



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107579/2017

Held in Edinburgh on 22, 23, 26, 27, 28 August 2019 and 5 September 2019

**Employment Judge J Porter
Tribunal Member J Chalmers
Tribunal Member D Frew**

Mrs G Lugenga

**Claimant
In Person**

Peacock Medicare Ltd

**Respondents
Represented by
Mr Howson and**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

It is the judgment of the Employment Tribunal to dismiss the claimant's claims of direct discrimination under s 13 of the Equality Act 2010, harassment under s26 of the Equality Act 2010 victimisation under s27 of the Equality Act 2010 and discriminatory unfair constructive dismissal under s39 of the Equality Act 2010.

Introduction

1. The claimant was employed by the respondents as a Care Assistant at their Woodlands Nursing Home between 8 March 2016 and 17 July 2017. On the latter date the claimant's employment terminated on account of the claimant's resignation.
2. In these proceedings the claimant claims discrimination under the protected characteristic of race. In particular, the claimant brings claims of direct discrimination under section 13 of the Equality Act 2010, harassment under section 26 of the Equality Act 2010 and victimisation under section 27 of the Equality Act 2010. The claimant also claims discriminatory unfair constructive dismissal under section 39(2) of the Equality Act 2010.
3. The claimant's claims are resisted and there were preliminary hearings in the matter on 4 April 2018, 11 July 2018, 23 October 2018, 11 December 2018 and 28 January 2019. The full hearing on the merits in the case was listed for 22, 23, 26, 27 and 28 August 2019. Due to a conflict on the part of one of the members the evidence in the case did not commence until the 23 August 2019. There was a Members Meeting in the case on 5 September 2019.
4. At the PH on the 11th July 2018 it was determined that the evidence in chief in this case would proceed by witness statements. Evidence was heard for the claimant from Dr Lavery, the claimant's GP and Juliet Ngwenga, an agency Care Assistant who works for the respondents. The claimant gave evidence herself. For the respondents evidence was heard from Cathy Paterson, the Home Manager at Woodlands Nursing Home, Pauline Flynn, Charge Nurse at Woodlands Nursing Home, John McMullan, Senior Care Assistant at Woodlands Nursing Home, Ann Warnock, Care Assistant at Woodlands Nursing Home and Lorna White, a Domestic Worker at the respondents' Woodlands Care Home. The Tribunal also heard evidence from two additional witnesses namely Pamela McCabe, former Senior Care Assistant of Woodlands Nursing Home and Derek Durkin an Organiser of UNISON and the claimant's Trade Union representative. The additional witnesses were called at the instigation of the Tribunal to assist them in their determination of this case.

5. The parties referred to a Joint Bundle of Documentation numbered **1** to **144**. The parties also produced a Joint List of Issues and a Chronology for the use of the Tribunal.
6. In advance of the full Hearing on the Merits the claimant withdrew her claim for psychiatric injury.
7. After hearing the evidence the Tribunal made the undernoted essential Findings in Fact.

FINDINGS IN FACT

8. The claimant commenced employment with the respondents as a Care Assistant on 8 March 2016 at the respondents' Woodlands Nursing Home. The claimant worked around 40 hours a week with overtime and worked on night as well as day shifts. Her net monthly wage was £1,322.48.
9. The claimant gave evidence that on 12 May 2016 Pauline Flynn Charge Nurse verbally abused her by saying to her "stupid black woman" and by swearing at her saying "fuck you". The Tribunal heard evidence from Pamela McCabe that on that day Pauline Flynn verbally abused the claimant and swore at her. Pamela McCabe was clear in her evidence however that she did not hear Pauline Flynn racially abuse the claimant. Pauline Flynn gave evidence that she did not racially abuse the claimant on the 12th May 2016 or indeed at any other time.
10. The claimant gave evidence that sometime in June 2016 Pauline Flynn racially harassed the claimant by shouting at her "fuck you stupid black woman". At the same time she threw a bag with faeces at the claimant which went on her uniform and her shoes. On the same day Pauline Flynn spat in the claimant's face saying "fuck you black woman" and then said "stupid" and closed the door on the claimant. Pauline Flynn denied that she had ever used this language or indeed had spat at the claimant. She stated that on the day in question the only contact she had with the claimant was to remind the claimant to remove yellow bags from the sluice and

take them to the bins outside as aroma was coming from the sluice down the corridor. The evidence of Pauline Flynn was that the claimant refused to do this task as she said that she was scared of the dark.

11. The claimant alleges that on 15 August 2016 whilst in a meeting with Cathy Paterson, Home Manager and Pauline Flynn both women verbally abused the claimant and called her “stupid woman black monkey”. The evidence of Cathy Paterson and Pauline Flynn was that on 15 August 2016 an investigation meeting was held with the claimant, the purpose being to discuss concerns regarding the claimant’s conduct at a recent staff training session. Both Cathy Paterson and Pauline Flynn denied using the racially abusive words it was alleged they used in the course of that investigation meeting. The outcome of the investigation meeting was that on 1 September 2016 Cathy Paterson wrote to the claimant regarding her conduct at the staff training session. In that letter she concluded that the claimant’s conduct had been inappropriate but stated that the respondents were not going to proceed with formal disciplinary action. (98).

12. On 9 November 2016 the claimant made a verbal complaint in respect of being shouted and sworn at by Pauline Flynn. It is a matter of agreement that following this complaint the claimant was moved to work to the first floor of the respondents. In evidence, the claimant claimed that this was an act of victimisation. The Tribunal accepted the evidence of Cathy Paterson that working on the first floor of the Woodlands Nursing Home was no more challenging than working on the ground floor; and that the reason why the claimant was moved to the first floor was to diffuse the situation between herself and Pauline Flynn. The Tribunal also accepted the unchallenged evidence that Pauline Flynn had to remain on the ground floor due to being the Charge Nurse and having responsibilities to maintain the building including the fire doors and alarms. The claimant also alleged that following the making of this verbal complaint Cathy Paterson said that she would watch the claimant on how she was doing and if the claimant was found not to comply with instructions she would be punished further. For her part, Cathy Paterson said that she may have said that the claimant was going to be monitored; and that it was not uncommon for employees of the respondents to be monitored if there had been any issues.

13. On 29 November 2016 the claimant raised a grievance against Pauline Flynn (**99 to 100**). The claimant's grievance stated: *"Further to my verbal and informal complaint against my colleague and senior staff Pauline on 9th November 2016. The grievances were based on repeated shouting and insults against me while alone and on some occasions in front of other staff. I have witnesses. The incident I am referring to is what I reported to you when she shouted at me and insulted me using the f word on 8 November 2016 at 10pm and was reported to you and Deputy Manager on the 9th November 2016 ..."* The claimant did not report the alleged earlier incidents of racial harassment in her grievance as her evidence was that Cathy Paterson told her that she would not hear any grievances from the period prior to 9th November 2016. For her part, Cathy Paterson denied that she limited the scope of the claimant's grievance.
14. Cathy Paterson responded to the claimant's grievance by inviting her to attend a grievance hearing on Monday 12th December 2016 at the Woodlands Nursing Home. (**101 to 102**). The grievance hearing was later rescheduled to Wednesday 14 December 2016 (**104**). Notes of the grievance hearing can be found at **105 to 106**. In the course of the grievance hearing the claimant did state that 8 November 2016 was not the first instance in which Pauline Flynn had sworn at her (**105**). When asked what resolution she was expecting, the claimant responded by stating *"I am happy working here and would like to sort this out it can be achieved. You could speak to Pauline and myself, it could be sorted, start a new page. I tell the truth, Pauline says I don't follow instruction – not true."* At the meeting the claimant was represented by her Union representative Derek Durkin who confirmed that the claimant was trying to bring an end to bullying and harassment and was not looking for disciplinary proceedings to be taken against any person (**106**).
15. The claimant's evidence was that at the point of the grievance hearing she had told Derek Durkin about the nature and extent of the racial harassment she had suffered at the hands of the respondents. In evidence, Derek Durkin stated that if the claimant had told him this then he would have advised her that she had a case of racial discrimination and would have proceeded to advise her of such a claim and

represent her in that claim. For these reasons his evidence was that the claimant did not tell him of the nature and extent of the racial harassment alleged by her in the course of her employment with the respondents.

16. At the claimant's request, Juliet Ngwenga, an agency Care Assistant was interviewed by Cathy Paterson (**108 to 109**). Juliet confirmed that on 8 November 2016 Pauline Flynn had sworn at the claimant and that on previous occasions she had witnessed the claimant crying after an argument with Pauline Flynn. Pamela McCabe was also interviewed (**110 to 111**). She spoke to the fact that Pauline Flynn shouted and swore at the claimant on 12 May 2016. Pauline Flynn herself was interviewed on 23 December 2016 (**112 to 113**).
17. As a result of these investigations Cathy Paterson wrote to the claimant on 23 December 2016 (**115**). That letter stated:

"I am writing to confirm the outcome of the grievance meeting held on 14 December 2016 in the presence of J Rae on behalf of the company. The issues/concerns were:

- *Personal harassment complaint against your colleague Pauline Flynn. This includes shouting and insults made against you, specifics being the incident which occurred on the 8th November 2016. Following the meeting, further investigations have been carried out which include:*
- *Investigation meetings with the witnesses you named in our meeting of 14th December 2016 with Pauline Flynn.*
- *In conclusion your grievance is substantiated and the company will be taking appropriate action."*

18. Cathy Paterson gave evidence that the only action taken against Pauline Flynn was to issue her with a letter advising her of the outcome of the claimant's grievance, and advising her of the respondents' concerns thereof. The letter was dated 23rd December 2016 and stated: *"On this particular occasion I have decided not to*

proceed with formal disciplinary action. However, this letter is to be treated as confirmation that I have discussed my concerns with you and that you are expected to make every effort to address the shortcomings that have been identified.” (114)

The Tribunal accepted the evidence of Cathy Paterson that she had regard to the claimant’s own wishes as expressed at the grievance hearing **(105-106)** in deciding not to proceed with formal disciplinary action against Pauline Flynn.

19. Meantime, John McMullan, Senior Care Assistant, complained that on 18 December 2016 as he was arriving at work for his day shift he was accosted by the claimant who complained about a broken bed and accused John McMullan of leaving the wing of the Care Home in a mess. John McMullan gave evidence that the claimant’s voice was raised and that she very confrontational. John McMullan stated that the claimant pointed her finger in his face and grabbed the jacket he was wearing. He verbally reported the incident to Cathy Paterson and thereafter gave a statement to Gina Delara the Deputy Manager which can be found at **104A**. It was accepted that Gina Delara wrote the statement, but that the words were those of John McMullan. John McMullan attended a meeting with Cathy Paterson on 5 January 2017 and confirmed the events of the morning of 18 December 2016 **(120)**. The Tribunal had no reason to doubt the veracity of the account of the incident given by John McMullan in evidence.
20. On 2 January 2017, Kirsty Scott, Staff Nurse reported to Cathy Paterson that the claimant had not followed her instructions and had not taken her break during her shift **(116)**. The Tribunal accepted that this matter was a serious allegation, involving as it did a potential breach of the Working Time Regulations 1998.
21. As a result of these two incidents the claimant was invited in for an investigation meeting on 4 January 2017. The Tribunal accepted the evidence of Cathy Paterson that the combination of the two incidents would have resulted in further investigation and possibly disciplinary action whoever the employee was.
22. The typed notes of the investigation meeting with the claimant on 5 January 2017 are to be found at **117 to 119**. The handwritten notes of the hearing are to be found

at **119A to 119E**. In evidence, the claimant stated that Cathy Paterson and Gina Delara shouted and screamed at her at this meeting and confronted her with questions in an intimidating and threatening manner. The Tribunal observed that from the handwritten notes it would appear that some questions were asked twice or three times (**119B**); however, the Tribunal accepted the evidence of Cathy Paterson that the reason for this was to obtain answers to the questions and that voices were not raised in the course of the meeting nor was the meeting conducted in an intimidatory manner.

23. Cathy Paterson gave evidence that following the investigatory meeting a decision was taken to proceed to a disciplinary hearing. The Tribunal accepted Cathy Paterson's evidence that the decision was taken due to the nature of the complaints made by the two employees against the claimant, and that given the nature of the issues a decision to proceed to a disciplinary hearing would have been made in respect of any of their employees. The Tribunal also observed that a decision was taken to investigate Pauline Flynn on receipt of the grievance from the claimant in November 2016, and that disciplinary proceedings did not then ensue only due to the claimant's own wishes. Accordingly the respondents' decision to proceed to instigate disciplinary proceedings against the claimant was consistent with their treatment of Pauline Flynn.
24. The Tribunal accepted the evidence of Cathy Paterson that at the point of proceeding to a disciplinary hearing the respondents had drawn no conclusion with regards to the complaints raised by John McMullan and Kirsty Scott. The letter requesting the claimant to attend the disciplinary hearing on Tuesday 10 January 2017 is to be found at **122**.
25. In the event, the claimant did not attend the disciplinary hearing as on 7 January 2017 she was assaulted by a resident. As a result of that assault the claimant was signed off work by her GP on 6 February 2017. The claimant did not return to her employment with the respondents.

26. On 6 February 2017 the claimant's GP requested that the respondents arrange counselling for the claimant as a result of the assault **(124)**. On 10 February 2017 the claimant's GP wrote to the respondents and requested that assistance be given via her pay for the claimant to purchase glasses as a consequence of the assault. **(125)**. The Tribunal accepted the unchallenged evidence of Cathy Paterson that the respondents have no access to counselling services. John McMullan confirmed the evidence of Cathy Paterson that the respondents have never purchased glasses for an employee.
27. On 10 February 2017 Cathy Paterson wrote to the claimant and then stated: *"I am writing to invite you to a welfare meeting on Tuesday 14th February 10am at Woodlands Nursing Home. I do not wish to pester you or cause you any stress. The reason for the meeting is to support you through your illness and keep communications open between employer and employee. If you prefer I can meet with you somewhere local for a coffee and chat.* **(126)** The claimant responded by letter dated 13 February 2017 **(127)**. She stated that she was not able to attend a welfare meeting at that time as she was still on sick leave. In that letter the claimant asked what the company policy was to cover the cost of her glasses and asked for a copy of her payslip.
28. On 22 May 2017 Cathy Paterson wrote to the claimant and asked that she attend an occupational health appointment. **(128)**. The occupational health assessment took place on 6 June 2017 having been rescheduled at the claimant's request **(129-130)**. The occupational health report stated that the claimant was still suffering significant issues of post-traumatic stress. The report also observed that the claimant had had issues at work with regard to harassment and allegations of misconduct against her. The occupational health report recommended counselling and stated that contact from management should be in a welfare capacity only **(131 to 132)**. The Tribunal accepted the evidence of Cathy Paterson that the comments in the report coupled with the claimant's letter of 13th February 2017 **(127)** led her to conclude that the claimant should be left alone to recover, and that for this reason she had no further contact with the claimant until the claimant's resignation. Following receipt of the occupational health assessment counselling was not

provided by the respondents as the respondents did not have access to counselling services.

29. On 4 July 2017 the claimant resigned from her employment with the respondents (133). That letter was addressed to Cathy Paterson and stated:

“Re resignation

Dear Cathy

This letter is to formally tender my resignation as Care Assistant at Peacock Medicare Ltd effective from 17 July 2017. This is in accordance with the 2 weeks period agreed at my time of employment. After careful consideration I feel that there is little probability for me to continue working in the same environment. Given what happened to me and the lack of support and assistance I have had throughout and to date I feel that I have no option than to resign.”

30. By letter dated 4 July 2017 (134) Cathy Paterson wrote to the claimant inviting her to reconsider her decision to resign and let her know within the next 5 days. Cathy Paterson also asked the claimant to put in any grievance she may have within the next five days. The claimant did not reconsider her decision or put in another grievance, and her resignation was effective as of 17 July 2017.

Observations on the Evidence

31. In these proceedings the Tribunal listened carefully to the claimant’s allegations of racial discrimination which encompassed some extreme allegations of racial harassment and abuse. In determining that the incidents did not take place as alleged by the claimant, the Tribunal had particular regard to the evidence of Cathy Paterson. The Tribunal considered Cathy Paterson was an inherently reasonable and measured witness who appeared to be very distressed at the allegations made against her. The Tribunal’s assessment of Cathy Paterson as an individual who was incapable of the acts of racial discrimination alleged was given credence by the evidence of Lorna White when she gave evidence spontaneously that she worked

in the Woodlands Home for 20 years and that one of the reasons for her longevity was the management of the Woodlands Home; and that, further, she did not believe that it was possible that Cathy Paterson had behaved to the claimant in the manner alleged by the claimant.

32. Insofar as Pauline Flynn was concerned the Tribunal took cognisance of the fact that there was evidence that Pauline Flynn had on occasion swore at the claimant. The Tribunal does not in any respect condone such behaviour; however the Tribunal's assessment of Pauline Flynn and in particular her evidence (given vehemently) that she would not engage in racial abuse led them to conclude that she did not make the racially abusive remarks alleged by the claimant.
33. Finally, in reaching their conclusions on the evidence the Tribunal had regard to the fact that the claimant gave evidence that Pamela McCabe had witnessed racial abuse; yet in evidence Pamela McCabe denied that this was the case. Her position in evidence was consistent with her written statement- that she had overheard Pauline Flynn swearing at the claimant, as had always been her position. Likewise, Derek Durkin was unable to give any evidence of the claimant advising him of any racial discrimination at the time of representing her. The claimant's position was that she did advise him of the racial discrimination that she had experienced at the hand of the respondents.

The Law

Direct Discrimination

34. Section 13 of the Equality Act 2010 ("the Equality Act") 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."

35. It is not necessary to point to an actual person as being more favourably treated although how others have in fact been treated may be relevant evidence from which an inference of discrimination may be drawn. The Tribunal should construct if

necessary a hypothetical comparator whose relevant circumstances are not materially different to the claimant's except for the protected characteristic.

36. The Tribunals do not have to construct a hypothetical comparator if they are able to make findings as to the "*reason why*" the treatment occurred without doing so. This is clear from the cases of **Shamoon v Chief Constable of the RUC 2003 ICR 337 HL**, **Stockton on Tees Borough Council v Aylott 2010 ICR 1278 CA** and **The Law Society and others v Bahl 2003 IRLR 640**.
37. The protected characteristic need not be the only reason for the treatment (**Owen and Briggs v James 1982 ICR 618**; **O'Neill v Governors of St Thomas More Roman Catholic School and another 1997 ICR 33 EAT**.) The EHRC Code of Practice on Employment states: "*The (protected) characteristic needs to be a cause of the less favourable treatment, but does not need to be the only or even the main cause.*" (para 3.11)

Harassment

38. Section 26 of the Equality Act 2010 provides:

"Harassment

(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 ...

(1) A also harasses B if –

(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex, and further

(b) The conduct has the purpose or effect referred in sub-section (1)(b) and

(c) Because of B's rejection of or submission to the conduct A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(2) In deciding whether conduct had the effect referred to in sub-section (1)(b) each of the following must be taken into account –

(a) The perception of B;

(b) the other circumstance of the case; and

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

39. There are 3 essential elements of harassment claim under section 26(1), namely (i) unwanted conduct, (ii) that has the prescribed purpose or effect and (iii) which relates to a relevant protected characteristic.

40. In deciding whether the conduct has the effect referred to in section 26(1)(b) (i.e. of violating a person's (B) dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B) each of the following must be taken into account: (i) the perception of B, (ii) the other circumstances of the case and (iii) whether it is reasonable for the conduct to have that effect (section 26(4)). The test has both subjective and objective elements to it. The subjective part involves

the Tribunal looking at the effect that the conduct of the alleged harasser has on the claimant. The objective part requires the Tribunal to ask itself whether it was reasonable for the complainant to claim that the harasser's conduct has that effect. In **Richmond Pharmacology v Dhaliwal 2009 ICR 724 EAT** Mr Justice Underhill then President of the EAT held that in assessing effect "*One question that may be material is whether it should reasonably have been apparent whether the conduct was or was not intended to cause offence (and more precisely to produce the prescribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt.*"

Victimisation

41. Section 27 of the Equality Act provides:

"27 Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because –

(a) B does a protected act or

(b) A believes that B has done or may do a protected act

(2) Each of the following is a protected act –

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act"

42. A's motivation may be subconscious. The key question is why B was treated in the way he or she was. The protected act need not be the only reason for the detrimental treatment but it must have a "significant influence" of the decision to act in that way (**Nagarajan v London Regional Transport 1991 ICR 877**). "Significant" means "more than trivial" (**Igen v Wong 2005 ICR 931**).

Discriminatory Unfair Constructive Dismissal

43. S39(2) of the Equality Act 2010 provides:

"39 Employees and applicants

"(2) An employer (A) must not discriminate against an employee of A's (B) -

(c) by dismissing B." Dismissal includes constructive dismissal (s29 (7)(b)).

44. In many instances, discriminatory conduct on the part of the employer will breach the terms of mutual trust and confidence implied into every contract of employment, thereby repudiating the contract and entitling the employee to resign and claim dismissal. However, this is not a foregone conclusion-the relevant legal test for constructive dismissal is one of contract, not discrimination law. Not every breach of contract will be repudiatory-ie of a nature that entitles the wronged party to treat the contract as being at an end (**Amnesty International v Ahmed 2009 ICR 1450 EAT**).

Burden of Proof under the Equality Act

45. Section 136 of the Equality Act 2010 provides for the shifting burden of proof. It is firstly for the claimant to prove facts from which a Tribunal could decide that there has been a contravention of the Equality Act. This is often done by drawing inferences from the established facts. If he or she succeeds in doing that then the burden shifts and it is for the respondents to prove that the reason for the treatment is not one prohibited by the Act. The respondents do not have to justify the treatment or show that it acted reasonably although such matters may go to the credibility of the reason put forward.

Time Bar

46. S123 of the Equality Act 2010 provides:

“123 Time Limits

Proceedings on a complaint within section 120 may not be brought after the end of –

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.”

47. The “just and equitable” discretion is generally seen as a wide discretion, the exercise of which is difficult to challenge on appeal.

SUBMISSIONS

48. For the Respondents

Mr Howson referred to the Agreed List of Issues in his submissions. Firstly the claimant identified ten matters in respect of her case of direct discrimination on the grounds of race.

Mr Howson submitted that the evidence demonstrated that moving the claimant to a different floor on 9 November was to try and diffuse the situation between Pauline Flynn and the claimant. To this end, Pauline Flynn, as Charge Nurse, had to stay on the ground

floor. Mr Howson submitted that the evidence also demonstrated that there was no practical difference on the level of work between the two floors. He submitted that these reasons apply also to the alleged act of discrimination in deciding to put the claimant on the upper floor after the claimant's grievance against Pauline Flynn.

Insofar as the claimant alleges that the decision not to take disciplinary action against Pauline Flynn following the verbal complaint on 9 November 2016 and grievance on 29 November 2016 was an act of direct discrimination, Mr Howson submitted that it was the claimant's own wishes that no action be taken against Pauline Flynn; and that further and in any event the respondents wrote to Pauline Flynn advising her of the outcome of the grievance procedure and then requested that Pauline Flynn make every effort to address the identified shortcomings.

The claimant also alleges that the conduct of the investigation meeting by Cathy Paterson on 5 February 2017 was an act of direct discrimination. Mr Howson asked the Tribunal to prefer the evidence of Cathy Paterson on the conduct of this meeting. He submitted that the evidence heard was clear, cogent and precise and was to the effect that these allegations did not, in fact, occur.

The claimant also alleges that the decision to investigate the complaint by John McMullan, the decision to investigate the complaint from Kirsty Scott and the decision to instigate disciplinary proceedings against the claimant in January 2017 were acts of direct discrimination. In this respect Mr Howson pointed out to the Tribunal that there was evidence which verified the proposition that disciplinary action would have been taken had such complaints been made against a white employee. Further, the evidence demonstrated that when the claimant raised a grievance against Pauline Flynn that grievance was investigated and an outcome reached. He submitted that in these circumstances there was no evidence to suggest that following the same procedure in respect of allegations against the claimant was an act of race discrimination.

The claimant also alleges that the respondents' failure to provide adequate care and support to her following the assault on her by a resident on 7 January 2017 and the failure to provide her with counselling and the failure to purchase new glasses for her were acts

of direct discrimination. To this end, Mr Howson submitted that the respondents invited the claimant to a welfare meeting on the 10th of February 2017; that further the evidence demonstrated that the respondents do not have access to counselling services for their employees and, that the respondents have never given glasses to any employee.

In conclusion, Mr Howson submitted that there was no evidence to suggest that any of the actions founded upon by the claimant in her case of direct discrimination had anything to do with the claimant's race.

Insofar as the claimant's claims of harassment are concerned Mr Howson asked the Tribunal to believe the respondents' witnesses whom he submitted had been entirely credible and had provided the Tribunal with clear, cogent and non-contradictory evidence. Further, he submitted that the claimant was not a credible witness and that her witnesses didn't support her own version of events. In particular, Mr Howson highlighted the evidence of Mr Durkin in stating that the claimant had never raised allegations of racial discrimination with him.

Mr Howson also highlighted that the claimant had had the opportunity of raising issues of racial harassment in the course of her grievance on 29 November 2016 but failed to do so

Insofar as the incident of 8 November 2016 – namely Pauline Flynn telling the claimant to “fuck off” and slamming the door in her face – Mr Howson submitted that there was no evidence that the actions of Pauline Flynn had anything to do with the claimant's race.

As regards the claimant's claim of victimisation on the grounds of race, the claimant's alleged protected acts are her verbal complaint on 9 November 2017 to Cathy Paterson and her written grievance on 29 November 2017. Mr Howson submitted firstly that both acts were not protected acts as neither the complaint or the grievance were advanced under the Equality Act 2010. He submitted that if the Tribunal was not with him in advancing this proposition then moving the claimant to a different floor on 9 November could not be a detriment in that the evidence demonstrated that there was no difference in working on different floors in the Woodlands Nursing Home; and that further the

decision of the respondents to initiate disciplinary proceedings against the claimant in January 2017 was a proportionate and reasonable decision which had nothing to do with the claimant's race.

Finally, insofar as regards the claimant's claim of discriminatory and constructive unfair dismissals is concerned, Mr Howson submitted that if the Tribunal finds that the claimant's claims of harassment fail, then this claim must also fail.

For the Claimant

49. The claimant likewise went through the List of Issues. She submitted that each and every case of hers had been proved by the evidence heard by the Tribunal. In all the circumstances, she submitted that the Tribunal should find for her in each case of racial discrimination advanced by her.

DISCUSSION AND DECISION

50. In their determination of these proceedings the Tribunal was guided by the List of Issues agreed by the claimant. **The issues are replicated below in italics.**

Direct Discrimination on the grounds of Race

Did the respondent treat the claimant less favourably on the grounds of race compared to a person or persons of a different race? The specific alleged discriminatory acts are as follows:

“(i) Moving the claimant to a different floor on 09.11.16; (iii) Decision to keep the Claimant on the upper floor after the Claimant's grievance against Pauline Flynn;”

51. In determining whether these actions of the respondents were acts of direct discrimination on the grounds of race, the Tribunal had regard to their own findings in paragraph (12) where it was found that the reason for the claimant's move to a different floor on 9 November 2016 was to diffuse the situation between herself and

Pauline Flynn, that working on the first floor of the Woodlands Nursing Home was no more challenging than working on the ground floor, and that Pauline Flynn had to remain on the ground floor due to being the Charge Nurse and having responsibility to maintain the building. As the Tribunal were able to make positive Findings in Fact on these issues, the Tribunal did not proceed to consider the issue of the burden of proof provisions.

“(ii) The decision not to take disciplinary action against Pauline Flynn following the verbal complaint on 09 11 16 and grievance on 29 11 16”

52. In determining this issue, the Tribunal had regard to their Findings in Fact in paragraph (14). The Tribunal found that at the claimant’s grievance meeting on Monday 12 December the claimant and her Union representative expressed the view that the claimant wished the situation to be “sorted out” and it was said that she was not looking for disciplinary proceedings to be taken against Pauline Flynn. Further and in any event, the Tribunal noted that following the grievance hearing, a letter was written by Cathy Paterson to Pauline Flynn which stated that her explanation for her actions was unsatisfactory and that that letter was to be taken as confirmation that she was to make every effort to address her identified shortcomings (18). In these circumstances, the Tribunal found that the decision not to take disciplinary action against Pauline Flynn was for non-discriminatory reasons, being the claimant’s own wishes that no action take place; and that further and in any event the respondents did send a warning letter to Pauline Flynn following the outcome of the grievance procedure. As the Tribunal were in a position to make positive Findings in Fact in respect of this issue, the Tribunal did not proceed to apply the burden of proof provisions.

“(iv) The conduct of the investigation meeting by Cathy Paterson on 05 01 17”

53. In evidence, the claimant claimed that Cathy Paterson shouted and screamed at her and confronted her with questions in an intimidating and threatening manner in the

course of the disciplinary investigation hearing on 5 January 2017. In their Findings in Fact, the Tribunal concluded that voices were not raised in the course of this meeting nor was the meeting conducted in an intimidatory manner **(22)**. The Tribunal observed from the handwritten notes of the investigation meeting that it appeared that some questions were asked several times; however Cathy Paterson's evidence was accepted that the reason for this was simply to obtain answers to the questions. As the Tribunal was in the position to make positive Findings in Fact in respect of this issue, the Tribunal did not proceed to apply the burden of proof provisions.

“(v) The decision to investigate the complaint by John McMullan; (vi) the decision to investigate the complaint from Kirsty Scott; (vii) the decision to instigate disciplinary proceedings against the claimant in January 2017”

54. Insofar as these issues are concerned the Tribunal accepted Cathy Paterson's evidence that the decision to instigate disciplinary proceedings was made due to the nature of the complaints made by John McMullan and Kirsty Scott and that in view of the nature of the complaints the same decision would have been made in respect of any employee of the respondents. **(21)**. The Tribunal also noted that Pauline Flynn underwent a disciplinary investigation in respect of the claimant's complaints against her **(23)**. The Tribunal also noted the nature and extent of the incident involving John McMullan **(19)** and the fact that the allegations raised by Kirsty Scott were serious allegations involving a potential breach of the Working Time Regulations 1998 **(20)**. In these circumstances, the Tribunal considered it entirely reasonable that Cathy Paterson should investigate these complaints raised by members of her staff. As the Tribunal was in the position to make positive Findings in Fact in respect of these issues, the Tribunal did not proceed to apply the burden of proof provisions.

“(viii) Failing to provide adequate care and support to the claimant following the assault by a resident on 7 January 2017 which includes failing to contact the claimant whilst signed off work and failure to act upon the Occupational Health Report; (ix) failure to

provide the claimant with counselling; (x) failure to purchase new spectacles for the claimant.”

55. In considering these issues, the Tribunal had regard to their findings in paragraph (27) , namely that the respondents invited the claimant to a welfare meeting at a venue of her choice and in response the claimant stated that she was not able to attend such a meeting as she was still on sick leave. The Tribunal further had regard to the fact that the respondents instigated an Occupational Health assessment for the claimant (28), and that the claimant’s response to the request for a welfare meeting (27) coupled with the terms of the Occupational Health assessment (28) led Cathy Paterson to conclude that the claimant should be left alone to recover. The Tribunal also had regard to their findings in paragraph (26) and (28) that the respondents have no access to counselling services and have never assisted in the purchase of glasses for any employee. In all of these circumstances, it is the conclusion of the Tribunal that the respondents did provide adequate care and support to the claimant following the incident on 7 January 2017. As the Tribunal was in the position to make positive Findings in Fact in respect of these issues, they did not proceed to apply the burden of proof provisions.

Harassment

Did the respondents engage in unwanted conduct relating to the claimant’s race that violated the claimant’s dignity and or created a degrading, humiliating, offensive, intimidating or hostile environment in which to work? The specific conduct is as follows:

“(i) Pauline Flynn referring to the claimant as a “stupid black woman” on 12.05.16; (ii) Pauline Flynn referring to the claimant as a “fuck you stupid black woman” and throwing a bag containing a pad and faeces at her in June 2016; (iii) Pauline Flynn referring to the claimant as “fuck you black woman” in June 2016; (iv) Pauline Flynn and Cathy Paterson referring to the claimant as “stupid woman black monkey” on 15 08 16”

56. In determining these issues, the Tribunal had regard to their own Findings in Fact in paragraph (9), (10) and (11) in which the Tribunal found that the alleged acts of

harassment did not occur. In these circumstances the Tribunal did not proceed to consider the burden of proof provisions.

“(v) Pauline Flynn telling the claimant to “fuck off” and slamming the door in her face on 08 11 16.”

57. The Tribunal noted the events of 8 November 2016, the investigatory meetings that thereafter took place and the conclusion of the respondents as intimated to Cathy Paterson (18). There was no evidence to suggest that Pauline Flynn abused or harassed the claimant on the grounds of race on 8 November 2016. In all these circumstances the Tribunal concluded that the claimant had not been harassed on the grounds of race on 8 November 2016. In the light of these Findings in Fact, the Tribunal did not proceed to consider the burden of proof provisions.

Victimisation on the grounds of Race

Did the claimant carry out a protected act? The claimant’s alleged protected acts were the verbal complaint on 9 November 2017 to Cathy Paterson and her written grievance dated 29 November 2017.

58. In considering these issues, the Tribunal had regard to the terms of the claimant’s verbal complaint on 9 November 2017 to Cathy Paterson as narrated by her in evidence and her written grievance of 29 November 2017 (12, 13). The Tribunal noted firstly that neither the complaint or the written grievance contained an allegation that Pauline Flynn or any other person employed by the respondents had contravened the Equality Act 2010. Accordingly the Tribunal concluded that such communications were not protected acts under s27 of the Equality Act 2010. For this reason alone the Tribunal concluded that the claimant’s claims of victimisation must fail .

59. Further and in any event, the detriments alleged by the claimant, namely: *“(i) Moving the claimant to a different floor on 09 11 17; (ii) the decision of the respondent to initiate disciplinary proceedings against the claimant in January 2017;”* were found

by the Tribunal not to be detriments (**12, 23**). The Tribunal reached this conclusion given that their findings were that employment on different floors of the Woodlands Nursing Home involved the same duties and given their findings that the decision of the respondents to initiate disciplinary proceedings against the claimant was due to the nature of the complaints made against her and for no other reason. As the Tribunal was in a position to make positive Findings in Fact on these issues they did not proceed to consider the burden of proof provisions.

Discriminatory Constructive Unfair Dismissal

“(i) Did the respondents without reasonable and proper cause undermine or breach the implied term of trust and confidence; (ii) Was the reason for these alleged breaches the claimant’s race (i.e. did any of the alleged acts of direct discrimination, harassment or victimisation stated above occur)?; (iii) did the claimant resign in response to these breaches?; (iv) does the claimant’s resignation therefore amount to a discriminatory constructive unfair dismissal?”

60. Given the conclusions of the Tribunal’s conclusion on the issues of direct discrimination, harassment and victimisation, is the decision of the Tribunal that the respondents did not undermine or breach the implied term of trust and confidence and so cause the claimant’s resignation thereof.

Time Bar

61. The Tribunal heard no submissions from either party on the issue of time bar. In view of their conclusions above the Tribunal considered it unnecessary to consider the issue of time bar in their determination of this case.

Conclusion

62. It is for all these reasons that it is the unanimous decision of this Tribunal to dismiss the claimant's claims of direct discrimination, harassment, victimisation and discriminatory unfair constructive dismissal.

Date of Judgement: 5th September 2019
Employment Judge: J Porter
Date Entered in Register: 9th September 2019
And Copied to Parties