EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104571/18

Held in Aberdeen on 6, 7 and 8 August 2019

Employment Judge Mr N M Hosie
Tribunal Member Mr A W Bruce
Tribunal Member Ms N Mandel

Ms J Ganecka — **Claimant**
Represented by
Ms L Campbell, Solicitor

Grampian Health Board — **Respondent**
Represented by
Mr A Watson, Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Tribunal is that the claim is dismissed.

REASONS

Introduction

1. Ms Ganecka brought a claim of direct discrimination in terms of s.13 of the Equality Act 2010 ("the 2010 Act"). She claimed that she was discriminated against because of the protected characteristic of "race" which, in terms of s.9 of the 2010 Act includes "nationality". She is of Latvian nationality. In short, she complained that, as a so-called, "Bank worker", she was discriminated against, because of her nationality, when it came to a fair allocation of work and not being offered a permanent contract. Her claim was denied in its entirety by the respondent.

The Evidence

2. We heard evidence first from the claimant, Ms Ganecka.

3. We then heard evidence on behalf of the respondent from:-

    - Jane Lloyd, Assistant HR Manager
    - Anne Morrison, Assistant Support Services Manager
    - Shona Strachan, Domestic Supervisor

4. A joint bundle of documentary productions was lodged ("P"), along with a "Statement of Agreed Facts".

The Facts

5. Having heard the evidence and considered the documentary productions, the Tribunal was able to make the following material findings in fact. The claimant began working for the respondent as a Bank worker, domestic assistant, on 13 October 2014. The role involved carrying out cleaning duties on an, "as and when required" basis, to cover sickness, leave, vacancies etc of permanent staff. The claimant mainly worked at Peterhead Community Hospital with occasional

shifts at Ugie Hospital (also in Peterhead). Shona Strachan was her Supervisor. Anne Morrison was the Manager to whom Shona Strachan reported.

6. The Statement of her terms and conditions of employment was one of the documentary productions (P26-31).

7. The claimant worked with 6 other Bank workers, namely Carol Concannon, Suzanne Duthie, Jeanette Johnson, Christine Gordon, Jade Strachan and Michelle Mortimer. They are all of British nationality. The Supervisor, Shona Strachan, who is also British, was responsible for allocating shifts to the Bank workers. Details of the shifts allocated in the period from March 2016 to June 2017 were produced. (P103-124). We were satisfied that this information was accurate. The claimant's Manager, Anne Morrison, obtained this information from the respondent's payroll system. She prepared these documents on the instructions of Jane Lloyd, the respondent's Assistant HR Manager, in connection with a grievance which was raised by the claimant.

8. We wish to record that Mrs Lloyd and Ms Morrison gave their evidence at the Tribunal Hearing in a measured, consistent and convincing manner and presented as both credible and reliable.

8 July 2016

9. The claimant attended work only to discover that she was not scheduled to work that day. However, she contacted the Manager, Anne Morrison, there was work for her to do and she agreed to the claimant remaining at work. The records record that she worked 4 hours that day (P120). The Tribunal was of the unanimous view that this was simply a mix-up in the scheduling arrangements which tended to be somewhat informal.

10. In May and June 2016 there was a period of some 7½ weeks when the claimant was not allocated any shifts. She raised her concerns with Ian Buchan the respondent's Domestic Support Services Manager. He advised her to contact

Anne Morrison. She did so and the issue was resolved at a meeting which she had with Anne Morrison and Shona Strachan. It was agreed that she would work primarily at Ugie Hospital in Peterhead. However, when she gave evidence she said that her work there increased to such an extent that it was too much, and her health was affected.

28 April 2017

11. When the claimant reported for work at Ugie Hospital she was advised that she was not meant to be working that day and she was sent home by her Supervisor, Shona Strachan. Again, there was nothing to suggest that this was other than a genuine mix-up.

Meeting on 5 May 2017

12. Anne Morrison, the Manager, met the claimant that day when she was in Peterhead to meet Shona Strachan, the Supervisor at Peterhead and Sarah Wilson, the Supervisor at Fraserburgh. The claimant spoke to Ms Morrison and expressed her concern about the lack of shifts. Ms Morrison explained the nature of her contract was such that the respondent had no obligation to offer shifts and she was under no obligation to accept if offered. However, Ms Morrison explained there was always work available at other sites, including Fraserburgh Hospital. She also explained that if the claimant was prepared to work at Fraserburgh she would be compensated for travelling from Peterhead and she would ensure that the shifts were longer to make it worthwhile. She also advised her that when she started she would meet her at the hospital in Fraserburgh and make introductions. However, the claimant advised that she was not interested in working at Fraserburgh.

15 May 2017

13. The claimant arrived intending to work at Peterhead Hospital. However, the respondent understood that she was scheduled to work at Ugie Hospital in

Peterhead. The claimant contacted Ms Morrison and she was able to arrange for the claimant to work at Peterhead. Once again the Tribunal was satisfied that this was no more than a genuine mix-up.

Grievance

14. On 30 May 2017, the claimant submitted a written grievance to Ian Buchan, Domestic Support Services Manager (P54-56). She raised a number of concerns and alleged that her Supervisor, Shona Strachan, was treating her less favourably than others.

15. At the same time, the claimant submitted a "Grievance Notification" in which she alleged "victimisation and discrimination" by her Supervisor (P57).

4 June 2017

16. This was the last day the claimant worked for the respondent.

"Informal Facilitated Meeting" on 28 June 2019

17. Mr Buchan was on holiday when the respondent received the claimant's grievance. On his return, he instructed Jane Lloyd, Assistant HR Manager, to deal with the grievance. In accordance with the respondent's Grievance Policy (P37-52), Mrs Lloyd arranged an "informal facilitated meeting" on 28 June 2019. In attendance at the meeting were the claimant and her partner, Shona Strachan, Anne Morrison and Mrs Lloyd as the facilitator.

18. Prior to the meeting, Mrs Lloyd asked Anne Morrison to provide details of the hours which had been allocated to the Bank workers, along with information about vacancies for permanent posts. At the meeting, Ms Morrison spoke to the information which she had obtained from the payroll records which she typed up immediately after the meeting (P103-124). She also spoke about how the rota was compiled (P125-138).

19. There did not appear to be any disparity in the allocation of the hours; the claimant's total hours in the period from March 2016 to June 2017 were the third highest (P103); and there were periods when each of the Bank workers had not been allocated shifts.

20. So far as the period in May/June 2016 was concerned, when the claimant alleged that she had not been given any shifts for a 7½ week period, Mrs Lloyd said that there was, *"no mutual recollection about the reason for the non-allocation in that period".* However, she noted that before and after that period the claimant had regularly been allocated shifts.

21. So far as the occasions when the claimant had turned up for work only to be advised that she had not been scheduled to work that day, were concerned, Mrs Lloyd considered the "booking system". It was a fairly informal one with the Bank workers advising Ms Strachan on their availability for shifts. Mrs Lloyd did not think there was anything untoward. The system was such that it was impossible for all Bank workers to be allocated the same hours each year, but Ms Strachan said in evidence at the Tribunal Hearing that she tried to even out the allocation of shifts as best she could. She also presented as credible and reliable.

22. As there was a reluctance on the part of the claimant to work with her Supervisor, Shona Strachan, Mrs Lloyd advised the claimant that she could communicate her availability for shifts by email to the Manager, Anne Morrison. She told her that, if she wished, she could work shifts not just at Peterhead but at other hospitals as well.

23. On 30 June, Mrs Lloyd wrote to the claimant a summary of what had been discussed at the informal meeting (P60/61). The following are excerpts:-

> *"From the letter which accompanied the Grievance Notification Form dated 30th May, I have summarised below the themes which appear to be the basis of your concern that you are being treated less favourably than others by your Supervisor in the following areas:*
>
> - *Unfair allocation of available hours to those on "Bank" Contracts*

- *Unexplained period when you had no hours allocated followed by period of hours which you found excessive*
- *Confusion over booked/changed shift on two occasions (July 2018 & April 2017)*
- *Undermined confidence in performance (e.g. given of Maternity/Summers ward split activity*

We made some progress discussing the first three of these by examining data on hours allocation where there appeared to be a similar pattern of hours across all those with a "Bank" arrangement,. In answer to your question, it was clarified that some of the staff who have substantive hours contracts also have a separate "Bank" contract. The numbers of hours available to the "Bank" varies quite considerably from week to week depending on sickness absence/vacancies etc but on reviewing together the information Anne had taken to our meeting for the full year 2016 and the year to date 2017, overall you had a similar number of hours to other "as and when required" i.e. "Bank" colleagues. In addition, "Bank" staff other than yourself have, from time to time, months with no hours allocated. There was however a period in late spring/early summer 2016 where you had a string of weeks with no hours. You were sure that this was not a period when you had been unwell, although it might have been when you were doing some study and gave less availability but you could not recall a period when you had offered no hours at all. You were of the view that this period was because you had raised a concern about your Supervisor Shona treating you differently to others in respect of working hours for the maternity area. Shona explained and indicated she could clearly demonstrate that all staff were allotted work in the same way when covering the maternity area. You recall having raised that concern in late April 2016 and we could see that you had worked hours in May but none in June. Other colleagues had no hours in April and July. It was therefore possible that the down period reflected differing availability of Bank staff with those unavailable in late summer having their share at this earlier period. This was credible as you and some others had high numbers of hours later in the summer.

While there was no evidence to lead Anne Morrison to believe that the system of "Bank" hours allocation was inherently unfair or being applied unfairly or advantageously towards any individual or groups, in response to your concern, she and Shona are happy to review the current system and make some tweaks to further demonstrate the transparency of the "Bank" hours available and equal access to all. These refinements will be put into practice as soon as possible.

You were concerned that having now submitted a Grievance Form, you might be allocated no hours solely in response to your action. Both Shona and Anne reassured you that this was neither of their intentions and you were encouraged to offer your availability for work as usual for Peterhead and/or Fraserburgh/any area under Anne's management. These will be handled as normal and no difference would be made towards you having

raised concerns via the Grievance Policy. I would recommend that you provide your available dates for work via email so there is a neutral record of what you offer to be viewed alongside the shifts allocated amongst the cohort of staff with "Bank" contracts.

At this stage in our discussion, there arose a clear indication from you that there were other issues which you hadn't mentioned in your Grievance Form but on which you said that you had already taken legal advice. Racism was inferred which NHS Grampian would view very seriously as it does all other alleged aspects of inappropriate behaviour.

I did my best to encourage you to share the full extent of your concerns and explained that our Grievance Policy encourages all parties to put considerable effort into resolving matters informally through respectful, constructive and supported discussion before we would progress through the normal hearing stages if required. I would therefore urge you again, as I did verbally, to work with me in enabling a local resolution to all your issues by agreeing to share what these are with me in the role of Facilitator. As you indicated that these might be difficult to express in front of your Supervisor, I offered to meet you separately with or without your immediate Line Manager Anne Morrison present. Of course you could again bring someone to accompany you and I would encourage you to do so.

Gordon (the claimant's partner) and you wished to leave at this point with you agreeing to give some thought to my request that you tell me all that had been troubling you. I explained that there was an expectation that all matters of concern would need to be clearly shared and I agreed that I would write this to you. I also offered to speak directly with your solicitor to help ensure that we were all working in the same direction to address the very real concerns that you clearly have about how you feel treated in the workplace.

I hope that you have had time to consider your approach to my suggestion and now you have received this letter will phone or email me at the above address with some availability for us to meet again to gather the full extent of your grievance and enable us to progress these serious concerns quickly and appropriately under our process."

Formal Grievance Process

24. However, the claimant remained dissatisfied and on 13 July her solicitor wrote to the respondent to intimate that she wished to commence the formal grievance process (P62-65).

25. Mrs Lloyd wrote to the claimant on 24 July to acknowledge receipt of the solicitor's letter and to seek clarification of the claimant's allegations (P66/67). The following is an excerpt from her letter:-

> *"I note that you have given no additional information in respect of any behaviour/attitude which you felt had been racist in nature – I'm sorry if you feel that I am repeating myself but it is really important you give us clear and detailed information (examples and/or descriptions) of everything which has occurred to lead you to feel aggrieved. You implied at the informal facilitation stage on 28 June, 2017 that there were things you had not shared which you found too humiliating to describe at the point when you chose to leave the meeting. I note again, as explained in my letter of 30th June, how important it is to let us have all the necessary information in order to assist in the best possible way to reach a resolution. If you choose not to share such things now, any new information you raise which was available to you at the earlier stage, would not be address (sic) in any next steps in progressing the information in your written grievance form to date but would most likely need to be considered separately under the informal stage. I would therefore once again urge you to give all the examples/aspects of how you feel aggrieved to afford your local manager the opportunity to respond to and aim to address these at the informal stage of our process …..*
>
> *Finally, we note that you have not been indicating availability for Bank work and we would reiterate that if you provided these to Anne Morrison, she would aim to allocate you any work available at sites other than those supervised by Shona Strachan in this interim period."*

26. On 3 August 2017 the respondent's solicitor responded in writing to Mrs Lloyd. He enclosed with his letter a statement from the claimant which he had prepared (P69-72).

Stage 1 Formal Grievance Hearing

27. This was held on 4 October. It was chaired by Ian Buchan. The claimant and her partner were in attendance. As Ms Morrison had been involved previously and presented "the management case" (P73-81), Eleanor McDonald, Assistant HR Manager was also in attendance.

28. On 6 October Mr Buchan wrote to the claimant to advise that her grievance had not been upheld (P95/96). The following are excerpts from his letter:-

> "**1. Unfair allocation of hours to those on 'Bank' contracts**
>
> *Monthly hours worked by those with "Bank" i.e. as and when required contracts were reviewed for the period March 2016 to June 2017. The number of hours allocated to you did vary from month to month however when evaluating the total number of hours worked during this period it was noted that you had been allocated one of the highest amount of hours. This evidence does not show unfairness …*
>
> **2. Why was there a period where there were no hours allocated followed by periods of excessive hours**
>
> *After reviewing the monthly hours worked from March 2016 to June 2017 it is evident that in June 2016 and June 2017 you worked zero hours. Looking at the entire rota it is noted that there were other members of Bank staff who also had zero hours for some months. We are unable to explain the reason for this however a reasonable assumption would be that staff already on duty were asked "there and then" to cover more shifts. The management of the Bank rota is currently under review.*
>
> **3. Confusion over booked/changed shifts**
>
> *This point links closely to point 2 around the allocation of hours and highlights the need for improved communication. A database for the allocation of Bank hours is currently being reviewed; work on this will continue to ensure a robust and fair system which will show transparency and reassurance to all parties.*
>
> ***4. Feelings of being undermined, affecting confidence and abilities***
>
> *Your appraisal paperwork from last year was excellent and shows no cause for concern by NHS Grampian; this is something you should be proud of and feel confident about your abilities. As I explained during the hearing, the programme of appraisals for Bank staff are carried out once permanent staff are completed. Bank staff appraisals for 2017 are due shortly and this is your opportunity to raise any concerns you have.*
>
> *Your appraisal last year was highly satisfactory and there has been no indication that this year will be any different. It is our intention to retain good members of staff and as such I would encourage you to regularly look at the vacancy bulletin on the NHS website for opportunities of permanent posts.*"

29. Mr Buchan then went on in his letter to advise that he had made a number of recommendations concerning the management of Bank staff and allocation of hours. He also advised that he would arrange further facilitation between the claimant and her Supervisor, Shona Strachan, "as a means of building bridges".

"Facilitation meeting"

30. Anne Morrison met the claimant and her partner, along with Sheila Swanney, Assistant HR Manager, on 29 November 2017 to discuss Bank work. Shona Strachan had also been invited to attend the meeting, but she declined as she felt that she had nothing further to add. The claimant said when giving evidence at the Tribunal hearing that, *"Shona's refusal to facilitate ended it for me. She didn't want me back at Peterhead".*

31. The claimant was offered shifts at Fraserburgh Community Hospital. However, she advised that she did not want to work there because of the travel distance, notwithstanding the fact that Ms Morrison advised her that she would be given longer shifts there and allowances would be made for her having to travel, which would be recognised financially.

32. The claimant also told Ms Morrison at that meeting that her concerns were, *"not about race".*

33. Ms Morrison wrote to the claimant again on 21 December (P97/98). The following are excerpts from her letter:-

> *"I understand that since the grievance meeting in October 2017, you had telephoned Shona, on a number of occasions, to request shifts, however, the telephone rang out and there was no answering machine for you to leave a message. It is unfortunate that you did not contact me directly to request shifts, as you know, I am always happy to speak with you and had contacted you to offer you shifts in Fraserburgh Hospital. I note that you were unable to accept the offer of shifts in Fraserburgh as this would have required you to travel some distance.*

> *I would like to reiterate my offer for you to return to work "Bank" shifts at Peterhead Hospital, however, you clearly stated that you did not wish to return to work at Peterhead Hospital. I understand that you feel there has been some delay in you being offered this. Please accept my apologies for this delay.*
>
> *Alternatively, if you would like to undertake shifts at Fraserburgh, I would ensure that those shifts are as long as possible to try to make it worth your while travelling to Fraserburgh."*

34. As she had not heard from the claimant, Ms Morrison telephoned her on 22 February to discuss the offer of Bank work. She then wrote to the claimant on 28 February in the following terms (P99):-

> *"It was good to speak to you on 22 February 2018.*
>
> *I understand that you received my letter of 21 December 2017 which contained various options for you. Unfortunately you have not been in touch to request work or to discuss the letter. When we spoke last week you explained that there are some parts of the letter which you do not agree with and that you had contacted your solicitor.*
>
> *My offer to you to work Bank shifts at Fraserburgh Hospital still stands and I would be happy to discuss this with you. Please can you contact me if you would like to discuss this or my letter to you."*

35. However, the claimant did not contact Ms Morrison and on 15 March 2018 she returned her uniform.

36. On 23 March, Ms Morrison wrote to the claimant again to ask if she had considered her offer of shifts at Peterhead or Fraserburgh (P100).

37. On 12 April, the claimant sent an email to Ms Morrison to intimate that she had given "written notice" (P101).

38. On 13 April, Ms Morrison wrote to the claimant to acknowledge her email (P102).

Permanent posts

39. The parties included with their Statement of Agreed Facts details of Bank workers who had been appointed to permanent posts in the period from April 2015 to April 2017.

40. The claimant said in evidence that she only started to look for permanent positions in 2016 after not being offered shifts for a 7½ week period. We were only concerned, therefore, with Carol Concannon, Jeanette Johnson, Suzanne Duthie and Christine Gordon.

41. The respondent advertises any job vacancies by way of a register on an electronic system with details of the title of the job and the geographic location. This can be accessed externally. Further, so far as community hospitals, such as Peterhead and Fraserburgh are concerned, vacancies will be put up on the notice board and Bank workers are likely to become aware, by way of discussion at work, of current vacancies and those which are due to come up.

Carol Concannon

42. This vacancy at Peterhead Community Hospital arose in December 2016 and not December 2015 as narrated in the Statement.

43. Ms Concannon was interviewed by Anne Morrison and Shona Strachan. She was appointed by the Manager, Anne Morrison. Ms Morrison could not recall the claimant applying for this post. She was not one of the candidates who was interviewed (P36).

44. In any event, the claimant had advised Ms Strachan that 15 hours per week wasn't enough for her.

Janette Johnson

45. This vacancy at the Peterhead Health Centre arose in the Spring of 2017. Ms Johnson was also interviewed by Anne Morrison and Shona Strachan and appointed by Ms Morrison. The 6 hours per week were insufficient for the claimant. She didn't apply.

Suzanne Duthie

46. This was a post at Ugie Hospital, Peterhead which it was anticipated would become vacant as a consequence of Suzanne Duthie leaving in April 2017. Anne Morrison advised the claimant of this and the claimant told her that she would be interested. However, as it transpired, there was a possibility that Ugie Hospital might close and, due to that uncertain future, the vacancy did not arise and was not filled.

Christine Gordon

47. This vacancy in the Maternity Department at Peterhead Community Hospital arose in April 2017. Ms Gordon had worked there often, and the Manager was happy with her work. Continuity was also important. The post was advertised on the notice board. Ms Gordon was interviewed by Ms Morrison and Ms Strachan. She was appointed by Ms Morrison. No-one else applied for the post.

Claimant's Submissions

48. The claimant's solicitor spoke to written submissions which are referred to for their terms.

49. She confirmed that the complaint was one of direct discrimination under s.13 of the Equality Act 2010 ("the 2010 Act").

50. In support of her submissions she referred to the following cases:-

Veola Environmental Services UK v Gumbs UKEAT/0487/12
Igen v Wong Limited [2005] ICR 931
Hewage v Grampian Health Board [2010] ICR 1054
Nagarajan v London Regional Transport 2000 1 AC501

51. She submitted that the "incidents in 2016 and 2017 when the claimant was not given shifts for a number of weeks, *"are connected and therefore both time periods feature in the same complaint due to their similarity and circumstances. It is submitted that individual acts of discrimination can form a continuing act regardless of whether they occur some months apart. Where allegations are linked by a common personality they cannot stand in isolation"*.

52. She relied on **Veola** in support of her submission in this regard.

53. She then referred to the burden of proof positions in s.136 of the 2010 Act.

54. She submitted, with reference to **Igen** and **Hewage**, that the respondent had failed to give a satisfactory explanation for their failure to "withhold hours of work" in 2016 and 2017 and, *"failing to offer the claimant a substantive contract when they did so many other British employees. It is not clear that any other British employee has been subject to the same treatment that the claimant was. It is the claimant's evidence that Ms Strachan refused to participate any further in the facilitation process, therefore bringing the prospect of resolution to a close and this being after the grievance process had already been concluded".*

55. She further submitted that the discrimination was, *"a subconscious decision that has resulted in the unfavourable treatment of the claimant."* She submitted that the claimant disputed the respondent's evidence that she was, *"unavailable or had other commitments that restricted her working availability".*

56. The claimant's solicitor invited the Tribunal to accept the claimant's evidence that she had a routine of receiving hours and that, *"it was as a result of Ms Strachan's actions and decisions that resulted in her not receiving hours for work when her colleagues of British Nationality were. There is not an adequate explanation*

provided by the Respondent. It is submitted that there should be a doubt planted in the mind of the Tribunal that her nationality is at least a factor when considering why she has been treated less favourably than her colleagues."

57. She submitted that, *"the discriminatory reason for the behaviour does not have to be the sole reason and the fact that this has been a contributing cause should allow the Tribunal to establish the presence of discrimination".* In support of her submission in this regard, she referred to **Nagarajan**.

58. In conclusion, the claimant's solicitor said this:-

> *"The claimant cannot prove that the respondent had a conscious intention to discriminate against her, however there is clear evidence that as a result of the respondent's actions there has been a negative effect on the claimant.*
>
> *It is my submission that the Tribunal should find that there is the presence of subconscious discrimination in this case. It is submitted that it is more likely than not that, in all of the circumstances, that the claimant's nationality was at least a factor in the treatment she was subject to. The Tribunal should reject the evidence of the respondent in their attempts to explain their actions and accept that of the claimant who suffered detriment thereafter. The claimant was left in a situation whereby she suffered financially and personally as a direct result of the respondent's decision. Had the respondent not treated the claimant less favourably than others then it is likely that the claimant would have continued in her employment through the same manner, as she had since she commenced employment in October 2014".*

Respondent's Submissions

59. The respondent's solicitor also spoke to written submissions, which are referred to for their terms.

60. In support of his submissions, he referred to the following cases:-

> ***Famy v Hilton UK Hotels Ltd*** UKEAT/0639/05
> ***Madarassy v Nomura International Plc*** [2007] IRLR 246
> ***Nagarajan***

61. So far as the nature of the claim was concerned, he said this:-

> *"There are two strands to the complaint of direct discrimination: (i) the claimant not receiving Bank hours in Peterhead at certain times; and (ii) the claimant not being offered a permanent contract. The issue that the Tribunal has to determine is that, in respect of the conduct complained of (not being offered shifts or a permanent contract) has the respondent treated the claimant less favourably than others* ***because of her race*** *contrary to Section 13 of the Equality Act 2010?"*

62. He submitted that, *"the respondent has provided an explanation for the fact of the claimant not being offered shifts at certain times, and not being offered permanent jobs. In terms of the shifts, the claimant was either in some way unavailable (summer 2016), receiving comparable shifts to her Bank colleagues (thereafter to June 2017, which the claimant appeared to accept in evidence), or not getting in contact with availability for shifts as directed (June 2017 onwards). In terms of the permanent jobs, the claimant did not express an interest, despite having the same opportunity to apply as everyone else, or when she did (the Ugie position) the role could not proceed (due to uncertainties with the future of Ugie Hospital)."*

63. He submitted that no inference of discrimination could be drawn as the claimant had only established her protected characteristic – her race. This meant that the burden of proof had not shifted. In any event, even if it had, it was submitted that there was an explanation for the way in which the claimant had been treated.

64. The respondent's solicitor then went on to detail a number of differences in the evidence which the Tribunal heard between the claimant and the respondent's witnesses. He invited the Tribunal to prefer the evidence of the respondent's witnesses.

65. He also made the following submissions so far as the claimant's evidence was concerned:-

> *"In evidence the claimant had multiple opportunities to cite her nationality as a cause for the respondent's actions but failed to do so:*
>
> *- **'Why do you believe you were not receiving any hours?'** This was punishment for complaining about the Health Centre being dirty, or because she had raised the issue around her having to clean the maternity unit after working in the summer ward.*
>
> *- **'Why do you think you didn't have as good a relationship with Shona Strachan?'** Essentially because she kept herself to herself.*
>
> *- **'Why do you believe others were offered a permanent contract but not you?'** In the beginning, she didn't need a permanent contract, but then years passed and she couldn't understand what happened. No-one said to her a job was coming up.*
>
> *I would note that it was not put to the respondent's witnesses that the issues in relation to shifts and permanent jobs was due to the claimant's nationality……..*
>
> *The case appears to have developed as follows. The claimant was upset at being sent home from work in April 2017. This brought up ill feeling (well-founded or not) dating back to the summer of 2016. She quickly got locked into a process of grievance procedures and legal advice regarding legal recourse. The claimant accepted that during the informal grievance meeting of 28 June 2017 she hinted that she had a complaint about Shona Strachan that caused her humiliation and she was not comfortable discussing this in front of Shona. This put the respondent on edge – they are thinking the claimant believes she has been subject to some form of race discrimination she is uncomfortable talking about. Nevertheless, the matter is left with the claimant being told to contact Anne Morrison with her availability for Peterhead and or Fraserburgh. The claimant is then notifying the respondent via her solicitors of her intention to claim constructive dismissal and race discrimination. Perhaps constructive dismissal is the primary claim and race discrimination secondary. She has essentially switched focus from returning to work (she did not want to return to Peterhead and work with Shona Strachan, nor accept work in Fraserburgh.)*
>
> *The constructive dismissal claim is struck out. She still feels aggrieved so continues with the legal proceedings. There is however no basis for a claim of race discrimination. The claimant appeared to admit as much in a meeting in November 2017, after months of receiving legal advice and assistance.*

The claim should not have been pursued. There is nothing to suggest the matter is about race; yet Shona Strachan has had months of looming Tribunal proceedings whereby she is being accused, essentially, of being racist. The entire process is alien to her and the outcome and repercussions of that unknown. This has had a profound effect on her. In addition, there has been significant management time and costs for the respondent. I can understand that the claimant may have had an axe to grind - particularly as she has lost out on earnings when she did not work - but this was a dangerous way to pursue her sense of unfairness by way of unfounded and very serious allegations of race discrimination against her managers. We would invite the Tribunal to dismiss the claim."

Discussion and Decision

66. This was a claim of direct discrimination, in terms of s.13 of the Equality Act 2010 ("the 2010 Act"), which is in the following terms:-

> *"**13 Direct discrimination***
> *(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."*

67. The "protected characteristic" relied upon, in terms of s.4 of the 2010 Act, was "race" which, in turn, in terms of s.9 includes "nationality". The claimant is a Latvian national.

Burden of Proof

68. A complaint of race discrimination requires a claimant first to establish facts that amount to a *prima facie* case: the claimant has the initial burden of proving, on the balance of probabilities, facts from which the discrimination can be presumed. The statutory basis for this so-called "shifting the burden of proof rule", is to be found in s.136 of the 2010 Act which applies to all discrimination and victimisation claims. S.136(2) provides that if there are facts from which the Court or Tribunal could decide, in the absence of any other explanation, that a person (A) contravened a provision of the 2010 Act, the court *must* hold that a contravention occurred; and

s.136(3) provides that s.136(2) does not apply if A shows that he or she did not contravene the relevant provision.

69. Guidance on the application of these provisions was given by the EAT in ***Barton v Investec Henderson Crosthwaite Securities Ltd*** [2003] ICR 1205. These guidelines were explicitly endorsed by the Court of Appeal in **Igen**, to which the Tribunal was referred, and other cases. Although these cases concerned the application of s.63A of the Sex Discrimination Act 1975, the guidelines are equally applicable to race discrimination complaints and the application of s.136 of the 2010 Act. When giving the judgment of the Court of Appeal in **Igen**, LJ Peter Gibson said this, by way of guidance, at para 76:-

> *"(1) Pursuant to section 63A of the 1975 Act, it is for the claimant who complains of sex discrimination 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 which is unlawful … These are referred to below as "such facts".*
>
> *(2) If the claimant does not prove such facts he or she will fail.*
>
> *(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".*
>
> *(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.*
>
> *(5) It is important to note the word "could" in section 63A(2). At this stage the Tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.*

> *(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 these facts.*
>
> *(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with section 74(2)(b) of the 1975 Act from an invasive or equivocal reply to a questionnaire or any other questions that fall within section 74(2) of 1975 Act*
>
> *(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining such facts pursuant to section 56A(10) of the 1975 Act. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.*
>
> *(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.*
>
> *(10) It is then for the respondent to prove that he did not commit, or as the case may be, it is not to be treated as having committed the act, that act.*
>
> *(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.*
>
> *(12) That requires the Tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, and further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.*
>
> *(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge the 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."*

70. Further, it was also significant in the present case, in view of the claimant's allegations about the unreasonable way she had been treated by Ms Strachan, that in ***Bahl v The Law Society and others*** [2004] IRLR 799, the Court of Appeal

upheld the reasoning of the EAT and emphasised that unreasonable treatment of a claimant cannot in itself lead to an inference of discrimination, even if there is nothing else to explain it. Although that case proceeded under legislation prior to changes made to the burden of proof provisions, the principle is still valid. In other words, unreasonable treatment is not sufficient in itself to raise a *prima facie*, case requiring an answer. It is necessary to create a presumption of race discrimination that someone not of the same race was (or would have been) treated more favourably.

71. As the EAT said in **Bahl** at para. 89: "… merely to identify detrimental conduct tells us nothing at all about whether it has resulted from discriminatory conduct.

Less favourable treatment ?

72. We first considered, having regard to the definition in s.13, whether the claimant was treated less favourably than the other British Bank workers with whom she compared her treatment.

Allocation of shifts

73. So far as the claim that the respondent had failed to allocate or withheld hours of work was concerned, the terms of the claimant's contract were significant. This was a so-called "zero hours" contract. There was no obligation on the respondent to offer the claimant any shifts and no obligation on the claimant to accept any shifts which were offered.

74. In any event, there was clear evidence from Jane Lloyd and Anne Morrison, both credible and reliable witnesses, that the claimant had not been treated *"less favourably"* and there was supporting documentary evidence. When the claimant raised her grievance, quite properly Mrs Lloyd asked Ms Morrison to prepare details of the hours worked by those on "Bank". Ms Morrison obtained that information from the payroll records (P103-124) and we were satisfied that it was accurate. That information revealed that the claimant had not been treated "less

favourably" when it came to the allocation of shifts. Admittedly, in June 2016 and June 2017 she had not been allocated any hours but that was the same from time to time as others on the "Bank".

75. We also accepted the evidence of Shona Strachan, who also presented as credible and reliable, that she endeavoured to achieve a fair allocation of the shifts. However, this was not an exact science and often it was only at short notice that a Bank worker was required. Work could also be offered to those on a permanent contract as well as those on the Bank. As Mrs Lloyd put it when she gave evidence, *" she was a good worker. We were keen to give her work when available."*

76. While we remained mindful that discrimination can be subconscious, we were not persuaded, therefore, that when shifts were offered and allocated the claimant was treated less favourably than the British Bank workers.

Permanent posts

77. So far as the issue of the claimant not being offered a permanent contract was concerned, we also heard detailed evidence about this. The claimant advised that she only started to look for a permanent position after June 2016 which meant that it was only the appointments of Carol Concannon in December 2016, Jeanette Johnson in the spring of 2017, the vacancy which arose at Ugie Hospital in April 2017 as a consequence of Suzanne Duthie leaving Ugie Hospital and the appointment of Christine Gordon to the Maternity Unit at Peterhead Community Hospital in April 2017, with which we were concerned.

78. We accepted the claimant's evidence that there was no impediment to the claimant applying for these posts. Details were online, they were also posted on notice boards in the hospitals concerned and it was highly likely that there would be discussion amongst the respondent's workers about vacancies for permanent positions which were either advertised or about to come up.

79. The claimant did not apply for the post to which Carol Concannon was appointed. In any event, she told Shona Strachan that 15 hours per week were not enough for her. The claimant did not apply for the post to which Janette Johnson was appointed but, in any event, that only involved a total of 6 hours per week which was also insufficient for the claimant.

80. Anne Morrison did mention to the claimant the possibility of a vacancy arising at Ugie Hospital. However, the position was never offered to the claimant as a vacancy did not arise due to uncertainties as to the future of the Hospital.

81. Nor did the claimant apply for the post at the Maternity Unit at Peterhead to which Christine Gordon was appointed. There was no impediment to her doing so had she been so inclined. We also accepted the respondent's evidence that the Manager at the Maternity Unit was happy for Ms Gordon to be appointed as she had worked there previously.

82. We arrived at the view, therefore, and we are bound to say with not a great deal of difficulty, that the claimant was not treated less favourably in respect of the two elements of her claim. Accordingly, the claimant failed to satisfy the test in s.13. She failed to establish a *prima facie* case which would have had the effect of shifting the burden of proof to the respondent. Accordingly, the claim is dismissed.

83. We also wish to add that in our view the respondent handled the claimant's grievance seriously and sensitively. They did all that could be reasonably expected of an employer faced with such a serious allegation. They carried out a thorough investigation and did their best to address the claimant's concerns by reviewing their system for allocating shifts, arranging for the claimant to advise Ms Morrison of her availability, rather than Ms Strachan, and offering her work elsewhere with an allowance for her travel time. We formed the view that the respondent tried to support the claimant recognising that she felt she was being discriminated against. She was a valued employee and the respondent did not want to lose her.

84. Further, we wish to record, for the sake of completeness, that even if the claimant had been able to establish that she had been treated less favourably, we would still have been of the view that she had failed to establish a *prima facie* case. The reason for this is that there were no facts which could allow an inference to be drawn that the claimant's nationality and any less favourable treatment were linked. The guidelines in ***Barton*** and other cases clearly require the claimant to establish more than simply the *possibility* of discrimination having occurred before the burden will shift to the employer.

85. That point was emphasised by LJ Mummery giving the judgment of the Court of Appeal in ***Madarassy***, to which we were referred by the respondent's solicitor:-

> *"For a prima facie case to be established it will not be enough for a claimant simply to prove facts from which the Tribunal could conclude that the respondent could have committed an act of discrimination. Such facts would only indicate a possibility of discrimination, nothing more. So, the bare facts of a difference in his status and a difference in treatment – for example, in a direct discrimination claim the evidence that a female claimant had been treated less favourably than a male comparator – would not be sufficient material from which a Tribunal could conclude that, on the balance of probabilities, discrimination had occurred. In order to get to that stage, the claimant would also have to adduce evidence of the reason for the treatment complained of."*

86. In our view, that would have been the position in the present case had the claimant been able to establish that she had been treated less favourably. It was significant, as the respondent's solicitor drew to our attention, that in the course of the Tribunal hearing the claimant was asked on a number of occasions why she was of the view that her treatment had been racially motivated. She was unable to give a satisfactory answer. This was also a matter which Mrs Lloyd raised with the claimant in para 2 of her letter of 24 July 2017 (P66), again without a satisfactory response. Further, at the meeting on 29 November 2017 the claimant stated: *"This is not about race".*

87. In the Tribunal's view, the way in which the claimant was treated by the respondent had nothing to do with her nationality (which she herself seemed to recognise at

the meeting on 29 November). Indeed, we were of the view that there was merit in the submission by the respondent's solicitor that it was likely that the claimant's primary complaint was one of constructive unfair dismissal, on the basis of the manner in which she alleged she had been treated by Ms Strachan. She set out a complaint of constructive unfair dismissal in her claim form, but, following a Preliminary Hearing, the Tribunal decided that it did not have jurisdiction to hear such a complaint and it was struck out.

88. That left the discrimination complaint, but the claimant failed to establish that she was treated less favourably than her comparators; she failed to set out primary facts which would enable an inference of discrimination to be drawn; she failed to discharge the onus on her of establishing a *prima facie* case. Accordingly, the claim is dismissed.

Employment Judge: **Nicol Hoise**
Date of Judgment: **26 August 2019**
Date sent to parties: **28 August 2019**