EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Ms J Davies	**AND**	Tui UK

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Swansea **ON** 22, 23 and 27 August 2019

EMPLOYMENT JUDGE: NW Beard **MEMBERS: Mrs D Hebb**
Mrs J Kieley

Representation
For the Claimant: In Person
For the Respondent: Ms Wheeler (Counsel)

JUDGMENT

The unanimous judgment of the tribunal is that:-

1. The claimant's claim of race discrimination pursuant to section 13 Equality Act 2010 is well founded.

2. The respondent is ordered to pay to the claimant £1,000.00 in compensation.

REASONS

Preliminaries

1. The claimant represented herself and the respondent was represented by Ms Wheeler of counsel. The claimant's claims direct race discrimination based on her Polish nationality. She also claims an unlawful deduction of wages. The tribunal was provided with a bundle of documents running to 145 pages. The claimant gave oral evidence; the respondent called three witnesses to give oral evidence: Amy Norman, a colleague of the claimant, Samantha Beynon who was a trainer and Clayton Meyer, who made the decision to dismiss the claimant.

2. At the outset of the hearing we discussed with the parties the issues the tribunal would be required to resolve. Both parties agreed that the issues were as set out in paragraphs 8 to 15 of the record of hearing contained within EJ Powell's order of 20 May 2019, they were as follows:
   2.1. That the claimant was subjected to demeaning comments by her colleagues to the effect that migrants were taking work and school places from Welsh people and congesting NHS services.
   2.2. That Amy Norman had taken a comment by the claimant about Welsh people who lived on Council Housing Estates and (a) distorted the claimant's comments and (b) escalated them as an allegation and a complaint to Miss Beynon.
   2.3. Treating the claimant less favourably by calling her to a meeting to explain her conduct.
   2.4. That the claimant recounted the demeaning comments set out in paragraph 2.1 above to s Beynon and Ms Beynon indicated that she agreed with them.
   2.5. Calling the claimant to a disciplinary hearing and dismissing her, when she explained the conduct of others who were not disciplined and dismissed.

3. The claimant told me she had no experience of tribunal proceedings. I gave the claimant outline guidance as to the order in which evidence, cross examination and submissions would be dealt with. In addition to this I give the claimant a brief outline as to cross examination, re-examination and the limits governing them.

The Facts

4. The claimant describes herself as Polish. She commenced employment with the respondent on 12 November 2018 and began a period of training. The claimant was being trained to be a call centre operative along with several others over a period of five weeks. At the end of this period, on 12 December 2018, she was dismissed. The claimant was offered the role and had accepted it on 14 September 2018. However, the claimant signed a written document setting out terms and conditions of employment showing her start date as 12 November 2018. There is no evidence that the claimant was told that the start date would be before 12 November 2018; the claimant commenced training on that date. The claimant arranged with the respondent that they would deduct from her wages a sum of money to obtain a parking permit.

5. The claimant has made comments recorded in a Universal Credit log kept by the DWP. On 22 November 2018 that record indicates that he claimant was expressing dissatisfaction about her position with the respondent. The claimant told the DWP that she was having problems, that Ms Beynon was

hostile toward her, that other employees were questioning her and that she attributed this to "*some sort of information circulating*".

6. The claimant and other trainees were at lunch on 30 November 2018. This was in an area called the kitchen, where apparently others beside the training group took lunch. It is clear that there was a heated discussion involving members of the training group including the claimant and this involved a discussion on Brexit. There is little else clear about the events of that day. We have heard conflicting evidence from witnesses who gave oral evidence, that also, to an extent conflicts with written statements made by others for the internal investigation and the tribunal is required to extract a true picture from what it regards as unreliable evidence from witnesses on both sides.
    6.1. The claimant's account was that an individual (who was not called to give evidence and the tribunal shall refer to as F) made remarks to the effect that foreigners were coming to live and work in Wales, which was a small country, and they were taking up services such as the NHS, with the implication that this was to the disadvantage of the existing population. The claimant told us that she had responded by talking about Welsh people who lived in council houses, but said that she had been misunderstood because she was referring to the lack of educational opportunities for such people.
    6.2. Miss Norman's evidence was that the claimant had made insulting remarks about Welsh people from council estates by indicating that such people did not want to work and that they and their children would not amount to anything. Miss Norman said that she responded by indicating that she had been brought up on a council estate and had found success and expected her children to succeed also. Her account was that the claimant persisted with these remarks, that Miss Norman told her that she was offended by the remarks and as a consequence Miss Norman became upset and left the kitchen. Miss Norman then told us that there was a chance encounter with Ms Beynon as she left, and Ms Beynon could see that she was upset and questioned her as to the reasons. Miss Norman did not initially mention that F had made any remarks along the lines of those set out by the claimant in her witness statement. In oral evidence when questioned by the claimant Miss Norman denied that she had heard any comments by F to that effect. However, when asked questions by the tribunal she changed her account and said that she had heard those comments, but after the claimant had made her comments.
    6.3. The written statement of F prepared for the internal investigation does not set out that she spoke in the way the claimant and Miss Norman have described. Her account does say that she began speaking about people from abroad coming to the UK to work. However she places

these remarks in the context of historical changes in the last 40 to 50 years. However, she does say that the claimant told her that she was offended by the remarks. Her account is that the claimant accused her of using the word immigrants which she denied using.

6.4. Ms Beynon's evidence was that she encountered Miss Norman in the corridor, found her upset, asked for the reasons and was told by Miss Norman about the comments about Welsh people made by the claimant. She then told us that she asked the claimant to come to the "glass room" away from the training rooms to speak about it. Her position was that after an initial discussion she asked Miss Norman to join them. That Miss Norman tried to explain the reasons for her offence but was prevented from explaining by the claimant speaking over her. Ms Beynon denied that the claimant had told her during this discussion about the claimant's offence at the words attributed to F. However, Ms Beynon then went on to explain that she knew that the words attributed to F were F applying an analogy to explain to the claimant why the claimant's words were offensive. This evidence was confusing because the written statement prepared by Ms Beynon indicated (paragraph 22) that she did not become aware of this explanation by F until a later meeting designed to clear the air. When asked about this Ms Beynon told us that she had spoken to F in the corridor on 30 November before speaking to the claimant. She told us that her memory was at fault when she prepared the statement but that her memory had been clarified during the course of the hearing.

6.5. The claimant's account of the meeting was that she had told Ms Beynon that the problem had begun with her feeling offence at the words of F. The claimant accepted that although she had been called to the meeting alone initially that Miss Norman joined them later. The claimant contended that at that meeting Ms Beynon told her that she agreed with what F had said. Miss Beynon denied this and told us that the claimant had not raised the issue of F and what F had said at all.

6.6. On the balance of probabilities, we consider it highly unlikely that the claimant would not have mentioned F and her comments. In our judgment Ms Beynon was in all likelihood trying to contain the situation to dealing with the claimant and Miss Norman. We take the view that Ms Beynon wished to avoid broadening the problem.

6.7. We consider that the evidence of Ms Beynon is unreliable because of her change in her accounts. However, we do not accept the claimant's evidence that Ms Beynon openly agreed with what had been said by F. Firstly we consider it unlikely that she would make a direct comment of this type and secondly it appears to us that from the various accounts Ms Beynon was trying to concentrate the meeting on the claimant's comments.

6.8. From that review of evidence given the following emerges which we find as fact:

6.8.1. The claimant, Miss Norman and, although as hearsay, Ms Beynon all accept that F used the phrases attributed to her by the claimant.

6.8.2. In our judgment the claimant used the phrases attributed to her by Miss Norman.

6.8.3. Although the claimant tried to argue that her words were "twisted", during cross examination she accepted the thrust of the words attributed to her. Her contention was that this was simply explaining her view of a lack of opportunities, that does not fit with the description of a heated argument.

6.8.4. We find that the claimant was deliberately offensive in using this language.

6.8.5. There is a clear dispute as to sequence i.e. whether the claimant or F made their respective comments first. This is a dispute we are not able to resolve because we cannot rely on Miss Norman's account which changed during the course of evidence. We cannot accept the accuracy of the claimant's account on the balance of probabilities as the claimant, in our judgment, minimised the offensiveness of her comments and was attempting to portray herself as entirely innocent. Ms Beynon was not present, and the account of F, similarly to the claimant, minimises the offensiveness of her comments.

6.8.6. We do conclude that Ms Beynon was not prepared to hear the claimant's explanation of the totality of events and instead concentrated on the upset that the claimant had caused Miss Norman. The explanation for this, that she was unaware of F's comments, we have rejected.

7. There was an incident on the 5 December 2018, involving the claimant being offensive about the way in which a fellow employee J smelled. This incident was unconnected with the events of 30 November 2018, however formed part of the investigation which we deal with below. For completeness in our judgment, even on the claimant's own account of events, she was overtly offensive by complaining about a smell when J sat next her and having had the explanation that he was damp because of walking in the rain, moved away from him demonstrating her view of the smell, along with commenting upon it.

8. The claimant approached the respondent asking to speak to the CEO. The claimant was seen by Adam Williams, who, apparently, was to find out what the claimant wished to speak to a senior person about. After this meeting the claimant met with Angela Terry as the most senior person present at Swansea at that point in time others being on holiday. There are emails in the

bundle about this meeting, however the tribunal have not heard from Angela Terry. The emails contain HR advice about speaking to the claimant about boundaries. However, in some way, which has not been explained to the tribunal, the result of these exchanges somehow led to a disciplinary hearing being arranged for the 12 December 2018.

9. Because of the discussions between Angela Terry and the claimant further training was arranged for the claimant. From the email sent by Angela Terry it would appear that, in her opinion, the claimant was dismissive of the quality of training provided by the respondent. In addition to this Angela Terry asked Ms Beynon to arrange a meeting with the claimant, Miss Norman, F and J. That meeting took place soon after. On the evidence we heard it did not appear that the meeting achieved anything specific.

10. Whatever the mechanism by 11 December 2018 a decision had been made to gather statements from F, J, an employee that had been present when the incident with J took place and from Miss Norman. From the evidence several others would have been present on 30 November 2018 in the kitchen, some of whom would have been involved in the discussion, however, no further statements were sought.

11. A decision was made to call the claimant to a disciplinary hearing. Mr Meyer told us that this was not his decision he returned to work from holiday on 12 December 2018 and was told to conduct the hearing. His evidence indicates Angela Terry made the decision that someone should consider disciplinary action because, after her meetings with her, the claimant had not apologised for any conduct and when Angela Terry had spoken to her about the offence caused by the comments about Welsh people the claimant had responded with “that your problem”. The claimant denied making this last statement, the tribunal reject her denial. The claimant when asking questions in cross examination demonstrated a level of insensitivity such as suggesting to Miss Norman that she had a “complex” about having lived in a council house. In addition to this there is a contemporaneous record of the claimant having said this (p. 74) We are convinced that the claimant’s natural response is combative and therefore conclude she is likely to have used the phrase as described. The claimant had complained about the quality of training that she had received, Angela Terry arranged for the claimant to have additional training. It appears that the concern that led to consideration of a disciplinary was the concern that the claimant was a disruptive presence emails on the day of the meeting refer to the claimant making complaints for the sake of it and being “very vocal” with her views and offending people.

12. There are notes of the disciplinary meeting. The claimant has signed and altered some of these notes. Despite this the claimant contended that some of the notes were not accurate. We reject that evidence. The claimant is clearly intelligent and was alert enough to make some detailed changes to the note taken, we consider that her argument that these were not accurate only arose when she became made aware, through questioning, that some of her comments in the note were damaging to her case.

13. In his evidence Mr Meyer accepted that, although he was following advice from HR, he did not consider that it was fair that the claimant was not informed that there was to be a disciplinary meeting until she arrived at the meeting. He also, candidly, said that he would have dealt with matters differently with hindsight. However, he was clear that the differences were in procedures not the outcome.
    13.1. He was presented with accounts of the claimant making the reference to Welsh people. He was not provided with any account of F making the foreigner's coming to Wales comments.
    13.2. The claimant gave, what appeared to him to be, implausible responses to the complaints against her. In particular she appeared to be contending that employees of the respondent had been turned against her because of her former husband paying staff to create problems for the claimant.
    13.3. He concluded that the evidence in the statements was accurate and that the claimant was not. He was also concerned at the claimant's temperament, he described a passage in the hearing where the claimant banged her hands on the table because Mr Meyer had mistakenly been interpreting her pronunciation of daughter as doctor.
    13.4. Mr Meyer was an impressive witness. He conceded ground readily on some matters but was firm on the important aspects of his evidence. In our judgment his decision was entirely based on the material before him which he decided indicated that the claimant had made offensive comments and that her general attitude and demeanour was likely to create difficulties in her relationships with staff leading to poor customer service.

14. The respondent took a sum of money from the claimant's wages to purchase a parking permit. This was paid for at the beginning of December however the claimant did not receive the parking permit before her dismissal. The evidence in relation to this shows that a purchase of a parking ticket off the local authority was governed by terms that only a full month could be refunded. No refund was made of the claimant's parking permit because there was not a full month left.

The Law

15. Race is a protected characteristic defined in the Equality Act 2010. It is clear that the claimant bases her race claim on her Polish origins. Section 13 of the EA 2010 provides:

> *(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.*
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>
> *(5) If the protected characteristic is race, less favourable treatment includes segregating B from others.*
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Section 136 EA 2010 provides:

> *(1) This section applies to any proceedings relating to a contravention of this Act.*
>
> *(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.*
>
> *(6) A reference to the court includes a reference to—*
>
> *(a) an employment tribunal;*

16. The tribunal is required to examine evidence in a broad way in dealing with issues of discrimination, consider **Anya –v- University of Oxford & Anr. [2001] IRLR 377** which demonstrates that it is necessary for the employment tribunal to look beyond the act in question and to consider background to judge whether racial factors have played a part in the conduct complained of. This is particularly important in establishing unconscious factors in discrimination. **Shamoon -v- Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285** indicates that the tribunal in examining whether there has been less favourable treatment compared to a real or hypothetical comparator should note that a bare difference in treatment along with a difference in race is insufficient. It is always necessary to find that the protected characteristic is an operative cause of the treatment.

17. We should also reflect the decisions in **Igen –v- Wong and Ors. [2005] IRLR 258** and **Barton –v- Investec Henderson Crosthwaite Securities Ltd.**

[2003] IRLR 332 requiring the tribunal to decide whether the claimant has on the whole of the evidence demonstrated a *prima facie* case of discrimination. We must decide whether the evidence has allowed us to draw any appropriate inferences such that we might consider there has been discrimination in the absence of an explanation. If there is not, then the burden of proof will not shift to the respondent to provide an explanation.

18. The decision in ***Vento v West Yorkshire Police [2003] IRLR 102 CA*** giving guidelines on awards for injury to feelings as increased by later authorities, and now by the Employment Tribunal President's guidance sets out bands of awards: they currently lower band of £900 to £8,600 (less serious cases); a middle band of £8,600 to £25,700 (cases that do not merit an award in the upper band); and an upper band of £25,700 to £42,900 (the most serious cases), with the most exceptional cases capable of exceeding £42,900 In **Vento** Mummery LJ, giving the judgment of the Court of Appeal said:

> *Although they are incapable of objective proof or measurement in monetary terms, hurt feelings are none the less real in human terms. The courts and tribunals have to do the best they can on the available material to make a sensible assessment, accepting that it is impossible to justify or explain a particular sum with the same kind of solid evidential foundation and persuasive practical reasoning available in the calculation of financial loss or compensation for bodily injury*.

and later:

> *At the end of the day this Court must first ask itself whether the award by the Employment Tribunal in this case was so excessive as to constitute an error of law. ---------- It is also seriously out of line with the guidelines compiled for the Judicial Studies Board and with the cases reported in the personal injury field where general damages have been awarded for pain, suffering, disability and loss of amenity. The total award of £74,000 for non-pecuniary loss is, for example, in excess of the JSB Guidelines for the award of general damages for moderate brain damage, involving epilepsy, for severe post-traumatic stress disorder having permanent effects and badly affecting all aspects of the life of the injured person, for loss of sight in one eye, with reduced vision in the remaining eye, and for total deafness and loss of speech. No reasonable person would think that that excess was a sensible result. The patent extravagance of the global sum is unjustifiable as an award of compensation.*

and finally:

Employment Tribunals and those who practise in them might find it helpful if this Court were to identify three broad bands of compensation for injury to feelings, as distinct from compensation for psychiatric or similar personal injury.

i) The top band ------ (s)ums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race.

ii) The middle band ----------should be used for serious cases, which do not merit an award in the highest band.

iii) --- (F)or less serious cases, such as where the act of discrimination is an isolated or one off occurrence.

Analysis

19. Dealing with the issues we have set out in respect of race discrimination:

19.1. In our judgment there was a heated discussion between colleagues about Brexit. The claimant and F made comments which were in that context. We are unable to say in which sequence the comments came but that is irrelevant. The relevant characteristics of a comparator, apart from the claimant's nationality, would be a person who engaged in a political discussion about Brexit. It appears to us that the comments made by F were set in that political argument. In our judgment, if a person who was not Polish had engaged with F in the same political argument it is more probable than not that F would have made the same points to that person. On that basis the claimant would not be less favourably treated than the hypothetical comparator.

19.2. In our judgment Amy Norman did not distort the comment made by the claimant about Welsh people who lived on Council Housing Estates. She was genuinely upset by these comments Further Miss Norman did not escalate the comments to her manager, she was asked why she was upset and gave an honest answer to that question. She would have done no differently if anyone not of Polish nationality had made similar comments. There was no less favourable treatment of the claimant in this respect.

19.3. Ms Beynon called the claimant to a meeting to explain her conduct in making the comments complained of by Miss Norman. On our findings Ms Beynon was aware of F's comments. Both comments are unacceptable in a workplace discussion. The comments are clearly made in circumstances where the claimant is Polish and the comments she made are about Welsh People and where F, who is not Polish, is making comments about foreigners. Therefore, the claimant was treated less favourably than F, in that she was called to explain her

comments and F was not. The question for us is was this on the grounds of the claimant's Polish nationality? We take the view that on the evidence we are entitled to draw inferences from the fact that race was an issue in the heated argument and that Ms Beynon was aware of that. On that basis we take the view that a prima facie case is made out in that a tribunal could conclude on the basis of the evidence that the difference in treatment was because of the claimant's nationality. The respondent has provided no satisfactory explanation for that difference in treatment and on the basis of the reversal of the burden of proof we conclude that the claimant has established that this treatment was because of race.

19.4. As a factual conclusion we did not accept that Ms Beynon indicated that she agreed with F's comments. On that basis we are of the view that there is no foundation for a complaint of race discrimination on this point.

19.5. The final element is about calling the claimant to a disciplinary hearing and dismissing her.

19.5.1. The events leading to the claimant's dismissal arise out of her pursuing matters to complain about the meeting with Ms Beynon. The claimant raised matters in such a way that her conduct and attitude was called into question. The claimant was asking the respondent to consider a complaint about the level of training, but continued to pursue her remarks about Welsh people on Council housing estates. In addition to this the claimant was seen as very vocal and prone to making unwarranted complaints. In our judgment a hypothetical comparator who was viewed in this light by Angela terry and who had worked for the respondent for only a short time would, on the balance of probabilities, have been sent to a disciplinary hearing. There was no unfavourable treatment.

19.5.2. The next question relates to dismissing the claimant. The claimant gave some quite bizarre responses to Mr Meyer's questions. She referred to individuals having been paid by her former husband to treat her poorly. She gave accounts of events of 30 November 2018 which Mr Meyer rejected. On the evidence before Mr Meyer it is unsurprising that he rejected the claimant's version of events. Given the claimant's account and the other information before him Mr Meyer had an indication that the claimant's character was disruptive and difficult, he had information which caused him concern over her credibility generally and he had direct evidence of an explosive response when she banged hands on the table. In our judgment, faced with a hypothetical comparator, who was a relatively recent employee, who had shown levels of loss of self-control, whose credibility was questionable and who was seen as a serial complainer and potentially disruptive, would have dismissed that comparator. On that basis there has been no less favourable treatment of the claimant in this regard.

20. We are considering a one-off act on the part of the respondent. That was an act where the injury to feelings of the claimant were to some extent long lasting as she was continuing to complain about this treatment to her employers in the weeks that followed. However, the act is also in circumstances where, objectively viewed, the claimant had some responsibility for the respondent's conduct in calling her to a meeting because she had engaged in a heated discussion where a colleague had become upset. Taking account of those matters and recognising that the dismissal and its consequences do not flow from this treatment, we are of the view that the treatment falls into the lower band of ***Vento*** awards. The tribunal consider that £1,000.00 (one thousand pounds) is an appropriate award for injury to feelings. No other compensation arises from the discriminatory act.

21. The claimant also complained of an unlawful deduction of wages. This claim is without merit. The claimant agreed for the respondent to deduct a sum for a parking permit. The respondent did so. The fact that the claimant did not have the benefit of that permit because she was dismissed does not convert that agreed deduction to an unlawful deduction of wages.

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Employment Judge W Beard
Date: 2 September 2019

Judgment sent to Parties on 3 September 2019

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For the Tribunal Office

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