



EMPLOYMENT TRIBUNALS

Claimant

Mr Ashley Benjamin

v

Respondent

**Bradford Teaching Hospital NHS
Foundation Trust**

PRELIMINARY HEARING

Heard at: Leeds

On: 25 & 26 September 2019

Before: Employment Judge Wedderspoon

Members: Mr G Harker

Mr D W Eales

Appearance:

For the Claimant: In person

For the Respondent: Mr S Proffit, Solicitor

JUDGMENT

1. The claims of direct race discrimination, harassment and victimisation are not well founded and are hereby dismissed.

REASONS

Amendment Application

1. By Claim Form dated 25 April 2019, the Claimant brought claims of direct discrimination because of the protected characteristic of race and harassment related to race. At the commencement of the hearing, the Claimant sought to amend his claim to add an additional claim of victimisation. He stated that he had sought to previously bring a claim of breach of contract which was dismissed by Employment Judge Keevash. His case was that he had submitted a grievance to the Respondent on 9 January 2019. He believes he was treated less favourably by reason of that protected act on 21 February 2019 when he believes Susan Burch breached his confidentiality by revealing his criminal

conviction. He became aware of this fact on 22 July 2019. On 23 July 2019 he had wrongly classified this as a breach of contract and sought to amend his claim. He stated he made a formal application to amend on 11 September 2019. The Respondent resisted this application on the basis that it was a new claim and was brought out of time but conceded that the Respondent was able to deal evidentially with the allegation.

2. The Employment Tribunal considered the submissions and the principles set out in the case of **Selkent Bus Co Limited v Moore (1996) ICR 836** and the Presidential Guidance (paragraph 5). The Tribunal concluded that the amendment was for a “new claim”; the Claimant had previously sought to amend his claim once he became aware of the matter but had wrongly classified it as a breach of contract claim; he would suffer prejudice if he was unable to pursue this allegation before the Tribunal, if the amendment was allowed the Respondent would be facing an additional claim which is prima facie out of time, but the Respondent is able to evidentially deal with the allegation.
3. When conducting the balancing exercise, the Tribunal concluded that greater prejudice would be caused to the Claimant if he was not permitted to make this amendment; so that the amendment was allowed. The Respondent would be permitted to introduce further evidence to deal with the Claimant’s allegation. The Tribunal granted the Claimant’s application to amend his claim to add in an act of victimisation.

Issues

4. The issues in the case were as follows :-
 - 4.1 Direct discrimination section 13 of the Equality Act 2010
 - (i) On 8 November 2018 did Susan Burch speak to C rudely in respect of taking leave; and
 - (ii) On 6 December 2018 did Susan Burch single the Claimant out due to what he was wearing.
 - (iii) Did Susan Burch treat the Claimant less favourably because of his race.
 - 4.2 Harassment section 26 of the Equality Act 2010
 - (i) In March 2017 did Susan Burch intimidate the Claimant on ward 37 due to an accidental mistake;
 - (ii) On 21 August 2018 did Janet Crabtree tell the Claimant his numbers were down;
 - (iii) On 21 August 2018 did Janet Crabtree tell the Claimant he was coding one episode per 30 minutes; and
 - (iv) On 11 January 2019 did Janet Crabtree intimidate the Claimant during a telephone call in respect of managing his sickness absence.
 - (iv) Did Susan Burch or Janet Crabtree engage in unwanted conduct;

- (v) Was the unwanted conduct related to race;
- (vi) Did the conduct have the purpose or the effect of (a)violating the Claimant's dignity or (b)created an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

4.3. Victimisation section 27 of the Equality Act 2010

On 21 February 2019 did Susan Burch subject the Claimant to a detriment of breaching his confidentiality by revealing his criminal conviction due to him having done the protected act of raising a grievance alleging race discrimination.

- 5. The Claimant relied upon actual comparators for his claims of direct discrimination, namely Anthony Hollings and Andrew Buck.

The Hearing

- 6. The Tribunal was provided with an agreed document bundle of 317 pages. The Tribunal heard from the Claimant and the Respondent's witnesses, Susan Burch, Team Leader of the Trust's Clinical Coding Department and Janet Crabtree, Clinical Coding Manager.

The Facts

- 7. The Tribunal having heard all the evidence and submissions found the following facts.
- 8. The Claimant is a black man. He was born in Huddersfield. His mother (now deceased) was from Trinidad and Tobago. From 9 January 2019, the Claimant was employed by the Respondent as a Clinical Coder. He was subject to a six-month probationary period which he passed and he was confirmed in post. He continues to be employed by the Respondent. The Claimant's team consisted of about 13 white employees, 6 Asian and he was the only black person. The department was located in a Portacabin on the Trust premises.
- 9. On commencement of his employment he was in training and he was supervised and coached by Joy. Susan Burch managed seven clinical coders out of 26 in the department. The Claimant was not a member of Susan Burch's team but she worked with all the clinical coders in the department. Susan Burch's manager was Janet Crabtree.
- 10. The Claimant described in his witness statement that he was treated differently and less favourably than other members of staff by Janet Crabtree and Susan Burch. He gave the example of Janet Crabtree tending to be more talkative and friendly with others; asking Safiya if she was alright and whether she needed help. He said he was not treated like this and he was treated less favourably than others. He also stated that Susan Burch spoke to him in a very rude manner in about March 2017 which caused him some embarrassment. This was disputed by both witnesses in evidence and the Tribunal did not accept the Claimant's account. In particular the tribunal found that the Claimant and Susan

Burch got on well at work. On 5 December 2018, the Claimant bought Susan Burch a bottle of prosecco for her birthday. The Tribunal found the Claimant's account to be inconsistent with the gift he gave to Ms. Burch. In fact, the Tribunal found the Claimant tended to be very sensitive (as set out below). This was a view shared by his trainer, Joy when she stated at page 177 *"he's been through an awful lot in his private life. He comes across quite bouncy at work, upbeat but he is sensitive."*

11. The role of the clinical coders (including the Claimant) is to review the files of the discharged patients and record the conditions for which they were treated and the treatment they received during their stay in one of the Respondent's hospitals. Each condition and form of treatment is given a code which is used by the Trust to claim payment by reference to a system of tariffs. It is important that the coding is accurate otherwise mistakes in coding can lead to incorrect claims for payment. The number of coding episodes expected of each clinical coder per day depends upon the complexity of the cases allocated to the coder; the less complicated the work, the more episodes per day is expected.
12. In March 2017, the Respondent continued to use some paper files. The Respondent uses electronic means of recording codes now. The Claimant coded the file of a patient of an outpatient ward at St. Luke's hospital. The Claimant was required on receiving the file to check it into the department and then check it out once he had finished with it and then return the file to St. Luke's hospital. The Claimant did not do either of these things. The patient attended the outpatient ward and the file was in transit to St. Luke's hospital. The hospital noting that the file had been coded as being checked out for coding contacted the department to request the urgent return of the file. There was no record of the department receiving it. It took about one hour to establish what had happened to the file and to locate it. The patient was waiting in the ward for that period of time. Susan Burch went to see the Claimant about the file. He was working on ward 32 of the Bradford Infirmary. Susan Burch found the Claimant working in the office. There is a dispute of fact as to what happened and what was said. The Tribunal is satisfied that Susan Burch closed the door of the office to speak to the Claimant and that no one else was present in the room. She told the Claimant directly it was important to check files in and out.
13. The Tribunal finds as a manager Susan Burch was entitled to raise this issue with the Claimant and do not find that she spoke to him in an inappropriate way at all. It was an important error which could potentially place the patient at risk if there was no file available. At this time the Claimant was a fairly new employee and the Tribunal accepts that issues should be raised at an early stage so that they do not occur in the future with a new employee. The Claimant alleges that this was harassment related to the characteristic of race. There was nothing said by Susan Burch to the Claimant about this performance issue related to race. It is likely a white employee who had made the same mistake as the Claimant would have had this issue raised with them by Susan Burch and that she would have spoken to them in a similar direct manner. Although the conduct may have been unwanted by the Claimant, in the context of a

performance issue that could affect patient health and safety and care it was appropriate that he should be spoken to immediately.

14. After the Claimant and Susan Burch returned to the Portacabin, the Claimant requested to speak to Susan Burch outside. The Claimant stated he was unhappy about the way Susan Burch had spoken to him. Susan Burch apologised if she had upset the Claimant. The Claimant appeared to accept her apology. The Tribunal found it was appropriate for a manager to raise a performance issue with an employee and it was oversensitive of the Claimant to consider he was being singled out. The incident is also brought as a claim to the Tribunal woefully outside the time limits.
15. In May 2017 a disagreement took place in the office when the Claimant was informed (but did not witness) that a male autistic colleague had cut his toenails in the office. The Claimant found this to be disrespectful and raised this with the male colleague. A row ensued. The Tribunal found it was aggressive of the Claimant to raise this himself in the manner that he did so with the individual rather than raising it with a manager to sort out particularly in the context that the Claimant was aware that the colleague was autistic.
16. In August 2018 Janet Crabtree and the Claimant were sitting at desks positioned back to back. The Claimant was sat facing the door. The Claimant became easily distracted when people entered the office and did not appear to be working efficiently. It is within that context, that Janet Crabtree checked the Claimant's performance. The Tribunal found this explanation credible.
17. On 6 August 2018 the Claimant had recorded 14 episodes in 7.5 hours. This amounted to about 1 episode per 30 minutes. He had started work at 7.30 a.m. but made his first recording at 8.15a.m. The Tribunal finds that the Claimant did not have a set target of episodes to record because some episodes take longer to record than others and accuracy and speed are both important in coding work. At this time, his work was not complex work and he should have been able to complete more work than record 14 episodes.
18. On 21 August 2018 Janet Crabtree raised with the Claimant he had coded only 14 episodes (this is evidenced by the summary see page 66). There is a dispute of evidence as to whether Janet Crabtree informed the Claimant, he should be coding 40 episodes per day. The Tribunal on balance prefer the Respondent's evidence that such a target did not exist and this was not said to the Claimant. Janet Crabtree agreed to meet the Claimant the next day at a 1 : 1 and provided copies of the print out for the codings (pages 60 to 69). At the 1 : 1 on 22 August 2018 Janet Crabtree asked the Claimant if he required any additional support. The Claimant said he did not because Joy could assist him. Janet Crabtree told the Claimant she thought he was easily distracted and suggested that he move away from the door to another desk. The Claimant agreed with this suggestion. The Tribunal finds that the Claimant was not given a Hobsons choice; the Claimant accepted the advice of a senior person at the Trust and agreed to move desks.

19. The Respondent provided coding summaries to the Tribunal in evidence. This showed for the period of 1 to 21 August that the Claimant's average coding was 21 per day. For the period from 21 to 31 August the Claimant's average coding increased by over 40% to 30 per day. In September 2018 the Claimant averaged 46 episodes per day and in October he averaged 34 codings per day.
20. The Tribunal is satisfied that Janet Crabtree was entitled to raise with the Claimant the issue of his low number of codings per day; it was a low level of productivity. She raised this with him because she genuinely believed the Claimant was distracted easily which impacted on his coding numbers. There was no evidence before the Tribunal that white employees such as Ian had a similar low level of performance of codings. The Tribunal finds that the Claimant's level of codings were down and he had only recorded one per 30 minutes. The fact that the Claimant's manager raised this with the Claimant had nothing to do with his race and nothing that the manager said to the Claimant had any racial context at all.
21. In about September 2018 Susan Burch spoke to Anthony Hollings about his inappropriate clothing when he attended work in short trousers, a hoodie and no staff identification. Mr. Hollings went onto the ward where he was seen by a consultant who asked him if he was actually a member of staff.
22. Following the issue with Mr. Hollings, Susan Burch and Janet Crabtree decided to introduce a dress code of the department. Employees had begun attending work in casual clothing (page 172). A trust wide policy existed which stated, "all staff should maintain a professional appearance at all times". This was not updated until November 2018. The managers tended to ignore employees wearing jeans because there was a lack of guidance about appropriate work wear.
23. During the afternoon of 7 or 8 November 2018, the Claimant asked Susan Burch if he could take the rest of the day off as sick leave because he was not feeling well. When an individual leaves work early, the Respondent requires a form to be completed. In the context that the Claimant did not give a detailed reason Susan Burch stated, "well what is it?" namely the Claimant was asked the reason he needed to leave early. A form was completed (see page 76). The Tribunal finds that this was a usual and reasonable request and that Susan Burch did not speak to the Claimant or request this information inappropriately or in a belittling manner. Her tone was abrupt. However, the Tribunal finds there was nothing said related to the Claimant's race or in the context related to race. The Claimant alleged in his statement that he believes if others (white) employees were in similar circumstances they would not be treated in this way. There were no actual white comparators. The Tribunal found that A white employee asking to leave work early would have been requested to provide a reason to leave work early and complete a form.
24. The Claimant also compares himself with Safiya who felt ill during Ramadan and asked Susan if she could leave after dinner because she felt faint from fasting. The Tribunal consider that Safiya gave detail to the Respondent at the

time as to the reason she required to go home earlier; the Claimant did not; he had simply said he did not feel well. The Tribunal do not find that Safiya was an actual comparator.

25. Generally, the Claimant's appearance at work was immaculate and very smart. However, the Claimant tended to dress down on days when he was working a half day. The Tribunal finds that the Claimant had not previously worn an Arsenal shirt to work on a half day.
26. On the morning of 6 December 2018, the Claimant entered the kitchen area of the Portacabin to make himself breakfast. He was wearing an Arsenal football shirt and jeans. Susan Burch was already in the kitchen making herself some tea. Only the Claimant and Susan Burch were in the kitchen. She asked the Claimant "is it dress down day". The Claimant stated he had the afternoon off. Susan Burch told the Claimant what he was wearing was not appropriate for work because he could be called upon to visit a ward. The Claimant appeared to accept what Susan Burch said.
27. There was a dispute as to what the Claimant was told off for and whether any other employees had been spoken to about their dress at work. Joy in her interview had stated that the Claimant was told off for wearing jeans (p.176). Deborah thought the Claimant was told off for wearing jeans (p.166). Irena refers to the Claimant wearing an Arsenal shirt and others looking shoddily dressed but unlike the Claimant they were not spoken to about their dress for work (page 180). These individuals did not give evidence to the Tribunal and were not in the kitchen at the time the Claimant was spoken to. Anthony Hollins says he was spoken to about his attire at work; he says he was "collared" a few times. Kathryn described the Claimant wearing a football top and trainers and she commented it was not appropriate (p.183). She describes the Claimant attending work in a tracksuit which she deemed to be inappropriate dress for work on another occasion. She described the Claimant sulking like a child when told about his inappropriate clothing and him getting frustrated which had led to the grievance (p.184). Andrew Buck (page 202) says that he did wear jeans between Christmas and New Year and was not spoken to but was looked at by Susan Burch as if to say you are wearing jeans. He said he believed something would be said about dress code because some people were coming in wearing a sports top dressed like a basketball player and some were dressed in jeans. The Tribunal did not hear evidence from these witnesses so the weight to be attached to their assertions in the grievance investigation had to be treated with caution. On balance the Tribunal preferred the evidence of Susan Burch; the Claimant generally was well presented at work and the wearing of the Arsenal shirt was unprofessional and stood out. Others had been spoken to about their inappropriate dress code.
28. Susan Burch returned to sit at her desk. A few minutes later, the Claimant shouted to Susan Burch from the kitchen *"its ok for some people to come to work inappropriately dressed and they don't get spoken to."* Susan Burch stated others had been spoken to. Kathryn Richardson took the Claimant outside the portacabin and told him what he was wearing to work that day was inappropriate.

29. The Claimant's case is that others wear jeans and dress casually for work so that he was singled out and treated less favourably by the comments of Susan Burch. The Tribunal finds that the Professional Appearance Policy did apply to the Claimant and the Claimant accepted this under cross examination. The Policy was updated on November 2018. The policy states "*All staff must be aware of and adhere to the Professional Appearance Policy at all times...Patients expect staff to have a neat and tidy appearance. Sloppy dress gives an impression of a lack of professional pride and poor personal standards*". The Tribunal finds that wearing an Arsenal shirt was inappropriate and unprofessional work attire and to do so was in breach of the Professional Appearance Policy. Further the Tribunal finds that it was common sense to appreciate that wearing an Arsenal shirt was inappropriate in a work environment. Susan Burch as a manager was entitled and in fact obliged to raise unprofessional work attire with the Claimant. It is likely that this stood out for the Respondent because generally the Claimant's work attire was very professional.
30. At a team meeting on 6 December, Susan Burch made clear to all the staff of the department that the wearing of t shirts or football shirts to work was inappropriate. They also made it clear that the wearing of jeans was not acceptable at work either.
31. The Claimant alleges that Anthony Hollings, "a comparator" was never spoken to about his unprofessional attire at work. The Tribunal finds on the basis of the evidence from Susan Burch that he has been spoken to. The evidence of Susan Burch is that in September 2018 Anthony attended work in a hoodie with no staff ID. A consultant enquired whether he was a staff member. Susan Burch informed Anthony what he was wearing was inappropriate for work.
32. The Claimant also compares himself with Andrew Buck. On the same day, as the Claimant was spoken to, Andrew Buck was wearing a woolly jumper, jeans and Timberland boots. Susan Burch's objections to the Claimant's clothing was his wearing of a football shirt to work and not his jeans. The Tribunal finds that there is a difference in attire to a football shirt and a woolly jumper. A football shirt is very casual attire and the Tribunal finds not suitable for work. On this basis the Tribunal rejects that Andrew Buck was an actual comparator. The Claimant also compares himself to Karen, a coding contractor who wore jeans. However, the Tribunal finds that the Respondent had tended to ignore the wearing of jeans because there was no clear guidance about this; the issue for the Respondent was the wearing of the Arsenal shirt in a professional work environment.
33. Following this matter, the Claimant took sick leave. On 20 December 2018 Janet Crabtree informed the Claimant she would refer the Claimant to Occupational Health. The Tribunal finds that this was a supportive step. On 21 December 2018 the Claimant was sent an email containing the referral (page 100). On 27 December 2018 (p.100) the Claimant responded that he officially declined the Occupational Health referral and would be organising his own.

Janet Crabtree sought advice from the Human Resources Department and sent the Claimant a stress risk assessment to complete at home (page 103). HR advised Janet Crabtree that the Claimant should not refuse an OH referral unreasonably. The Claimant was also invited to a sickness review meeting on 18 January 2019.

34. On 5 January 2019 the Claimant submitted a written grievance. He also provided some text messages as evidence to support his complaints. The Tribunal finds that the Claimant's grievance was a protected act.
35. During the week of 7 January 2019 Janet Crabtree met with Michael Cockayne of the Human Resources Department. He confirmed that the Claimant had an obligation to comply with reasonable requests to attend an occupational health appointment made by the Respondent.
36. On 11 January 2019, the Claimant telephoned Janet Crabtree to inform her that he was feeling better but would not be attending the sickness review meeting arranged for 18 January (page 102). The Claimant stated that the Human Resources department had advised him that he did not need to attend. The Claimant would, not tell Janet Crabtree who in the Human Resources department had told him this (page 103). Janet Crabtree told the Claimant she was sending him a stress risk assessment to complete. The Claimant stated that she could send it to him but he would not be completing it. At this point the Tribunal finds that Janet Crabtree warned the Claimant that this was a potential disciplinary issue because he had a contractual obligation (page 103). The Tribunal do not consider that this was a threat; it was simply informing the Claimant that disciplinary action could follow if he did not co-operate in the process with his employer. The management of the Claimant's sick leave was passed then to Janet Crabtree's manager to deal with. At this time Janet Crabtree was unaware of the Claimant's grievance. She was entitled to ask him who from Human Resources had told him he did not need to attend the OH appointment because this conflicted with the advice she had received. There was no reference express or implied in anything she said to the Claimant related to race.
37. On or about 14 January 2019, Ms. Fedell, Director of the Trust informed Susan Burch that the Claimant had raised a grievance against her and Janet Crabtree and he had alleged that they had bullied the Claimant and subjected him to discrimination. Susan Burch was not shown the grievance. Rachel Pyrah, Flexible Workforce Manager was appointed to investigate the Claimant's grievance.
38. On 21 February 2019 Susan Burch (accompanied by her trade union representative) was interviewed by Rachel Pyrah about the Claimant's grievance. Susan Burch formed the view that the Claimant took things personally and did not accept any criticism and was vocal about matters he wished to challenge. In the course of the interview, Susan Burch described the aggressive way the Claimant raised an issue about a colleague who cut his toenails in the office (page 195). She also mentioned that she had spoken to

the Claimant about the over friendly manner he displayed to a female colleague (who found his conduct uncomfortable). On discussing the Claimant's behaviour Susan Burch also mentioned that the Claimant had a conviction for assaulting an ex -girlfriend and had received anger management training and a community service order. This information was not confidential; the Claimant had discussed the criminal case in the office and with a number of staff members; so that a number of employees in the department were aware of it. The Claimant had stated he had been given a light community sentence. The Tribunal finds that Susan Burch raised this issue in the context of the discussion of the Claimant's behaviour and she did not do so as a means of getting back at the Claimant for raising a grievance. The Claimant's conviction is accessible from the internet.

The Law

39. The burden of proof is set out in section 136 of the Equality Act 2010. It states *"..(2)If there are facts from which the court could decide in the absence of any other explanation that a person (A) contravened the provision concerned the court must hold that the contravention occurred.(3)But subsection (2)does not apply if A shows that A did not contravene the provision.."*
40. Pursuant to section 13 of the Equality Act 2010 "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". On comparison of cases, "there must be no material difference between the circumstances relating to each case" (section 23 of the Equality Act 2010).
41. Pursuant to section 136 (2) and (3) of the Equality Act 2010, a "reverse" burden of proof is provided so that if there are facts from which the court could decide in the absence of any other explanation that a person (A) contravened the provision concerned the Court must hold that the contravention occurred. Guidance on the application of this burden was provided by the EAT in the case of **Barton v Investec Henderson Crosthwaite Securities Limited (2003) IRLR 332** and the Court of Appeal in **Wong v Igen Limited (2005) EWCA Civ 142** as follows
 - (1) ..it is for the Claimant who complains of ..discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the employer has committed an act of discrimination against the claimant which is unlawful...is to be treated as having been committed against the claimant. These are referred to below as "such facts";
 - (2) If the Claimant does not prove such facts he or she will fail;
 - (3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of ..discrimination. Few employers would be prepared to admit such discrimination even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that he or she would not have fitted in.

- (4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal;
 - (5) ..At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.
 - (6) In considering what inferences or conclusions can be drawn from the primary facts the tribunal must assume that there is no adequate explanation for those facts.
 - (7) These inferences can include in appropriate cases any inferences that it is just and equitable to draw from an evasive or equivocal pleading in response to a claim
 - (8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so take it into account in determining such facts. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.
 - (9) Where the claimant has proved facts from which conclusions could be drawn that the employer has treated the claimant less favourably on the ground of (sex) then the burden of proof moves to the employer.
 - (10) It is then for the employer to prove that he did commit or as the case may be is not to be treated as having committed that act;
 - (11) To discharge that burden it is necessary for the employer to prove on the balance of probabilities that the treatment was in no sense whatsoever on the grounds of (sex) since no discrimination whatsoever is compatible with the Burden Of Proof Directive.
 - (12) That requires a tribunal to assess not merely whether the employer has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that (sex) was not a ground for the treatment in question.
 - (13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or a code of practice.
42. The Court of Appeal in the case of **Madarassy v Nomura International plc (2007) EWCA Civ 33** confirmed that a claimant must establish more than a difference in status and a difference in treatment before a tribunal will be in a position where it could conclude that an act of discrimination had been committed.
43. Pursuant to section 26 of the Equality Act 2010 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. In determining whether conduct has the effect of violating B's dignity or creating the relevant environment, the Tribunal must take into account B's perception; the other circumstances of the case and whether it is reasonable for the conduct to have that effect (**Land Registry v Grant 2011 EWCA Civ 769** and **Richmond Pharmacology Limited v Dhaliwal 2009 IRLR 336**).

44. Pursuant to section 27 of the Equality Act 2010 a person A victimises another person B if A subjects B to a detriment because B does a protected act. The protected act has to be the effective cause of the employer's detrimental actions but does not have to be the principal cause.
45. In the case of **Shamoon v Chief Constable of the Royal Ulster Constabulary (2003) ICR 337** held that an unjustified sense of grievance cannot amount to a detriment.
46. The Court of Appeal held in the case of **Chief Constable of Greater Manchester Police v Paul Bailey (2017) EWCA Civ 425** a "but for" causative link does not mean the detriment was "because of" the protected act.
47. Pursuant to section 123 (1) of the Equality Act 2010 discrimination claims should be brought within 3 months, starting with the date of the act to which the complaint relates or such other period as the employment tribunal thinks just and equitable. Conduct extending over a period is treated as done at the end of the period.
48. A number of acts may provide evidence of a policy, rule or practice; the existence of such a policy or practice may itself constitute a continuing act **Owusu v London Fire and Civil Defence Authority (1995) IRLR 574**. In order to establish the existence of a policy or practice, the complainant must establish some degree of co-ordination; **Metropolitan Police Commissioner v Hendricks (2001) All ER 57**.
49. In considering applications for extension of time, the correct approach for the tribunal to take is to bear in mind that employment tribunal time limits are generally enforced strictly and to ask whether a sufficient case has been made out to exercise its discretion in favour of an extension. In deciding whether or not it is just and equitable to grant an extension of time, the Tribunal must take care first to consider the reason why the claim was brought out of time but all relevant factors including the balance of prejudice and the merits of the claim should be considered **Abertawe Bro Morgannwg University Local Health Board v Morgan (2018) EWCA Civ 640**.

Submissions

50. The Respondent provided written submissions and added to these orally. In summary the Respondent submitted that the Claimant had failed to discharge

the relevant evidential burden. Mr. Profitt submitted that the Claimant was sensitive and that all the conduct the Claimant complained about had no connection with his race. He submitted that the Claimant accepted in evidence that there was nothing to suggest that the treatment related to race; this was how the Claimant had felt at the time. He submitted that the Claimant had accepted that he was wrong about difference of treatment in respect of Anthony Hollings (he was spoken to about his clothing); Ms. Crabtree was correct that the Claimant's codings were low and there was a non-race related reason for the treatment. He also submitted that only three matters were in time; 6 December 2018; 11 January 2019 (the conversation about sickness absence) and 21 February 2019 (detriment because of the grievance). There was no continuing acts and the Claimant had failed to show that time should be extended.

51. The Claimant relied upon his skeleton argument (see page 224) and supplemented this with oral submissions and a further written document, "submissions for the Claimant". The Claimant states that Shabana and Amy witnessed the incident in March 2017 when he was spoken to by Susan Burch about the patient's file. They were not interviewed about how he had been treated. He submitted he had been requested to slow down for accuracy which might explain why his coding numbers were low. He was a hardworking and dedicated person. He said he had worn the football shirt before and not been told that it was inappropriate; he was being picked on; others were not spoken to. The cumulative effects of the harassment had caused him to become unwell. He was treated in this manner because he was black. Susan Burch disclosed his confidential information even though as a NHS employee she was bound by confidentiality. She did this because he raised a grievance.

Conclusions

52. Direct discrimination section 13 of the Equality Act 2010

52.1 The Tribunal, as set out above, do not find that on 8 November 2018 Susan Burch spoke to the Claimant rudely in respect of taking leave. Although her tone was abrupt, as a manager she was entitled to ask for the reason as to why the Claimant needed to leave work early because a form giving a reason has to be completed. The Tribunal did not find that Safiya was a comparator. She had given her manager detail about the nature of her illness and why she needed to leave work early. The Claimant had given limited information. This has nothing whatsoever to do with race.

52.2 The Tribunal as set out above do not find that on 6 December 2018 Susan Burch "singled" out the Claimant due to what he was wearing. The Respondent as indicated above did raise with the Claimant his inappropriate clothing for work in the context that he was wearing a football shirt. The Tribunal finds that Anthony Hollings clothing of a woolly jumper was different to the Arsenal football shirt in the workplace. He was not an actual comparator. The issue of raising the Claimant's wearing of a football shirt in the workplace as inappropriate had nothing whatsoever to do with race.

53. Harassment section 26 of the Equality Act 2010

53.1 The Tribunal do not find that in March 2017 Susan Burch intimidated the Claimant on ward 37 due to an accidental mistake. The Claimant accepted that he had made a mistake. It was appropriate for Susan Burch as a manager to raise this issue because the mistake could have put patients at risk. The Claimant may have considered the conduct unwanted but the context was the justifiable raising of a performance issue with an employee. It was not related to race nor in its context could it reasonably be considered to have the purpose or the effect of either violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

53.2 On 21 August 2018 the Tribunal finds that Janet Crabtree did tell the Claimant his numbers were low. The Claimant accepted in evidence that Janet Crabtree was correct. Further on 21 August 2018 Janet Crabtree did tell the Claimant he was coding one episode per 30 minutes and that was correct. As a manager Janet Crabtree was entitled to raise this with the Claimant; it was an issue of his performance. There was a noticeable improvement in the Claimant's performance once this issue was raised with him. Although the conduct may have been unwanted by the Claimant, it was not related to race nor could it reasonably be considered to have the purpose or the effect of either violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

53.3 The Tribunal rejects the allegation that on 11 January 2019 Janet Crabtree intimidated the Claimant during a telephone call in respect of managing his sickness absence. It was appropriate for Janet Crabtree to encourage the Claimant to attend Occupational Health which is a supportive step taken by the Respondent and correct to remind him that he was obliged to comply with the Respondent's policies as an employee. Furthermore, since the advice the Claimant stated he received from the Human Resources department was inconsistent with the advice received by Janet Crabtree she requested the Claimant to inform her who told him this information. The Claimant may have found the conduct unwanted but it was not related to race. In the context, the conduct could not have been reasonably perceived as having the purpose or the effect of either violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

54. Victimisation section 27 of the Equality Act 2010

On 21 February 2019 Susan Burch mentioned the Claimant's criminal conviction in the interview about the Claimant's grievance. The Tribunal does not find that this was a breach of his confidentiality. The Claimant had openly discussed his conviction at work with his colleagues in the office. The conviction

is easily available on the internet and does not appear to be a confidential matter. Furthermore, the tribunal accept that the criminal conviction was revealed by Susan Burch in the context of describing the Claimant's general conduct. It was not revealed because the Claimant had committed a protected act by raising a grievance alleging race discrimination.

55. Time

The Claimant's claim was lodged at the Tribunal on 25 April 2019. The dates of the ACAS conciliation certificate are Day A 21 February 2019 and 4 April 2019. The Tribunal finds any acts occurring prior to 22 November 2018 are prima facie out of time.

56. Three aspects of the Claimant's claim are prima facie in time namely the acts complained dated 6 December 2018; 11 January 2019 and 21 February 2019. From the first act complained about in March 2017 there are no incidents until August 2018; this is a period of 16 months. The incident in March 2017 involves Susan Burch and the incident in August 2018 involves a different manager Janet Crabtree. The Tribunal finds that the time gap is significant between incidents and involves two different managers; the Tribunal does not find that this was a continuing act and the incidents of both March 2017 and August 2018 are out of time. There is no evidence before the Tribunal to establish that it is just and equitable to extend time. Furthermore, the next incident is dated 8 November 2018; this incident involves Susan Burch. The Tribunal have already found that this was not an act of direct race discrimination. It was a management issue unrelated to race. It does not form any part of a continuous act of discrimination and is also out of time. There is no evidence before the Tribunal to find that it is just and equitable to extend time.

57. All of the claims are not well founded and are dismissed.

Employment Judge Wedderspoon

Date: 18 December 2019

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