



EMPLOYMENT TRIBUNALS

Claimants: Miss S Kaur (1)
Miss S Rehman (2)

Respondents: Mr J Woodhouse (1)
Capita Retail Finance Services Ltd (2)

Heard at: Leeds **On:** 2 and 3 October 2019

Before: Employment Judge Maidment
Members: Mr W Roberts
Mr M Brewer

Representation

Claimants: Mr A McMillan, Counsel
Respondents: (1) In person
(2) Mr I Ahmed, Counsel

JUDGMENT having been sent to the parties dated 3 October 2019 and written reasons having been requested by the Claimants in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Issues

1. Within these reasons the Claimants are referred to by their individual names, the first Respondent by his name and the second Respondent as "Capita". The Claimant's complaints are of racial harassment arising out of a single comment alleged to have been made by Mr John Woodhouse. This is disputed and therefore first issue for the Tribunal to determine is what if anything was said.
2. If the comment was made, the Tribunal will determine whether it amounted to unlawful harassment pursuant to Section 26 of the Equality Act 2010. If so, Capita then seeks to rely on Section 109(4) of the Act which provides that it is a defence for the employer to show that it took all reasonable steps to prevent a discriminatory act.

Evidence

3. The Tribunal had before it agreed bundle of documents. Having identified the issues with the parties, the Tribunal took some time to privately read into the witness statements exchanged between the parties and relevant documentation. This meant that when each witness came to give their evidence, they could simply confirm their written witness statements and then, subject to brief supplementary questions, be open to be cross-examined.
4. The Tribunal heard firstly from Miss Kaur and Miss Rehman, then from Mr Woodhouse and finally from Mr McCouaig, Operations Manager, on behalf of Capita.
5. The Tribunal then heard submissions from all the parties on the question of liability. Having given its decision as to liability, the Tribunal clarified that the Claimants did not wish to give any additional evidence regarding hurt feelings in circumstances where the only remedy sought was indeed compensation for injury to feelings. They were content to rely on the evidence they had already given. The Tribunal therefore moved on to hear submissions on remedy on behalf of the Claimants and from Mr Woodhouse. Capita had by this stage, given the Tribunal's Judgment as to liability, been released from proceedings, albeit Mr Ahmed remained in the hearing room during these further stages. Having retired again to consider its decision, the Tribunal delivered then its Judgment as to remedy.
6. Having considered all relevant evidence, the Tribunal made the following factual findings.

Facts

7. The Claimants, both of Asian ethnicity, complain of racial harassment arising out of an alleged comment made by their Operations Team Manager, Mr John Woodhouse. Both state that on 16 January 2019 at around 10:45pm, shortly before the end of their shift, Mr Woodhouse had been walking past their bank of desks. He is said to have looked at a white colleague and stated: *"Has Mattar been dipped and had his head shaved?"*. The white colleague was occupying a seat usually occupied by a black colleague, Mattar. Mr Woodhouse denies that he made that comment on that day or at any other time.
8. Mr Woodhouse had managed both of the Claimants as part of a team of around 16 people from September 2018. His relationship with Miss Kaur had significantly broken down by around November 2018 arising out of his putting Miss Kaur on performance management and the way she perceived she was being treated by him. She had come to the point where she did not trust having a one-to-one conversation with him without a witness present. She felt the onset of panic attacks after her conversations with him. Indeed, on 4 January 2019 she requested a shift change citing his behaviour and her feelings towards him as the reason for her wishing to move from a late to an early shift.
9. She told the Tribunal that she had never heard Mr Woodhouse make any previous comment of an inappropriate nature based on race. She did not

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maintain that his previous treatment of her had been in any sense influenced by her race.

10. She was shocked when she said she heard Mr Woodhouse make the alleged comment on 16 January 2019. As soon as she heard it, she understood that Mr Woodhouse was referring to the white colleague's skin colour. She described an awkward silence for about 10 seconds after Mr Woodhouse had made the comment and before he then walked away. She said that her colleagues Ms Rehman, Mr Taj and Mr Bushrod were all present in the vicinity waiting to go home.
11. She had assumed that Mr Woodhouse had been attempting some form of humour as, based on the look on his own face, he seemed to find the comment funny. She did not find it funny. She accepted, however, that the comment hadn't been directed at her.
12. Miss Kaur said she was clear that she certainly now could no longer work with Mr Woodhouse. She chased her request for a change in shift by emails of 18 and 25 January. In the meantime, on 21 January she raised a written grievance. The majority of the grievance was made under the heading of bullying and harassment and dealt in some detail with some of the more historical issues she had had with Mr Woodhouse. At the end of the grievance letter, under a separate heading of "*racist comment*", she referred to alleged comment on 16 January.
13. Miss Kaur was interviewed in respect of her grievance by Mr Adrian McCouaig, Operations Manager, on 4 February. She explained the nature of the comment and told him about the other employees who had been in the vicinity.
14. Miss Rehman in her evidence to the Tribunal was absolutely adamant and forceful in her insistence that the alleged comment had been made. She said that she had been shocked at the time the comment was made and that someone thought they could comment about another's skin colour. She said that she took the comment personally, it was not acceptable and she did not find it funny at all. It did not matter if the comment had not been directed at her. She had experienced racism in her life including, as a child, being told that her skin colour was "*dirty*". The comment was offensive. She said that she understood that people could sometimes make mistakes in the way they spoke and that, if Mr Woodhouse had recognised that he had made a mistake and said sorry and he did not mean it, she would have thought that to be fair enough. His subsequent denial that he had made the comment annoyed her.
15. Miss Rehman is a close friend of Miss Kaur. She said that she had witnessed how Miss Kaur felt after she had been managed by Mr Woodhouse and understood that Miss Kaur considered that she was being bullied by him. She said, however, that she had not witnessed any bullying by Mr Woodhouse of Miss Kaur herself. Miss Rehman had also on 4 January made a request for a change in shift where she had given family reasons as the reason for her seeking this. She told the Tribunal however that part of her reason had been that she was concerned that, if Miss Kaur

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left the shift, Mr Woodhouse would turn his bullying behaviour towards someone else and she might be effectively his next victim. When suggested that she might have a particular motivation for wishing to support Miss Kaur in her grievance, she said that she was clear that the comment had been made and had shocked her. If she had wanted to, she could have sought to support Ms Kaur's more general allegations of bullying behaviour but she had not, because she had not witnessed anything first-hand.

16. She had not submitted her own grievance about the alleged comment as she thought that was unnecessary given that Miss Kaur was raising it and she expected in any event to be interviewed as part of an investigation.
17. Mr McCouaig interviewed Miss Rehman on 18 February. She corroborated Miss Kaur's account of what Mr Woodhouse was alleged to have said. She referred to his comments being made towards the end of the shift with three or four people present and whilst Mr Woodhouse was putting his coat on. She said that everyone looked at each other, that they were in shock and there was an uncomfortable laugh as if to say: "*Did he just say that?*". When asked if she considered what had been said to be racist she responded that the comment was very unexpected: "*So yes. All of us shocked for a moment. All discussed between ourselves and said did that actually happen.*"
18. Mr Bushrod was interviewed on 13 February and asked if he had ever noticed a comment of a racist nature in a meeting. He replied that he had not witnessed anything.
19. Mr Taj was interviewed on 5 March. He told Mr McCouaig that he didn't really want to get involved, but Mr McCouaig said that he just wanted some help to get to a fair decision. Mr Taj described that someone else was in Mattar's seat and that Mr Woodhouse came across and said to the group of case handlers, with reference to the white person sat in seat: "*Someone's been dipped*". He described himself as being "*gobsmacked*" by the comment. When asked what he understood by the comment he said: "*I perceived black guy sat there, then white person – as in dipped.*"
20. On 11 March Mr McCouaig interviewed Mr Woodhouse. When the allegation of the specific comment was put to him he replied: "*Don't recall. Don't see it being anything to do with Sandeep [Miss Kaur]. I have lots of connections and take great offence to racist comment. Wife's Asian, Chinese cousins, black friends, proud of being colourblind. I can recall looking for Mattar but I wouldn't have said dipped.*" He said that on the day he was thinking there was a white person sat there "but people are either the same or not."
21. In considering his grievance conclusion, Mr McCouaig did not find evidence of more general bullying or harassment. However, as regards the complaint about the racist comment, he believed that on the balance of probabilities Mr Woodhouse had made the comment. Miss Kaur was provided with an outcome letter confirming Mr McCouaig's decision including his upholding of this part of her grievance.

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22. Following the raising of Miss Kaur's grievance, she remained working in the same team, albeit it is noted that she had already been given a different manager, Mr Barton, to report to, given the existing relationship difficulties between her and Mr Woodhouse. Nevertheless, she and Mr Woodhouse were working in the same area until she in fact moved to a day shift on 4 February. Despite that move, as Mr Woodhouse sometimes attended work earlier than his designated start time, she did sometimes see him prior to her finishing her own shift. Miss Rehman, it is noted moved to an early shift also, on 6 February.
23. Mr Woodhouse was on holiday from around 18 March to 4 April but, on his return to work, he was suspended pending a disciplinary investigation, the Tribunal understanding that there were other issues separate from the alleged racist comment which resulted in that suspension. Mr Woodhouse has been subsequently absent from work due to sickness and has not since that date returned to the workplace. Nor has any disciplinary process been concluded in the light of that sickness absence.
24. In correspondence Mr Woodhouse sent to Capita on 1 August, he took issue with a statement in Capita's response to the Claimants' Tribunal application where it said that he had been proceeding through a disciplinary process relating to Miss Kaur's grievance. Ms Hooley of Capita responded that where any employee raises a grievance relating to potential breach of equality and diversity, then that has to be investigated. When the grievance process was completed they would have liked to have addressed the issue with him at that time and this would have been in the form of the disciplinary process. However, they had been unable to do so as he had been absent from the business since 18 March due to holidays, suspension or sickness absence.
25. Within Mr Woodhouse's communication, he also said that, thinking back, he recalled Miss Kaur asking if a male employee with a shaved head wearing a football strip top was her teammate, Mattar. He was confused as to how she could get the two of them mixed up and had said something like: *"Well not unless he has shaved his head and is wearing a different strip since lunchtime."* In his witness statement, he refers to that conversation taking place on 16 January 2019. Before the Tribunal he said that he thought this conversation may have occurred in December 2018, probably around 18 Decemebr. He might have used the word *"strip"* or *"kit"* which might then have been misheard. The Tribunal found Mr Woodhouse's description of any such conversation to be vague and unconvincing.
26. On the balance of the evidence, it is more likely than not that the comment was made. The Claimants were clear before the Tribunal, as they had always had been, as to the words said. Their evidence was convincing before the Tribunal. Miss Kaur is said to be an individual with an agenda and indeed she had had an extremely problematical relationship with Mr Woodhouse. Miss Rehman had not and, whilst it is suggested that she might have wished to support her friend, the Tribunal is convinced that she is not inventing the alleged comment in order to do so. As she said, had she wished simply to support Miss Kaur she could have commented on her wider grievances, but she did not because in truth she had not witnessed

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any bullying behaviour by Mr Woodhouse. Both of them were clear (and willing to volunteer) that Mr Woodhouse's comments were a one off and not part of any pattern of discriminatory behaviour. In addition, there is the evidence of Mr Taj who appears to be an entirely independent witness, who was reluctant to be involved, but whose account completely corroborated that of the Claimants.

27. Against that Mr Woodhouse's account to Mr McCouaig was much less convincing in circumstances where his instant reaction was that he didn't recall the comment and that it had nothing to do with Miss Kaur (suggesting that he recognised that something had been said). His raising of the reference to a football strip as to what had been potentially misheard was at a late stage, unconvincing and would involve the Tribunal being persuaded that three separate individuals had misheard the same thing and indeed wrongly attributed the comment as having been made on 16 January 2019.
28. Mr Bushrod not having heard anything is not supportive of Mr Woodhouse.
29. The Tribunal accepts that Mr Woodhouse did not intend to cause offence and that the comment was not of a nature he would ordinarily use. The Tribunal does not doubt the sincerity of Mr Woodhouse's comments regarding his commitment to equality and his respect for people from different backgrounds and ethnic origins. The comment appears to have been something of an out of character aberration, but it did happen.
30. Capita has shown to the Tribunal that it has a very full employee handbook provided to employees on the commencement of their employment which they sign to confirm they have received and read. This covers comprehensively the promotion of equality and diversity in the workplace. In addition, Capita operates a separate policy to deal with allegations of bullying and harassment, including where such behaviour is discriminatory because of a protected characteristic.
31. All employees undergo annual training in diversity and inclusion through an online package which is not logged as completed unless they have satisfactorily answered the questions. These training modules include references to behaviour and the treatment of others in the workplace. Capita monitors the completion of this training and chases people up if they appear not to have been through it. Mr Woodhouse had received this training and, as a manager, at a higher level than more junior staff. Capita also operates specialist training for managers, which included Mr Woodhouse, involved in recruitment which involves information regarding the possibility of and the need to eliminate unconscious bias. Whilst Miss Rehman had not seen any such communications, the Tribunal accepts Mr McCouaig's and Mr Woodhouse's evidence that periodically reminders are sent out to the workforce by email relating to equality and dignity at work.
32. All of the witnesses accepted that no employee could be in any doubt as to the inappropriateness in the workplace of the type of comment which it was alleged that Mr Woodhouse had made.

Applicable law

33. The complaint of harassment is brought pursuant to Section 26 of the Equality Act 2010 which states:

*“(1) A person (A) harasses another (B) if -
A engages in unwanted conduct related to a relevant
protected characteristic, and
the conduct has the purpose or effect of—*

violating B's dignity, or

*creating an intimidating, hostile, degrading, humiliating
or offensive environment for B.*

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

(a) the perception of B;

(b) the other circumstances of the case;

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

34. Section 136 is relevant to establishing that the unwanted conduct in question related to the relevant protected characteristic. In order to shift the burden of proof, there is a need for the Claimant to adduce evidence to suggest that the conduct could be related to the protected characteristic, i.e. the Tribunal could reasonably conclude the detrimental treatment to be related to race.

35. The Tribunal has been referred to the case of **Insitu Cleaning Co Ltd v Heads 1995 IRLR 4** in support of the proposition that a one-off incident, if sufficiently serious, can amount to unlawful harassment.

36. Harassment will be unlawful if the conduct had either the purpose or the effect of violating the complainant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.

37. A claim based on “*purpose*” requires an analysis of the alleged harasser's motive or intention. This may, in turn, require the Employment Tribunal to draw inferences as to what the true motive or intent actually was. The person against whom the accusation is made is unlikely to simply admit to an unlawful purpose. In such cases, the burden of proof may shift from accuser to accused.

38. Where the Claimant simply relies on the “*effect*” of the conduct in question, the perpetrator’s motive or intention – which could be entirely innocent – is irrelevant. The test in this regard has, however, both subjective and objective elements to it. The assessment requires the Tribunal to consider the effect of the conduct from the complainant’s point of view. It must also ask, however, whether it was reasonable of the complainant to consider that conduct had that requisite effect. The fact that the Claimant is peculiarly sensitive to the treatment accorded her does not necessarily mean that harassment will be shown to exist.
39. Section 109(4) of the Act states that: “*In proceedings against A’s employer (B) in respect of anything alleged to have been done by A in the course of A’s employment is a defence for B to show that B took all reasonable steps to prevent A... (a) from doing that thing, or (b) from doing anything of that description.*”
40. The onus rests on Capita to establish the defence. Further, the defence is limited to steps taken before the discriminatory act occurred, albeit subsequent events are relevant in so far as they shed light on what occurred before the act complained of, for example, by demonstrating that an equal opportunities policy that exists on paper was not in fact operated in practice. What amounts to “*all reasonable steps*” will depend on the circumstances, but the EHRC Employment Code suggests the implementation of an equality policy, ensuring workers are aware of the policy, providing equal opportunities training, reviewing the policy as appropriate and dealing effectively with employee complaints.
41. The Tribunal has been referred to the case of **Canniffe v East Riding of Yorkshire Council [2000] IRLR 555** where it was said that the Tribunal must identify whether there were any preventative steps taken by the employer and whether there were any further preventative steps that the employer could have taken that were reasonably practicable, albeit the Tribunal appreciates that the defence is now one of “*all reasonable steps*”. In that case the EAT said that where employers or managers are not aware of any risk of inappropriate behaviour or harassment by an employee, particularly towards another employee, it may be sufficient for the Tribunal simply to ask whether there was a policy in place and whether it was disseminated. This is particularly relevant where there has been a one-off incident of serious harassment. A contrast was drawn with the situation where management knew or suspected that there was a risk that a particular employee might carry out inappropriate acts.
42. Ordinarily, however, simply issuing an employee with a dignity at work or equality policy will not, in itself, be sufficient to meet the defence.
43. Applying its findings of facts to the legal principles, the Tribunal reaches the following conclusions.

Conclusions

44. The comment made by Mr Woodhouse on 16 January 2019 was clearly, the Tribunal finds, unwanted conduct related to race. It was a one-off comment, but clearly unwelcome to anyone with sensitivities relating to race. Miss Rehman explained that the comment denoted for her a removal of a person's ethnic origin/identity. It singled out an employee from a non-white background for special humorous treatment.
45. The comment was not made by Mr Woodhouse with the purpose of creating a hostile or offensive environment. Did it, however, have that effect? The Tribunal is clear that it did. For Miss Rehman it brought back memories of previous racism she had experienced and she was shocked by the comment. Miss Kaur was also shocked. She said in evidence that she was intimidated and every time Mr Woodhouse walked past her, she thought that he was capable of making another offensive comment. She said that she found the comment to be very offensive. The Tribunal is mindful of the wording of Section 26 of the Act, but considers that the comment did have the effect necessary to satisfy the need for the creation of an offensive environment.
46. The comment was (objectively) clearly reasonably perceived as having that effect. This could not be said to be a comment so minor or trivial or made in a context so as to have rendered it unreasonable for the Claimants or anyone else to have considered it to have created an offensive workplace environment for them.
47. The comment was made in the course of Mr Woodhouse's employment. Did then the Respondent take all reasonable steps to prevent the alleged comment? The Tribunal's concentration must be on what was done to stop the harassment before it occurred. In this regard, Capita did not just have comprehensive policies in place. It communicated them, trained all employees on them and updated that training annually. As all of the witnesses, including Mr Woodhouse, confirmed, no employee could have been in doubt that offensive remarks relating to race were not appropriate and would not be tolerated by Capita.
48. In terms of any inference which could be drawn out of the actions of Capita after Miss Kaur had made her complaint, the Tribunal would note that whilst Mr Woodhouse wasn't removed from the area where she worked, he was no longer her manager at the time of the comment or her subsequent complaint. She was in the process of being transferred already to another shift which would significantly reduce the contact she might have with Mr

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Woodhouse. Their period of working together was less than 2 weeks and Mr Woodhouse was on leave during part of that period. The response of Capita might have been viewed differently had the allegation been of direct racial abuse, but it was not. Mr Woodhouse was then working on a different shift from both of the Claimants with much reduced scope for contact, effectively only on or around a shift handover. Miss Kaur's grievance was properly investigated and indeed upheld. Mr Woodhouse was then suspended from work and has not returned to the workplace since in circumstances where he does still face disciplinary proceedings arising out of the comment made. The Tribunal would note its view that the words spoken by Mr Woodhouse do not as a one-off out of character aberration and in the overall context in which they were used, fall within the category of gross misconduct and Capita's response to Miss Kaur's grievance must be seen in that context.

49. Capita has satisfied the Tribunal that it took all reasonable steps to prevent the comments being made and therefore that it is not liable for any act of unlawful harassment.

Remedy

50. In terms of remedy, the Tribunal was referred to the Vento guidelines (derived from the case of **Vento v Chief Constable of West Yorkshire 2003 ICR 318**) and to the guidance given in that case where reference was made to three bands of awards. Sums within the top band should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory treatment. The middle band was to be used for serious cases which did not merit an award in the highest band. Awards in the lower band were appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence. Nevertheless, the Tribunal considers that the decisive factor is the effect of the unlawful discrimination on the Claimant.
51. The bands originally set out in **Vento** have increased in their value due to inflation and a further uplift of 10% given to general damages pursuant to the case of **Simmons v Castle [2012] EWCA Civ 1039**. This had given rise to Presidential Guidance which, in respect of claims brought on or after 6 April 2019, prescribes a lower band from £900 to £8,800 and middle band of £8,800 to £26,300.
52. The Claimants had produced schedules of loss in which they sought the sum of £4,000 as compensation for injured feelings. Mr McMillan on behalf of the Claimants indeed proposed in submissions that an award at that level would be appropriate recognising that this was a one-off act and that it ought to be assessed in the lower Vento band.
53. The Tribunal considered that the comment made by Mr Woodhouse was indeed properly categorised as an isolated one-off act with no previous comments of a similar nature made by Mr Woodhouse to or in the Claimants' presence and none since the incident in question. His words

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were not directly aimed at the Claimants. The comment made was not in the nature of direct abuse aimed at the Claimants. It was, however, ill-judged and, as already found, offensive. The Claimants had produced no medical evidence and had been able to go to work on the days following the comment.

54. The comment did, however, cause both of the Claimants upset. Both were shocked by it. In Miss Rehman's case it reminded her of previous racism she had experienced as a child and therefore revived disturbing memories. In Miss Kaur's case, she was concerned that there might be a future offensive comment made by Mr Woodhouse. Whilst the type of upset the Claimants experienced differed, there is, on the evidence, no basis for differentiating between them in terms of the appropriate level of an award of injury to feelings.
55. The Tribunal considers the appropriate award in this case for each Claimant should be in the sum of £1250, as commensurate with the treatment to which the Claimants were subjected and as representing, in so far as possible in money terms, the hurt and upset caused to them. To this award, interest must be added at the rate of 8% from the date the comment was made. This amounts to a period of 37 weeks and therefore a further sum in interest of £71.15. On that basis, Mr Woodhouse is ordered to pay to each Claimant the sum of £1321.15.

Employment Judge Maidment

Date 11 October 2019

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