EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4112768/18

Held on 9 September 2019

Employment Judge J M Hendry

Mr A Mamun	**Claimant** **Represented by:** **Mr S Marfat,** **Friend**
Maritime and Coastguard Agency	**Respondents** **Represented by:** **Ms A Hunter,** **Solicitor**

JUDGMENT

The Judgment of the Tribunal is that the following claims having no reasonable prospects of success are struck out and dismissed in terms of Rule 37:

1. **The claim for direct race discrimination.**
2. **The claim for religious discrimination.**
3. **The claim for victimisation.**
4. **The claim for harassment.**

REASONS

1. The claimant in his ET1 sought findings that he had been unfairly dismissed from his employment as a Marine Surveyor (1) Engineer with the respondents.

2. The respondents denied that the claimant had been unfairly dismissed and also denied that he had been subjected to any discrimination on the grounds of either race or religion.

Procedural history

3. The case proceeded to a preliminary hearing which was conducted by telephone conference call on 3 October 2018. I prepared and issued a Note following the hearing dated 9 October 2018. The respondents prior to the preliminary hearing set out a number of concerns about the claimant's position in particular that the unfair dismissal claim was lodged out of time. Time-bar issues were also raised in relation to the discrimination claims.

4. Paragraph 10 of the Note I recorded:

"*It was agreed that the claimant will have 21 days from the date of the issue of this Note to lodge better and further particulars setting out why the unfair dismissal claim and the discrimination claim should be accepted late, the background to their lodging and also the legal basis on which the discrimination claim proceeds under the Equality Act.*"

5. The Note contained an Order requiring the claimant in his better and further particulars to do the following:

"*(a) full details in chronological order of all the events or incidents upon which he relies in support of the case, including in particular:*
i) The nature of the discrimination complained about and its statutory basis.
ii) the date of each event or incident,

iii) the persons involved, and
iv) what happened and what was done or said in each case; and

(b) specification of:
i) the act or acts complained of which are said to amount to less favourable treatment;
ii) the identity of the person or persons with whom the claimant compares his treatment; and
iii) the basis upon which the less favourable treatment is said to have occurred."

6. Mr Mamun lodged two documents the first, a chronological sequence of events and the second a document setting out his position in relation to time bar and further information contained by way of background. Under the heading ''Explanatory Notes'' he made references to breaches of the Equality Act and to the change of policy over "CTC" (Counter Terrorism Check). He wrote:

"*130. Such a sudden change in policy with regard to CTC clearance created a disadvantageous condition for a small group of people, whether that is intended or not.*
131. In addition, there was no justifiable reason to explain this change in policy. Any change in policy should have a reason behind it. For a change in the Respondent's security policy there should have been a perceived or a conceived threat from this small group of five 5 (five) officials. But, there was no such evidence which the Respondent can produce.

132. As such it clearly implies a breach of s.19(1) of the Equality Act 2010."

7. The respondents continued to be dissatisfied with the state of the claimant's pleadings. A preliminary hearing was arranged for the 1 February to deal with time-bar.

8. The respondents issued a response to the submissions made by the claimant in an e-mail dated 21 November submitting that the claimant had not set out a valid basis on which the Tribunal should have jurisdiction to hear the claim for unfair dismissal, the statutory basis for alleged discrimination or the act or acts which he alleges amount to a less favourable treatment, the identity of

the comparator being used by the claimant and the basis on which the less favourable treatment was said to have occurred.

9. The hearing was conducted by Judge Hosie who issued a judgment to parties on February 2019. He dismissed the claim for unfair dismissal and held that the Tribunal had jurisdiction to consider the discrimination claim. The judgment was not appealed nor was reconsideration of the judgment sought by the claimant.

10. A further telephone preliminary hearing was fixed on 8 March 2019 to consider the written pleadings, future procedure, any relevant matters and orders. It was conducted by Judge Hosie who prepared and issued a Note following that hearing dated 14 March. The focus of discussion at that hearing was the claimant's pleadings. The claimant was advised that he had to provide fair notice of his case to the respondents and was given 21 days to provide better and further particulars. He was directed to set out under separate headings each of the complaints he wanted to pursue. Reference was made by the Judge to the burden of proof and the two-stage approach required by Section 136 of the Equality Act 2010.

11. The claimant prepared better and further particulars and lodged these (intimating them to the respondents) on 25 April. He set out his position in relation to race discrimination and religious discrimination. He also made further submissions in relation to the unfair dismissal and wrongful dismissal claims. I explained that I could not interfere with Judge Hosie's earlier decision which the claimant would have to appeal or seek a review from the Judge. Those matters therefore do not concern us here.

12. In paragraph 43 he set out claims for discrimination (sections 13 and 14 and 39(2)(c) of the Equality Act, in direct discrimination section 19 of the Equality Act, harassment section 26 and 41(a) of the Equality Act, victimisation section 27 of the Equality Act. Little was added to the factual position nor did the claimant indicate how his treatment was less favourable to others nor did he specify who a comparator was.

13. In response the respondents e-mailed the tribunal on 7 May 2019 indicating that the unfair dismissal and wrongful dismissal claim should not be reopened They dealt once more with the issue of specification of the discrimination claims. In summary their position was they did not consider the claimant to have properly specified the claims although he had set out apparent legal claims he had not set out the factual basis for them nor how those facts engaged with the statutory claims being made.

14. The case came before Judge Hosie on 31 May by way of a telephone conference call. He reiterated that the unfair dismissal complaint was now dismissed and fixed a preliminary hearing to consider (one) whether the claimant requires to further amend his pleadings and if so, whether he should be allowed to do so, (two) whether any of the complaints comprising the claim should be struck out in terms of Rule 37(1)(a) on the basis that "it has no reasonable prospect of success", (three), whether any of the complaints comprising the claim has "little reasonable prospect of success" and if so, whether the claimant should be required to pay a deposit not exceeding £1,000 as a condition of continuing with the complaint in terms of Rule 39.

Preliminary Hearing

15. A preliminary hearing took place on 9 September 2019. Unfortunately, the claimant could not attend. He had warned the tribunal before the hearing that he was unable to attend. The tribunal e-mailed the claimant on 6 September indicating that his e-mail had been passed to me and although he was free to ask a friend to represent his interests as he requested he was warned that *"unless fully conversant with all the facts and circumstances of your case, he may not be able to represent your interests properly and you will be prejudiced as a result."*

16. The tribunal was advised that a friend of the claimant Mr S M Marfat would attend the hearing which he duly did.

17. At the outset of the hearing I noted that Mr Marfat was not a solicitor although he explained to me that he had some experience of employment tribunal cases. He seemed knowledgeable about the claimant's case and prepared. I then explained to him the purpose of the preliminary hearing and what was going to be discussed and considered. He indicated that he had a submission to present to the tribunal which had been prepared by the claimant. I allowed him to lodge this document and adjourned for a short period to allow Ms Hunter an opportunity of reading it.

18. On her return she observed that the document made reference to the unfair dismissal complaint and the wrongful dismissal complaint. I explained to Mr Marfat that as Judge Hosie's judgment had not been appealed or reconsidered I could not deal with either of these matters as they were not "before me". Mr Marfat indicated that he understood the difficulty I was in but urged me to consider the rest of the document which related to discrimination complaints which I confirmed I would. He reiterated that neither he nor Mr Mamun were legally qualified and he understood that Mr Mamun was struggling to put down in writing what was required by the law. He hoped that there was sufficient facts before the tribunal from which the tribunal could discern the basis for the legal claims that were being made.

19. We first of all looked at the various "submissions" that had been made starting with narrative in the ET1, the submissions submitted in November and the better and further particulars that had been lodged.

20. I explained to Mr Marfat the basis on which a strike-out application/deposit order could be made and the two tests that Judge Hosie had set out in his judgment. I invited Mr Marfat to ask, at any point for clarification of any matter if he required to do so.

21. In the event Mr Marfat contributed appropriately to the ensuing discussion. Ms Hunter set out the strike out application in essence expanding on the terms of the e-mail of the 7 May 2019. The remaining claims were for race

and religious discrimination, harassment and victimisation. She took me to page 12 of the better and further particulars. She went through the various claims that were made there detailing the lack of factual basis for each of them. In particular she criticised the lack of any basis for the claim for indirect discrimination and for victimisation. There was no evidence she submitted of any protected act although it could be argued in fairness to the claimant that raising the issue of discrimination at the appeal stage could be a protected act but the alleged victimisation occurred prior to this.

22. Ms Hunter referred me to the case of ***Ahair v. British Airways*** *[2007] Court of Appeal*. In her view this was a case that met the high test required of the Tribunal to dismiss the claim. The claimant had not set out the primary facts (or a *prima facie* case) in which the tribunal could infer the discrimination. She made reference to ***Madarassy***. In essence the unfair dismissal claim has been "shoehorned" into a discrimination claim. There was reference to some sort of 'operation' or conspiracy by the respondents to remove both people of the same ethnic background as the claimant but no basis for this proposition was set out nor any particular instances or instance given that might explain why the respondents were targeting Bengali citizens. If the tribunal did not agree that the claim should be struck out then her she sought deposit orders for each of the individual issues raised.

23. Mr Marfat confirmed that the claimant was Bengali. He hoped that there was enough to allow the claims to proceed to a hearing. The claimant felt aggrieved at what had happened and the dire consequences to him and his family of losing the employment with the respondents.

24. I explained to Mr Marfat that if I came to the view that a Deposit Order should be made I could properly take account of the claimant's financial position. I questioned Mr Marfat in relation to this and he confirmed that he could give the Tribunal information. I noted from him that the claimant's finances had been badly hit when he lost his job with the respondents having moved his family to the UK. His wife and daughter have now had to return to Bangladesh. The claimant has obtained employment (full employment as a

librarian) but he is supporting himself and his son who is currently at University. He is struggling to support two households. Mr Marfat reiterated that he hoped that there were sufficient facts to allow the tribunal to identify the claims.

Discussion and Decision

25. I first of all set out the terms of Rule 37 which deals with strike out and thr legal principles that should be applied.

"37. Striking out

(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds -

(a) that it is scandalous or vexatious or has no reasonable prospect of success;

…"

26. It has been recognised that striking out is a draconian power that must be exercised carefully. If exercised it would have the effect of preventing a party from having their claim determined by a Tribunal. The claims we are dealing with here are claims for discrimination. The legal principles applicable in relation to the striking out of discrimination complaints pursuant to this Rule are well-established. In the House of Lords case of ***Anyanwu & Ano v South Bank Student's Union and Ano*** *2001 ICR 391*. Lord Steyn said as follows:

"24. … *Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest. Against this background it is necessary to explain why on the allegations made by the appellants it would be wrong to strike out their claims against the university*."

And at paragraph 39 of the judgment Lord Hope of Craighead said as follows:

"Nevertheless, I would have held that the claim should be struck out if I had been persuaded that it had no reasonable prospect of succeeding at trial. The

time and resources of the employment tribunals ought not to [be] taken up by having to hear evidence in cases that are bound to fail."

27. The rule came under scrutiny again in the case of ***Ezsiasv North Glamorgan NHS Trust*** *2017 ICR 1126,CA* , the Court of Appeal was considering a case involving public interest disclosure and held that a claim should not ordinarily be struck out where there was a:

"*29. … crucial core of disputed facts in this case that is not susceptible to determination otherwise than by hearing and evaluating the evidence. … It would only be in an exceptional case that an application to an employment tribunal will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the applicant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation. …"*

28. In the more recent case of ***Ahir v British Airways plc*** *[2017] EWCA Civ 1392* , Underhill LJ said as follows:

"*16. … Employment tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context. Whether the necessary test is met in a particular case depends on an exercise of judgment, and I am not sure that that exercise is assisted by attempting to gloss the well-understood language of the rule by reference to other phrases or adjectives or by debating the difference in the abstract between 'exceptional' and 'most exceptional' circumstances or other such phrases as may be found in the authorities. Nevertheless, it remains the case that the hurdle is high, and specifically that it is higher than the test for the making of a deposit order, which is that there should be '* little *reasonable prospect of success'."*

29. One of the difficulties commonly faced by litigants in person is in adequately pleading a claim by setting down what is required by the terms of the section of the statute that is being founded upon. Tribunals are aware of such difficulties and often through case management ‘tease out’ sufficient information to satisfy the terms of the section in issue and to give the

respondents fair notice of a claimant's position. It is often apparent from the facts where a claim may lie.

30. However, one the problems that can arise, as in this case, is where a claimant has a strong belief that he or she has been badly treated and that belief then leads to claims being made for discrimination (sex, race or whatever) without there being something more that indicates that that the treatment complained of occurred because of the protected characteristic of race, sex or whatever.

31. This principle that unreasonable behaviour is not on its own sufficient was referred to by Judge Hosie in his Note dated 14 March 2019 in which he made reference to the case of **Madarassy v Nomura International PLC** (2007) ICR 867 particularly at paragraph 56. He also acknowledged, as do I, the difficulty facing unrepresented parties. A more full quotation is repeated here of the Judgment of Mummery.L.J :

> **"54. I am unable to agree with Mr Allen's contention that the burden of proof shifts to Nomura simply on Ms Madarassy establishing the facts of a difference in status and a difference in the treatment of her. This analysis is not supported by *Igen Ltd v Wong* [2005] ICR 931 nor by any of the later cases in this court and in the Employment Appeal Tribunal.**
> **…**
> **56. The court in *Igen Ltd v Wong* [2005] ICR 931 expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicated a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.**
> **57. "Could… conclude" in section 63A (2) must mean that "a reasonable tribunal could properly conclude" from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of sex discrimination, such as**

evidence of a difference in status, a difference in treatment and of the reason for the differential treatment. It will also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory "absence of an adequate explanation" at this stage (which I shall discuss later), the tribunal will need to consider all the evidence relevant to the discrimination complaint; for example, evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment, evidence as to whether the comparisons being made by the complainant were of like with like as required by section 5 (3) of the 1975 Act; and available evidence of the reasons for differential treatment.

58. The absence of an adequate explanation for differential treatment of the complainant is not, however, relevant to whether there is a prima facie case of discrimination by the respondent. The absence of adequate explanation only becomes relevant if a prime facie case is proved by the complainant. The consideration of the tribunal then moves to the second stage. The burden is on the respondent to prove that he has not committed an act of unlawful discrimination. He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If it does not, the tribunal must uphold the discrimination claim.

…

69. ... The only factor which section 63A (2) stipulates shall not form part of the material from which inferences may be drawn at the first stage is the "the absence of an adequate explanation" from the respondent.

70. Although no doubt logical, there is an air of unreality about all of this. From a practical point of view it should be noted that, although section 63A (2) involves a two-stage analysis of the evidence, the tribunal does not in practice hear the evidence and the argument in two stages. The employment tribunal will have heard all the evidence in the case before it embarks on the two-stage analysis in order to decide, first, whether the burden of proof has moved to the respondent and, if so, secondly, whether the respondent has discharged the burden of proof.

71. Section 63 A (2) does not expressly or impliedly prevent the tribunal at the first stage from hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the complainant's evidence of discrimination. The respondent may adduce evidence at the first stage to show that the acts which are alleged to be discriminatory never happened; or that, if they did, they were not less favourable treatment of the complainant; or the comparators chosen by the complainant or the situations with which the comparisons are made are not truly like the complaint or the situation of the complainant; or that, even if there has been less favourable treatment of the complainant it was not on the ground of her sex or pregnancy.

72. Such evidence from the respondent could, if accepted by the tribunal, be relevant as showing that, contrary to the complainant's

allegations of discrimination, there is nothing in the evidence from which the tribunal could properly infer a prime facie case of discrimination on the proscribed ground. As Elias J observed in *Laing v Manchester City Council* [2006] ICR 1519, para 64, it would be absurd if the burden of proof moved to the respondent to provide adequate explanation for treatment which, on the tribunal's assessment of the evidence, had not taken place at all.

…

76. In my view, Mr Allen's submission goes further than *Igen Ltd v Wong* warrants. He argued for a presumed lack of an adequate explanation providing "a material premise" for the reversal of the burden of proof. The "absence of an adequate explanation" may, he said, be the only basis on which the tribunal could infer that a significant ground for the treatment of the complainant was a proscribed one.

77. In my judgment, it is unhelpful to introduce words like "presumed" into the first stage of establishing a prime facie case. Section 63A (2) makes no mention of any presumption. In the relevant passage in *Igen Ltd v Wong* … the court explained why the court does not, in the first stage, consider the absence of an adequate explanation. The tribunal is told by the section to assume the absence of an adequate explanation. The absence of an adequate explanation only becomes relevant to the burden of proof at the second stage when the respondent has to prove that he did not commit an unlawful act of discrimination. In *Igen Ltd v Wong* the court did not go so far as to say that there was "a statutory presumption that there was no adequate explanation" for the respondent's treatment of the complainant and that there was therefore discrimination on a proscribed ground and that this presumption alone caused the burden of proof to move to the respondent.

…

79. I do not accept Mr Allan's submission on the construction of the expression "in the absence of an adequate explanation" or his criticisms of Elias J in *Laing* [2006] ICR 1519. It seems to me that the approach of Elias J is sound principle and workable in practice. This court should approve it. No alteration to the guidelines in *Igen Ltd v Wong* is necessary."

32. The background to the case was that the claimant was recruited from Bangladesh. He was working in Shetland and was told to hire a car which he did. He thought that he could legally drive on his Bangladeshi Licence. This proved not to be the case and he was dismissed for driving without a valid license and insurance. He was employed to carry out marine surveys and he could not do so independently until he was cleared to do so following the CTC check to which he refers.

33. Following the issue of Judge Hosie's Note in March directed the claimant to lodge better and further particulars of his claim which we now have to consider together with the rest of the pleadings.

34. We now have a five-page statement or narrative from the claimant in the ET1 (Document1), an eighteen-page document headed 'Submission to the Employment Tribunal' (Document 2) and a 14 page 'Better Particulars of Claim' (Document 3). In these documents the claimant has set out with some considerable care and attention to detail the factual history of his employment with the respondents.

35. In considering the pleadings the Tribunal bore in mind the terms of Section 136 of the Equality Act which deal with the burden of proof of discrimination cases.

Race and Religious Discrimination, Victimisation and Harassment

36. The first claim I will consider is for direct discrimination namely that the claimant was discriminated against because of his race. As I understand it the detriment or disadvantage claimed was not to put the claimant forward for a CTC check which if passed would allow him to survey vessels independently.

37. The claimant in his ET1 writes:

"*From the beginning of this case I felt that I was being discriminated by my line management as a foreign national in MCA, especially because of my religious identity. My line manager never talked or discussed with me clearly what was going on with regard to the car accident that I was involved in Shetland Islands up until the time of my suspension, except giving me some suspicious indications. Because, instead of looking into the incident that why it happened and how it happened, the line of query from my management side always indicated that there was a tendency to victimise me rather than*

showing any sympathy or reconciliation for an incident that happened on an official travel, which could have made me seriously injured or even could have endangered my life.

The basis of my suspicion was mainly due to some of the comments made by the line manager on Monday, the 17th July 2017, when he called me to his office after I returned back from my annual leave. He mentioned that after the incident of Shetland Islands the MCA Head Office had decided not pursue our "Counter Terrorism Clearance (CTC)" after 18 months of our residence in UK, a waiver from the UK Government for MCA to apply for the CTC for the foreign nationals working within MCA instead of the usual 36 months applicable for other organisations in UK.

I inquired with him that why and how my incident was connected in making such a change of policy which MCA enjoyed for long. He replied that no one in MCA Head Office wanted to take any risk by pursuing our early CTC. He also added that MCA HR dept considered it was a "mistake" to recruit me, because they were suspicious whether I would get a clearance even after 3 years of my stay in UK. When I asked him that why they were considering so and what could have prevented me from getting a counter terrorism clearance when I know that I had a clean background.
He added that on this matter of CTC the Head Office was very much concerned about few of us like me who were yet to apply and get cleared with CTC, as we were not officially allowed to go for any survey independently till we had our CTC issued. So, he advised me to maintain a low profile and meantime he would try and find enough jobs for me in the office and would try and convince head office that I was fully engaged in my job without even going for any independent survey on board the ships. ……"

38. Document 2 adds little to this. At paragraph 9 (c) the claimant states that he could '*visually feel a tendency to victimise'* himself and then he turns to the alleged comments made about his recruitment and CTC clearance. He then repeats the allegation of a 'cleansing' operation. In Document 3 the claimant adds background detail (paragraphs 31 onwards) He adds that after the car accident his line manager told him that his CTC check was not being pursued. This he believed to be unusual. The CTC check would have been carried out by the Home Office. The manager told the claimant to keep a low profile. In paragraph 61 the claimant alleges that the way the allegtions were brought makes it clear to him that he was 'framed'.

39. In the 'Explanatory Notes' in Document 2 the claimant gives further detail about the car accident but seems to indicate that this was a general change in policy that affected more than just him. He points to other accidents involving staff leading to no action being taken against them in contrast to himself and alleges that this was direct discrimination in terms of Section 13 of the Equality Act (Paragraph 127). The claimant does not know the detail of these accidents or disciplinary actions or if he does they are not set down. Without such detail and a truly comparative exercise it is impossible to say that there was a disparity of treatment let alone that it was on the grounds of race or religious belief.

40. At paragraph 129 referring to what he believed is a change of policy around the CTC he writes that according to information he has five officials were affected by the change to the CTC and four out of five were Muslim and Bangladeshi. He gives no further detail.

41. I would observe that the focus of the claimant's documents still seem to be the dismissal which took place because of the driving and licence issues.

42. The claimant does not explain why he thinks the change of policy was driven by racial prejudice although he makes reference to other Bangaldeshi's being affected. He also makes reference to the comment from his manager that 'Head Office' thought it was a mistake to recruit him. He does not directly link these matters to his race or indeed religion nor does he speculate why it was a mistake to recruit him. These remarks were supposedly made on the 17 July. (Document1). Given the difficulties he encountered driving in Shetland in May the remark is obviously capable of having a number of innocent interpretations. The claimant, however, interprets these matters as evidence of discrimination as in his view there was no reason to otherwise link the CTC issue with the car accident. I am not convinced that a case has been set out making that link. He does not explain how they are linked or why if they are other Bangladeshi's are being allegedly being targeted at this time in the so called 'cleansing operation'.

43. Another difficulty with the claimant's position is that it is not clear what the detriment or disadvantage the change in policy actually made given that his manager was telling him he would keep him occupied with other work meantime. He does not complain of any cut in salary. There was no clear detriment. The claimant wasn't dismissed because he could not yet carry out independent marine surveys. It is also odd that the respondents in any event not want to prevent him carrying out the full role for which he was recruited.

44. Considering the matter in the round the claim for race discrimination is very weak and confused. The change in CTC rules must have affected any foreign national employed by the respondents in a similar position to the claimant and not just Bangladeshi employees. The claim is just too speculative. In these circumstances I have concluded that it has no reasonable prospects of success and is the sort of case that, despite it relating to allegations of discrimination, can properly be struck out.

45. The claim for religious discrimination is best set out in Document 2 at paragraphs 14 onwards. The claimant asserts that those of the Muslim faith were dismissed ('singled out and sacked') including himself. He once more refers to the change in CTC policy affecting him and others. He asserts that three other recruited at about the same time, I infer that they are also Muslim, were 'under some sort of disciplinary procedure or targeted with an issue to bring a case against them' (paragraph 15). Further he says that 4 out of 5 Marine Surveyors with foreign nationality (presumably Muslim Bangladeshi) were affected by the change in CTC checks. The details of the disciplinary incidents or evidence that they were bogus is not alluded to nor why the claimant believes that the disciplinary action was not justified. It is interesting to note that despite reference to the so-called cleansing operation the claimant only asserts that three colleagues (15(1)) were facing disciplinary action not that they were dismissed. He does then say that of the four affected by the CTC change two were dismissed along with a Pakistani national. The claimant does not say how the CTC change in any way impacted on the

dismissals. The claimant alleges that these people were targeted to correct the mistake made in their recruitment. Indeed, he only alleged that his recruitment was a mistake (Paragraph 9(d)). The allegation boils down to the claimant asking the Tribunal to infer from the incidence of disciplinary action/ dismissal involving Bangladeshi Muslims recruited at the same as him is evidence of discrimination and by inference his dismissal was really on these grounds.

46. I came to the same view in relation to this claim that I did in relation to the race discrimination claim. This claim has no reasonable prospects of success and is struck out.

47. The same document deals with harassment at Paragraph 31. The Section reads as follows:

"26 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.

(2) A also harasses B if—

(a) A engages in unwanted conduct of a sexual nature, and

(b)the conduct has the purpose or effect referred to in subsection (1)(b).

(3) 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,

(b) the conduct has the purpose or effect referred to in subsection (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.

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

(a) the perception of B;

(b) the other circumstances of the case;

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

(5) The relevant protected characteristics are—

- ***age;***
- ***disability;***
- ***gender reassignment;***
- ***race;***
- ***religion or belief;***
- ***sex;***
- ***sexual orientation.”***

48. It is not completely clear what the harassment was other than possibly the Decision Manager not discussing the claimant’s grievance letter and his behaviour at towards the claimant at a disciplinary hearing. There is no indication of why the claimant believes that this particular behaviour related to either his race or religion. It seems highly improbable that the Decision Makers actions could violate the claimant’s dignity or create a hostile, degrading, humiliating or offensive environment. This is insufficient, without much more, to constitute the sort of behaviour the section prohibits. The claim as stated had no real prospects of success.

49. Victimisation is dealt with at Paragraph 37. I reminded myself of the statutory requirements for such a claim contained in Section 27:

“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.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual."

50. The allegations seem to relate to the actions of the Appeal Manager. It is suggested that her failure to deal with the claimant's grievance (which is commonly a separate process) at the appeal hearing was victimisation. The claimant does not say what the protected act was. It seems very improbable that refusing to clarify points in relation to a grievance or a failure to give a detailed decision, even if true and without something more, in itself could amount to harassment. This claim appears to have no merit and no reasonable prospects of success.

Employment Judge: **James Hendry**

Date of Judgment: **11 October 2019**

Date sent to Parties: **14 October 2019**