process that, looked at in the round, would have passed the test of fairness in s.98(4) of the Employment Rights Act 1996. It is a process that was certainly not without fault, but overall, it was a fair process.

58. Would a quiet chat alone have been sufficient? On the issue not turning up to work on a Saturday alone, may be so, certainly at least once. Sadly, what Mr Truett has not recognized, is the significance of the progressive doubt as to his honesty that emerged over the subsequent events. There is the

cumulative evidence of his not being honest. We accept that Mr Teague was an extremely busy person at the time, trying to cover Duxford on top of his usual duties. It is not surprising that matters were not dealt with instantaneously and one can see why the incident with the receptionist probably triggered the final straw. The accumulative effect of that lack of honesty was sufficient to amount to a breach of trust and confidence; dismissal would have been inside the range of reasonable responses, if that had been the test before us. The decision to suspend, given the dishonesty, was in accordance with the respondent's policy. He was not prevented from gathering evidence.

59. There are no facts on which we could conclude that race lay behind the motive for the actions taken by the respondent and Mr Teague in particular, either in the process, or in the disciplinary action, or in the decision to dismiss. They found that the allegations were well founded, they were entitled to do so, they had good reason for doing so. A person in exactly the same circumstances as Mr Truett, but white British, would have been treated the same way. The treatment of which he complains did not relate to race and did not amount to harassment. As for the remaining allegations outside the dismissal process that we have been through, as we have indicated in our findings of fact, we have found on the balance probability that those matters did not take place.

60. For those reasons Mr Truett's complaint fails and is dismissed.

61. We would like to add that in a more finely balanced case, the absence of those particular witnesses and the lack of evidence about ethnicity, might well have made all the difference.

Costs Application

62. At the conclusion of the case, the respondent has made a costs application.

The Law

63. The provisions as to orders for costs are contained in rules 76 and 77 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. In particular, an order for costs may be made where a party has acted vexatiously, abusively, disruptively or otherwise unreasonably in the bringing of the proceedings, or the way the proceedings have been conducted, or the case had no reasonable prospects of success.

64. It is well understood in the employment tribunals that there is a culture of not generally speaking as a matter of course making costs orders in favour of the successful party, so for example often quoted is Lord Justice Sedley in the case of Gee v Shell UK Ltd where he says:

> "It is nevertheless a very important feature of the employment jurisdiction that it is designed to be accessible to ordinary people without the need of lawyers and that in sharp distinction for ordinary litigation in the United Kingdom losing does not ordinarily mean paying the other side's costs".

> That is a sentiment often repeated in subsequent appeal decisions over the years. As I see it, what that means is that people are entitled to come to an Employment Tribunal to say, without fear of punishment in the form of a costs order, "this is what has happened to me, I think it is unfair, I think it is unreasonable, I think it is discrimination, what do you think?" Costs remain the exception rather than the rule in the Employment Tribunal. On the other hand, employers should not be subject to expensive, time consuming, resource draining claims that are without merit; the rules of procedure say that a Tribunal may order costs in the circumstances set out in Rule 76 set out above. If the conduct of the litigant meets that definition, then the Tribunal has a discretion to order costs.

65. In Millan v Capsticks Solicitors LLP & Others UKEAT/0093/14/RN the then President of the EAT, Langstaff J, described the exercise to be undertaken by the Tribunal as a 3 stage exercise, which I would paraphrase as follows:

1. Has the putative paying party behaved in the manner proscribed by the rules?

2. If so, it must then exercise its discretion as to whether or not it is appropriate to make a costs order, (it may take into account ability to pay in making that decision).

3. If it decides that a costs order should be made, it must decide what amount should be paid or whether the matter should be referred for assessment, (again the Tribunal may take into account the paying party's ability to pay).

66. Whilst the threshold test is the same, whether a party has been represented or not, the exercise of discretion should take into account whether the party in question has been professionally represented. A litigant in person should not be judged by the same standards as a professional representative; the self-representing may lack the objectivity of law and practice that a professional representative will, (or ought to) bring to bear. See AQ Ltd v Holden[2012] IRLR 648 in which HHJ Richardson said:

> "…[32] The threshold tests in r 40(3) are the same whether a litigant is or is not professionally represented. The application of those tests should, however, take into account whether a litigant is professionally represented. A tribunal cannot and should not judge a litigant in person by the standards of a professional representative. … Justice requires that tribunals do not apply professional standards to lay people, who may be involved in legal proceedings for the only time in their life. As Mr Davies submitted, lay people are likely to lack the objectivity and knowledge of law and practice brought by a professional legal adviser. Tribunals must bear this in mind when assessing the threshold tests in r 40(3). Further, even if the threshold tests for an order for costs are met, the tribunal has discretion whether to make an order. This discretion will be exercised having regard to all the circumstances. It is not irrelevant that a lay person may have brought proceedings with little or no access to specialist help and advice.
>
> [33] This is not to say that lay people are immune from orders for costs: far from it, as the cases make clear. Some litigants in person are found to have

> behaved vexatiously or unreasonably even when proper allowance is made for their inexperience and lack of objectivity…"

67. The Tribunal has a discretion, not an obligation, to take into account means to pay. This was considered in the case of Jilling –v- Birmingham Solihull Mental Health NHS Trust EAT 0584/06. What that case said was that if we decide not to take into account the party's means to pay, we should explain why, and if we decide to do so, we should set out our findings about the ability to pay, what impact that has had on our decision whether to award costs and if so, what impact means had on our decision as to how much those costs should be.

68. There are 2 cases often referred to in support of applications for costs in instances where a party has been found by a tribunal to have lied: Nursing Home Limited –v- Matthews UK EAT20519/08 and Dunedin Campbell Housing Association –v- Donaldson UK EAT0014/09. In summary, the thrust of those cases is that where a litigant has lied, that may be taken as unreasonable conduct. Indeed, it was suggested that not to find such a lie as unreasonable conduct might be perverse on the part of an Employment Tribunal. On the other hand, the EAT subsequently made clear in HCA International v May-Bheemul UKEAT/0477/10, that Daleside and Dunedin do not establish the principle that if a Claimant fails to establish a central allegation, costs must follow. Mr Justice Cox said:

> "..a lie on its own will not necessarily be sufficient to found an award of costs, It will always be necessary for the tribunal to examine the context and to look a the nature, gravity and effect of the lie in determining the unreasonableness of the alleged conduct"

69. That was an approach subsequently endorsed by the Court of Appeal in Arrowsmith v Nottingham Trent University EWCA Civ 797.

70. The EAT reminded us more recently that the mere fact that the Claimant may have given false evidence is not reason on its own to automatically order costs against the Claimant. One has to look at the case as a whole, see Kapoor v Governing Body of Barnhill School UKEAT/0352/13.

The Application

71. So if I turn to the circumstances of this case, Ms Rokad says that we should look at the whole picture and conclude that the claimant conducted matters unreasonably. That is, in the way he has made allegations, serious and multiple allegations, which are found not proven and we have found that the evidence of the claimant is not credible. She spoke of the lack of particularisation, despite repeated requests. She referred to the preliminary hearing, when the need for particularisation was explained to the claimant. She referred to a letter from the respondent's solicitors of 10 August 2018, suggesting that he take advice and reserving the respondent's position as to costs. She makes the point that we have found not a single allegation proven and that we found the disciplinary process followed fair and unrelated to race. One thing I note about all of that is that what we have not been referred to is what is sometimes called a Calderbank offer: there has been no offer of some kind of payment to settle the proceedings nor have

we been referred to a costs warning letter where there has been a detailed explanation of where the weaknesses in the claimant's case lies.

Conclusions

72. This is a case which has turned upon credibility. It has turned upon allegations of specific things having been said and done. On balance, the balance of probability, a more than 50% chance, we have found in favour of the respondent, not the claimant. In a case like this, we could well be wrong, we know that. It could well be that Mr Teague behaved in the appalling way described. But, on balance, weighing the evidence, we found not. We have not made a finding that the claimant lied. There were matters in this case which I have highlighted and drawn to the respondent's attention, which were unsatisfactory. That they did not call two witnesses, to call them key witnesses might be to overstate it, but two witnesses on two allegations and they were unable to produce their ethnicity statistics.

73. Furthermore, we heard evidence from the claimant that he is without work and has remained out of work. He is in rented accommodation, without capital assets and debts in the order of £3,000.

74. In the circumstances, we will not make an order for costs. In the first place, because we do not consider it appropriate that such an order should be made, that the threshold has not been crossed. However, if it had been, we would still have been disinclined to make an order for costs on the basis of the claimant's means. The application for costs is therefore refused.

_____
Employment Judge Warren

Date: 3 July 2019

Judgment sent to the parties on

.....11/07/19.....

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For the Tribunal office