EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr R Mapembe **v Opus International Consultants (UK) Ltd**

Heard at: Watford **On**: Between 13 & 16 January 2020

Before: Employment Judge Manley
Members: Mrs G Bhatt
Mr M Bhatti MBE

Appearances

For the Claimant: In person – assisted/represented by his wife and son
For the Respondent: Ms M Tutin, counsel

RESERVED JUDGMENT

1. The claimant's application to amend the claim with respect to one aspect of alleged race discrimination is allowed.

2. The claimant's application to make any further amendments to the race discrimination claim is not allowed.

3. There was no breach and certainly no fundamental breach of contract on the part of the respondent. Even if there had been, the claimant did not resign in response to any such breaches. The claimant was not dismissed. His claim for unfair dismissal must fail.

4. There was no less favourable treatment of the claimant because of his race and his claim for direct race discrimination also fails.

5. The claim is dismissed.

REASONS

Introduction and issues

1. The issues in this case were clarified in a case management summary on 1 August 2018. In this judgment, initials are used for the names of comparators. The claim and issues are as set out in that summary contained within paragraphs 3 and 4 as follows:-

> **"The claim**
>
> 3. The claimant was employed by the respondent from 2013 until he resigned with effect from the 31 October 2017. He says that although he was employed ostensibly as an Assistant Engineer, in fact he worked as a Project Manager imbedded with Hertfordshire County Council and that is the basis of his discrimination claim and it is also one of the issues which arises in respect of his claim for constructive unfair dismissal.
>
> **The issues**
>
> 4. The issues between the parties which potentially fall to be determined by the Tribunal are as follows:
>
> *Constructive unfair dismissal*
>
> 4.1 Was the claimant dismissed, i.e. (a) was the respondent in fundamental breach of the contract of employment, and/or did the respondent breach the so-called 'trust and confidence term', i.e. did it, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence between it and the claimant? (b) if so, did the claimant affirm the contract of employment before resigning? (c) if not, did the claimant resign in response to the respondent's conduct (to put it another way, was the claimant's conduct a reason for the claimant's resignation – it need not be <u>the</u> reason for the resignation)?
>
> 4.2 The conduct the claimant relies on as breaching the trust and confidence term is:
>
> a. The fact that he was paid less than the other three white Project Managers;
>
> b. The respondent's failure to follow protocol in investigating the bullying by Mr Richardson who was an employee of Hertfordshire County Council;
>
> c. The respondent colluding with Mr Richardson so as to allow him not to sign the project plan for the following year. The project plan would have reduced Mr Richardson's powers to assign work to the claimant. No issue arises as to justification of a dismissal if there was a constructive dismissal.
>
> *Race Discrimination*
>
> 4.3 The claim based on race discrimination is founded solely on the fact that the claimant was paid less than the other three Project Managers who had been inserted into Hertfordshire County Council. There is

> no dispute that the claimant is a black African and that the other three Project Managers were white British. The extent and the reasons for any difference in salary are in dispute. Ms Koon on behalf of Hertfordshire County Council confirmed that Hertfordshire County Council paid the respondent a figure based on four Project Managers being provided to Hertfordshire County Council so there was no differential between the amount Hertfordshire were paying in respect of the claimant and the amount Hertfordshire was paying in respect of the other three white Project Managers."

2. After that preliminary hearing, there was a further preliminary hearing by telephone on 25 April 2019, which dealt primarily with questions of disclosure of documents. There was no application to amend at that time or before that hearing.

Application to amend

3. At the commencement of this hearing the respondent's counsel raised questions about the claimant's witness statement which made reference to matters outside those as set out above in the list of issues. These appeared at paragraphs 24 to 26 of the claimant's witness statement. These read as follows:

> "24 In the circumstances I consider myself to have been constructively dismissed for a series of breaches that culminated in my forced resignation for the following reasons;
>
> (a) The respondent failed in its commitment to ensure that my "skills, knowledge and talent are proactively identified and developed" to full potential (pages 58 to 59) leading me on for almost 3 years with false promises to either upgrade me or move me to a higher position. In the meantime, the respondent upgraded others with less qualifications and skills than me.
>
> (b) When the respondent finally upgraded me to Project Manager, I was not rewarded the same as the other 3 white Project Managers. In addition I was made to work more hours the other 3 white Project Managers. Therefore I was not treated equitably, fairly and honestly.
>
> (c) The respondent failed to treat me with dignity, integrity and respect by failing to create a working environment free from harassment and bullying. For over a period of 6 months, the respondent either colluded with NR to bully me or made feeble attempts to investigate allegations of NR bullying by failing to follow the Joint Protocol.
>
> 25. Further or alternatively, I consider that I was subjected to direct discrimination by being paid less than my 3 white colleagues. I consider that I was given differential less favourable treatment in spite of;
>
> (a) Doing work of the same value that required the same skills and responsibility

(b) Outperforming my 3 white colleagues.

(c) Having the highest qualifications.

(d) I regard this behaviour as a breach of the implied term of trust and confidence that I was no longer prepared to put up with.

26. Further I consider that I was subjected to direct discrimination on the grounds of my race, in rejecting all my applications for higher roles consistent with my qualifications as opposed to my white colleagues who cannot even provide evidence of their qualifications. In addition, I witnessed other white college with less qualification than me, being upgraded within a short period. In addition, I was the only Project Manager who was black, working more hours and paid less out of the 4 Project Managers. In fact, LH was being paid more than the value he was bringing in the company. The only way this was possible was to exploit me"

4. The respondent's representative having raised this issue, matters were discussed with the claimant, his son and his wife. The Employment Judge reminded the claimant and his family that these matters were not contained within the list of issues nor was it clear that they were within the claim form. They would be likely to require an amendment. It was agreed that the question of the difference in pay between the claimant and his three white comparators was an issue but there was no issue with respect to comparative hours as referred to above at paragraph 24 (b). The information which related to the claimant's alleged "*skills, knowledge and talent*"; promises to upgrade or promote and any comparison between his performance or qualifications and those three white colleagues were not matters previously raised.

5. The claimant was allowed time to consider what he wished to do whilst we did our pre-reading. We then discussed matters again at the beginning of the afternoon session on the first day. The tribunal was informed that the family had considered this carefully and felt that the alleged failure to allow the claim to progress was part of "*the picture*". Initially, Mr Mapembe junior suggested that the claimant wanted to apply for an amendment and there was then further discussion about this.

6. As it appeared this application would now refer to matters way out of time, the claimant having resigned in October 2017, the Employment Judge suggested that some of the information provided might be taken into account as background in the event it assisted the tribunal in coming to a determination on the issues as agreed in August 2018. The claimant decided not to pursue an application to amend at that point and we proceeded to hear his cross examination.

7. Cross examination was not completed that afternoon. On the morning of the second day the claimant, through his son, made an application to amend the race discrimination claim. The claimant felt it would be detrimental to his case if we did not consider performance or working hours as it was the claimant's case that he performed better than his comparators. We

proceeded to discuss this application in some detail as it did not contain the wording for any new proposed issues. After discussion, and with the Employment Judge assisting, these were the three matters put forward as proposed amendments:

*7.1 "Whether the claimant was working more hours than his named comparators and, if so, was that less favourable treatment because of his race? (*After some more later discussion it appeared that this related to the difference in the contractual hours of 40 for the claimant, 37 for one of his comparators and 37.5 for another*).*

7.2 Whether LH was progressed from Level 4 to Level 5 in 2013 (within a year of employment with the respondent) and, if so, was this less favourable treatment as the claimant was not progressed within a similar time period?

7.3 The claimant applied for three posts as Senior Engineer and was not successful. Was that less favourable treatment than any unknown successful applicants because of his race?"

8. The claimant was asked to explain the delay in these matters being put forward as issues to be determined. The claimant said, or it was said on his behalf, that he did not realise some of the issues were relevant until they saw the respondent's witness statements and documents. The tribunal was reminded of the claimant's lack of legal knowledge and it was said that it was assumed that the issues for determination would be further discussed at this hearing.

9. The tribunal was told that there was some evidence in the bundle with respect to working hours and there may be some documents that go to qualifications although no more than that.

<u>The respondent's objection to the amendment application</u>

10. The respondent took a short break to respond and objected to the application. We were reminded of the principles in <u>Selkent Bus Co Ltd v Moore [1996] IRLR 661</u> and that is how the respondent's representative outlined its objections. First, it was said that the amendments suggested were significant and went considerably further than the question outlined in the issues which was about the difference in pay. The respondent was not in a position to answer questions about progression of the claimant or his comparators.

11. Secondly, as far as timing and manner of the application is concerned, the respondent pointed out that the claimant had a number of opportunities to apply for these amendments and it was not until Ms Tutin pointed out difficulties with the claimant's witness statement yesterday that this application was made. Although the claimant is a litigant in person, he was present at the hearing in August 2018 when the Employment Judge pointed out the significance of agreeing the issues. It was argued by the respondent

that the claimant is a highly qualified engineer and he could have raised concerns about the list of issues at any point either with the Employment Tribunal or the respondent.

12. The respondent says that the suggested amendments are insufficiently particularised. As far as the difference in hours is concerned, it is not clear whether the claimant is relying on contractual hours or whether he is going further than that and wants to give evidence about actual hours worked.

13. As for the amendment about the claimant's "*non-progression*", it is also unclear whether he is saying that he should have been automatically upgraded or whether this relates to applications he made for other jobs. The current named comparators are not comparators for any job applications and the respondent does not know, at the moment, who, if anyone, was successful or their race.

14. The respondent is concerned because it is unclear what documents might be in the bundle that are relevant and also what might be available but not in the bundle.

15. Importantly, the respondent asked us to take note of the limitation periods. As far as the working hours issue is concerned, it is unclear whether the claimant is asking the tribunal to go back to the commencement of his employment in September 2013, in which case it could be as long as six years out of time, or whether he is asking us to consider a different timeframe maybe, as his witness statement suggests, the "*non-progression*" from September 2014 which would make it more than five years out of time. We do not have dates for when he made any applications for jobs, but the last possible date for limitation purposes must be October 2017 when he resigned. At the very least, the amendments are made two years out of time. The claimant has given no evidence, says the respondent, of why it would be just or equitable to extend time.

16. Finally, as far as the balance of hardship is concerned, the respondent repeats that it is unclear what documents or witness evidence would be required. The respondent's witness statements have been prepared in line with the list of issues as agreed, and there would be a significant disadvantage if the amendments were allowed. If amendments were allowed, there would have to be a postponement which would have a significant impact on an already delayed case and would be a waste of resources.

17. The respondent agreed, when asked by the Employment Judge, that there might be some evidence readily available with respect to working hours. Again, upon questions from the Employment Judge, it emerged that the amended response was presented in September 2018, the bundle was prepared around February 2019 and exchange of witness statements was around April/May 2019.

<u>The tribunal's decision on the amendment application</u>

18. The tribunal spent some time deliberating. We took into account the Selkent principles - the nature of amendment; time and manner of the application; the merits and issues of limitation. It goes without saying that the claims are now made considerably out of time. These are applications to amend the race discrimination claim so the tribunal should consider, those matters being out of time, whether it is just and equitable to extend time.

19. The claimant had an opportunity at the preliminary hearing in August 2018, at a later preliminary hearing by telephone in April 2019, and at any time up to the second day of the hearing to raise questions about any further matters he wished to raise under the heading of race discrimination.

20. We have decided, with some reluctance, that it is possible for us to include, in his general complaint about the difference in his pay and pension with his comparators, the question of the difference in contractual hours. It appears we have documents with respect to two of the comparators and the claimant is not pressing for us to get details of the other one. The respondent's explanation for the difference in hours is relatively straightforward and is essentially the same justification as for other matters of pay and pension differentials. We have decided to allow the application to make the first amendment even though significant time has elapsed. It seems to us that it does not cause considerable prejudice to the respondent, who have witnesses here who can deal with it and it is a relatively short point.

21. Turning then to the other two amendments requested. We do not allow that these matters to be added to the claimant's race discrimination claim. These are significantly different questions which would involve oral and documentary evidence about the comparisons and, in the case of job applications, the, successful applicants that we do not have information about.

22. As far as comparators for "*progression*", we do not have evidence with respect to the whole of the comparators' employment as the respondent said they have been TUPE'd to the respondent. It was not an issue the claimant raised during employment or in his claim form so it could not have been of concern to him either when he resigned, when he put in a subsequent grievance, or when he had two discussions with judges about this case. These are significant amendments which are not the same or similar to those discussed previously. The amendment application is made considerably out of time and it would require a postponement of this hearing which could not then be heard for many months. The claimant has failed to show any good reason why it would be just and equitable for us to extend time. It is not in the interests of justice to allow these last two amendments.

The hearing

23. As indicated, we allowed the amendment with respect to the difference in contractual hours and gave our judgment on the application orally at 12

noon of the second day. We then went on to hear the rest of the claimant's evidence. We then heard from four witnesses for the respondent;

- Mr Moolman, who was the claimant's "pastoral" Line Manager,
- Mr Barrow, who was Mr Moolman's Line Manager,
- Ms Harrington, who was a Learning and Organisational Development Manager, who was asked to meet with the claimant and his Line Manager at Herts County Council, and
- Mr Chappell, who looked into the claimant's grievance.

24. We also had a bundle of documents which numbered around 500 pages. The tribunal looked at fewer than 100 of those pages.

The facts

25. The respondent is part of a global engineering consultancy, the parent company being based in New Zealand. It is a multi-disciplinary infrastructure consultancy which provides engineers, designers, planners etc to work on infrastructure and building projects in the private and public sectors.

26. The respondent agreed to carry out work for Hertfordshire County Council (HCC) on highways and structural engineering projects. An agreement called the Whole Client Service Agreement (WCS) was entered into in 2012. At that point there were several employees, some of whom had been employed previously by HCC but were, at this point, employed by Mouchel Parkman. These employees transferred to the respondent under the TUPE regulations. The information about this transfer was provided in the respondent's further response in September 2018 after the preliminary hearing. The claimant did not appear to take issue with whether there was such a TUPE transfer until this hearing. Documents in the bundle, with respect to LH (one of the comparators), indicate that he commenced working for HCC in 1997. Another document, prepared by the respondent, shows the salary details of PC (another comparator) and records the TUPE transfer in 2012. We have Mr Barrow's sworn evidence that there was such a TUPE transfer. Although the claimant sought to throw doubt on whether it had occurred, the tribunal accepts that there was such a TUPE transfer and that those employees moved across, as is usual and required by law, with their terms and conditions intact. LH's contract said 37 hours per week and PC's contract said that he would work for 37.5 hours per week. LH was a Senior Engineer with many years' service with HCC and its successors. PC was an Assistant Engineer.

27. The claimant applied for a job as an Assistant Engineer with the respondent and was interviewed by Mr Moolman in the summer of 2013. The claimant says that he was *"promised*" that he would be "*progressed*" after six months' probation and that his role would be upgraded as would his pay. Mr

Moolman did not recall any such conversation. The tribunal believes that Mr Moolman may well have said something encouraging about likely progression, but it certainly did not amount to a "promise" at that stage. The claimant has never suggested in writing at any point during his employment, that such a promise had been made. The claimant was successful and was appointed as Assistant Engineer at Level 3 from September 2013 within the respondent's structure and the contract stipulated 40 hours per week. Mr Barrow said that the 40 hour contractual working hours is common for the respondent's employees (including himself), unless they have been TUPE'd and there is no evidence to suggest otherwise. The tribunal accepts those were the contractual working hours.

28. The claimant alleges that he spoke to Mr Barrow a few months after the start of his employment and perhaps later. It is agreed that Mr Barrow encouraged the claimant to apply for more senior jobs with the respondent and the claimant did so. It seems that he applied for three jobs, but the tribunal has no evidence about the dates of those applications, the details of them or the reasons for the claimant not to have been successful.

29. HCC spoke to the respondent about having the four engineers who were working with them, namely LH, MN, who were Senior Engineers at Level 5, the claimant and PC, who were Assistant Engineers at Level 3, to work more closely with teams at HCC. The word used was to "*embed*" these engineers to that they could give more technical support to the Highway Locality Budget Teams. The claimant was aware of these discussions. His evidence was that he believed the three other engineers, who were all white, were allowed to choose the geographical areas that they worked in leaving him with East Herts Group, which was managed by Mr Richardson. Mr Moolman gave evidence, which we accept, that it was for HCC to decide which of the engineers should work in which geographical area. It is accepted by the tribunal that the two Senior Engineers were placed in geographical areas that were a little more complex and varied than that of the claimant and PC. The arrangement was from May 2016.

30. The respondent's process required a document called a Project Plan to be drawn up to set out some details of the arrangement with HCC. The names of the four Project Managers appear at page one. Under LH and MN's names, it says *"(with delegations to carry out final appraisal and release)"*. This does not appear under PC and the claimant's names. The Project Plan also includes some details of the work that they should carry out which included assisting locality officers and managers with respect to highways work and so on and also sets out individual responsibilities under the Work Element Plan. There are two main aspects where LH and MN had some responsibilities not undertaken by the claimant and PC. These were "*programme management*" and "*verifications*". Under Personnel and Responsibilities, it names the four individuals in a table. For "*Position & Role on Project*" it says "*Project Manager/Designer*" for all four engineers but under "*Relevant Skills Experience etc*" it refers to LH and MN as Senior Engineers and the claimant and PC as Assistant Engineers.

31. It has emerged during the course of this hearing and might have been alluded to in the telephone case management hearing, that the claimant was seeking to argue that it was from the date that the engineers were embedded that he was "*appointed*" Project Manager in line with the other engineers and that he should have, at that point from May 2016, had his pay and hours adjusted to those of his comparators. The respondent says that merely using the title of Project Manager did not change their terms and conditions with respect to their underlying post with the respondent which was as Assistant Engineers and Senior Engineers. PC was at the same level as the claimant although he had a slightly higher salary because he transferred on that level.

32. The claimant argues that both Senior Engineers have fewer qualifications and he may or may not be right about that. It is irrelevant for our determination. The claimant applied for and accepted the job of Assistant Engineer and carried that out until he resigned. Two of his comparators were already in post as Senior Engineers and were working at that level when he joined.

33. Sometime later in 2016, there was a lunch meeting with these four embedded engineers and Mr Barrow. It appeared, at that stage, that everything was progressing fairly well with the arrangement. The claimant recollects that Mr Barrow, having heard good reports from Mr Richardson about the claimant, said something like "*How much money are you paying NR to say good things about you*". Mr Barrow cannot remember making that comment but, if he did so, said that it would have been in jest and there was no response from the claimant to suggest that he was unhappy with what was said. The tribunal can make no determination about whether any of the four teams were performing less well than the others.

34. The claimant says that in April 2017 he mentioned to Mr Moolman that there were some difficulties with Mr Richardson signing his Project Plan for the next year. At paragraph 17 of his witness statement he said:

> "HM was aware of ongoing issues because I had highlighted them to him verbally and by email as early as the beginning of April and on several occasions afterwards, especially NR's refusal to sign the Project Plan for 2017."

35. The claimant was cross examined on this. Mr Moolman denies that the claimant raised this issue and the claimant could not take us to any such emails. The tribunal does not accept that the claimant did raise this issue with Mr Moolman. His evidence has lacked consistency and clarity, especially in asserting emails were sent when there is no such evidence. In our view, he would have put it in an email to take matters forward. We come to the significance of this a little later.

36. On 12 June 2017, Mr Richardson wrote in an email to Mr Moolman as follows:

> "I have considerable concerns regarding the ES for East Herts and Broxbourne and believe as the post holders Opus line manager that you are first point of contact to discuss?
>
> Assuming so can you let me know when you might be free to talk about this in the first instance so we can establish a way forward?

37. This led to a meeting the next day between Mr Moolman and Mr Richardson. Mr Moolman wrote a note of that meeting. In summary, Mr Richardson raised several relatively serious concerns with the claimant's performance. Mr Moolman's summary appears at page 189 and reads as follows:

> "It seems there is a lack of commitment from Renato.
>
> The quality of work is not as expected.
>
> Lack of support and attitude issue.
>
> Broken down relationships with Rosemary.
>
> Referred to issues about scheme which one of the councillors is not happy with.
>
> Neil has an email trail to support his conversations with Renato.
>
> Neil wants Renato to be removed from the EH Group."

38. Mr Moolman thought that there were signs of a relationship breakdown. He therefore arranged to meet the claimant on 15 June. His notes suggest that he prepared an agenda beforehand and then took notes. Again, there is a summary. It reads as follows:

> "Renato admits that he and Neil had talked about issues.
>
> Renato refers to an email trail he has where issues were discussed.
>
> His view is that he is not responsible for BoQ and that is the (HLO) AHLM responsibility.
>
> It seems if the issues are with Rosemary and that she expects him to do things for her that other AHLMs are doing."

39. The next day the claimant sent a document to Mr Moolman entitled "*Feedback EHG*". It is dated 16 June and is a one and a half page document. In that document the claimant agrees that there are "*ongoing contentious issues that are ongoing within the team"*. He then went on to raise relatively serious issues about the relationship. In particular, he raised concerns about Mr Richardson, that he "*never greets us or say good morning to me but will do so to RSC in my presence whilst in the process of ignoring me"*. He said that Mr Richardson communicated largely by email, that they differ on matters of rules and policy etc and that he was not prepared to sign the Project Plan. He also said:

> "I can recall at one time he threatened to "sack" me in front of other people, Vicky Saunders rebuked him, asking how he "can say things like that". This was very demeaning."

40. The claimant did not ask for any specific action to be taken. He did not use the words "*bullying*" or "*harassment*" in that document, nor does he make any reference to matters which could be said to amount to race discrimination. This Feedback document has been the subject of considerable consideration and cross examination in the tribunal hearing. It appears that the claimant is now alleging that that was a complaint about bullying and the respondent's witnesses were asked questions about it in this hearing.

41. Under cross examination, Mr Moolman agreed that it some of the allegations "*could be harassment"*. He said that he escalated it to Mr Barrow and that he said, "*It doesn't look good*". Mr Barrow, when he read it, did not consider the document to be an allegation of bullying and harassment but did believe it showed a breakdown in relationships which he should take action about.

42. Ms Harrington, who later was involved in trying to set up meetings with the clamant and Mr Richardson, was asked about this document in the tribunal hearing although it is not said to be one that she saw at the time. Her opinion was that the threat to sack the claimant would amount to bullying (if it had occurred).

43. The claimant's main concern about the steps the respondent took after seeing his document, was that it is not in line with the "*Joint Protocol on Harassment and Bullying*" which is part of the WCS Operating Procedures. The main concern that the claimant has is that at paragraph18.2.3 the protocol says, "*When an allegation is made against an employee, their employer will take the lead and investigate any allegations that are raised*". The tribunal understands that the claimant's case is that this matter should have been referred to HCC. The Joint Protocol is not contractual. The claimant asks us to consider it now, but he made no reference to it during his employment with the respondent or in the grievance which was submitted after his resignation.

44. The tribunal find that this 16 June document from the claimant contains some allegations which some people might well interpret as a complaint of bullying and harassment. It is also true that others would be justified in not considering it to be such a complaint. It clearly raises concerns, but it is not immediately obvious that it is a matter which should go through the Joint Protocol. The claimant did not suggest any race discrimination and asked for no particular outcome. Mr Barrow's opinion, which we can understand, was that the claimant might well have written this in response to Mr Richardson having himself raised concerns about the claimant. The tribunal does not accept that there was a failure to follow the Joint Protocol at this point.

45. When Mr Barrow saw that letter, he decided that he needed to take matters forward. His evidence is that he thought that there should be a meeting with the claimant and Mr Richardson to "*clear the air*" and get "*to the bottom of the problems"*. He spoke to Mr Richardson's line manager at HCC and they agreed that it would be useful to have that joint meeting. He did not have a formal mediation in mind but asked the clamant whether he would be prepared to have such a meeting. Although Mr Barrow did not speak to Mr Richardson himself, at some point it became clear that Mr Richardson was not prepared to participate in such a meeting, and it did not therefore proceed.

46. On 19 June 2017 the claimant sent an email to someone in HR at HCC with the subject heading "*Complain about my immediate Manager*". It said that he wanted to meet someone "*so I can consider my options about my situation at work*". There is no evidence that anyone at the respondent knew about that email. We have seen no reply from HCC. On 27 June 2017 a large number of the respondent's employees, including the claimant and Ms Harrington, were sent an email with details about logging in to a short on-line course entitled "*Bullying, Harassment and Discrimination Prevention*". This was sent by the Head Office in New Zealand. The claimant believes there is some sort of connection between his email to HCC and this course link being sent. There is absolutely no evidence to that effect. The evidence is that such a course would have had to be planned well in advance. The tribunal is satisfied that there is no connection.

47. On 16 July 2017, the claimant applied for a job with Slough Borough Council as a Senior Engineer.

48. Later that month there was an email exchange about Mr Richardson's refusal to sign the claimant's Project Plan for 2017. The evidence on this was that this was a document prepared by the claimant. It largely follows the earlier Project Plan and had spaces for several people to sign. It specifically refers to LH and MN having responsibility for "*Update to year ratings for project managing and project complicity assessments".* It repeats the extra responsibilities under "*project management"* and "*verifications"* as the Project Plan. The claimant has signed that document as have MN, LH and PC. There was a space for Mr Richardson and two other HCC employees to sign but it is not signed by them. The claimant raised this issue in writing and was then told by Mr Barrow that Mr Richardson having refused to sign it, then he did not need to. This was an Opus document and the respondent could not require an HCC employee to sign it. In any event, there is no disadvantage to the claimant in Mr Richardson not signing it.

49. As the arrangement to have a joint meeting with the claimant and Mr Richardson had failed, Mr Barrow thought he would try a different approach. He spoke to Ms Harrington who has considerable experience in learning and development. She told us that she did some training and development work with HCC employees as well as Opus employees although she is employed by Opus. She was asked to speak to Mr Richardson as it needed to be made clear to him that he had to work within the WCS model, namely

that it was not possible to simply remove an engineer who was embedded in the team under the WCS. Ms Harrington therefore met Mr Richardson who, it seems, had been spoken to by someone at HCC to let them know that he needed to speak to her. She explained to him that he needed to give feedback to the claimant and after that meeting, he sent her a mid-year PR review for the claimant and she gave him some advice on that.

50. Ms Harrington also tried to set up a meeting with the claimant during August. She saw him in the corridor and said she wanted to meet with him. He said that he was very busy, and she also had leave booked. She told him the dates she was available and that he should put a meeting in her diary. The claimant's evidence was that he had no access to her diary, but he made no attempt to meet with her. Although he told us he was waiting for her to arrange a meeting, we do not accept that is what he was told. It may have been that he was less interested in trying to find a resolution with Mr Richardson once he was progressing his Slough Council application.

51. A little later in August, there was also an email exchange about the claimant's leave which was booked for September. Mr Richardson was concerned as he believed that he had been informed late about this although the claimant's evidence was that Mr Richardson had known for some time. Mr Moolman supported the claimant and said that he needed to use up his leave and it was a common arrangement between them that the claimant took a period of over two weeks around September and that he should be allowed to go. The claimant was on leave therefore between 4 and 29 September.

52. Also during August, the respondent was asked, by Slough Borough Council, for a reference for the claimant. In answer to the question "*Capacity in which known to you"* - Mr Moolman said that the claimant was "*Project Manager in the East Herts Area"*. On any account, this is a very positive reference, providing mostly "*good*" and only 2 "*average"* assessments and mentioning the claimant having a team to manage. Mr Moolman signed it on 25 August.

53. The claimant has had some difficulty remembering the dates around his application for this Slough Borough Council post. He says that he was interviewed but he could not remember when. He does not believe that he received a written job offer from Slough although there is a letter dated 5 November which we have seen, which refers to an earlier letter confirming an offer had been made. The claimant had been asked to disclose documents relating to this application and, indeed, any other applications but no further documents have been disclosed. The claimant did accept, under cross examination, that there had been a job offer, subject to satisfactory references, made sometime between 16 July and 25 August but we do not know when he agreed to take up the post.

54. By letter of 2 October, the first day he came back from leave, the claimant resigned. The tribunal finds that the claimant must have known, at some point, probably when he was on leave, if not before, that he was to take up this post. The letter of resignation was sent to Mr Barrow and reads:

> "I am writing to notify you of my formal resignation from my role as "Assistant Engineer" at Opus International (UK) Limited.
>
> As my contract requires that I give you one month notice, my last day will be 31 October 2017.
>
> Thank you very much for all your professional and personal development opportunities presented to me during my 4 year period.
>
> I have enjoyed working for you and appreciate the support provided during my time with the company. If there is anything I can do to help with the transition, please let me know".

55. As is clear from that letter there is nothing in that to suggest any difficulties. Although the respondent's managers were aware that there had been a breakdown in the relationship between the claimant and Mr Richardson, the claimant makes no reference to it in that letter.

56. The claimant did provide the answers for an Exit Interview Report. In that document he is referred to as an Assistant Engineer. He indicated that he was unhappy although he did say that he would recommend the organisation as a place to work and that he would consider working there again. The main reasons in that report for him leaving were "*career progression, salary rewards and vertical relationships*". The one that was least important for his leaving was "*wellbeing*". He said that he left for "*a step up in your career*". He did give us a key reason for leaving, *"Harassment or bullying*" and said as a main reason "*breakdown of working relation between HCC Manager and Opus bullying is at its peak*". It is not clear whether Mr Moolman saw that exit interview report, but Mr Barrow's evidence was that he did see it but that it was some time later.

57. There was then a meeting between Mr Moolman, Mr Richardson and the claimant on 12 October to discuss transitional arrangements. It was at this meeting that the claimant mentioned that he was being bullied by Mr Richardson. Mr Moolman's view was that this was the first time it had been spoken of in that way. Mr Richardson asked if the claimant had raised bullying with Opus. The claimant, in Mr Moolman's notes says "*not yet*". The claimant's notes of suggest a slightly different answer but it is still not clear whether he was saying that he had told Opus about the "*bullying*".

58. Mr Barrow was aware that the claimant was unhappy, and he met with him on 19 and 23 October. On those occasions he informed the claimant that, if he felt it was appropriate, he could present a grievance with respect to Mr Richardson. There was nothing in anything the claimant said which referred to race discrimination nor was there any suggestion that he was concerned about differences between him and the other embedded engineers.

59. The claimant did decide to present a grievance on 27 October. That document concentrates entirely on the difficulties with Mr Richardson and how the respondent dealt with that in terms of trying to arrange meetings

and so on. Again, that grievance did not refer to the claimant's stated case now that he believes he should have been on the same terms and conditions as his fellow embedded engineers. There is no reference to a belief that he was no longer an Assistant Engineer or anything of that kind.

60. Clearly, the claimant was about to leave the respondent's employment. There were some difficulties during the period of his notice which were to do with the claimant wanting to work from home as he had done from time to time during his work with HCC. Mr Richardson asked him to work in the office during his notice period because this was a handover period. The claimant was upset about that as can be seen from the exchange of emails.

61. Mr Chappell was appointed to carry out the grievance investigation. He is a senior employee who did not know the claimant. He spoke first to the claimant to get more information about his grievance and he then spoke to Mr Moolman, Mr Barrow and Ms Harrington. He prepared a detailed grievance outcome which is dated 7 December. He did not uphold the claimant's grievance. There was no reference in the outcome letter to the possibility of an appeal and the claimant did not appeal.

62. The claimant presented his ET1 on 31 January 2018 and this was where he raised questions of race discrimination and pay discrepancy. It was the first time those matters had been raised.

The law

63. The tribunal is concerned to decide whether there has been a dismissal in accordance with Section 95(1) Employment Rights Act 1996 which states:-

"For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2)….only if)-

a)-

b)-

c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of his employer's conduct"

64. This is what has become known as "constructive dismissal". The leading case of Western Excavating (ECC) Ltd v Sharp 1978 ICR 221 makes it clear that the employer's conduct has to amount to a redudiatory breach. The claimant must show a "*significant breach which goes to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract*". The employee must show that such a fundamental breach of contract caused them to resign and that they did so without delay.

65. The claimant is also claiming direct race discrimination under the Equality Act 2010 (EQA). He relies on the protected characteristic of race, that he is Black African and his comparators are white. Direct discrimination is covered by s13 EQA which prohibits less favourable treatment because of a person's race. S39 covers the position of employment and S39(2) reads:-

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

a) as to B's terms of employment;
b) in the way A affords B access, or by not affording B access, to opportunties for promotion, transfer or training or for receiving any other benefit, facility or servie;
c) by dismissing B;
d) *by subjecting him to any other detriment*."

66. The tribunal is mindful that it is unusual for there to be clear, overt evidence of race discrimination and that it should consider matters in accordance with S136 EQA. In addition, the tribunal accepts the guidance of the Court of Appeal in *Igen v Wong [2005] IRLR 258.* This may be considered through a staged process. We first make findings of primary fact to determine whether those show less favourable treatment and a difference in race. The test is: are we satisfied, on the balance of probabilities, that this respondent treated this claimant less favourably than he treated or would have treated a white employee. When establishing whether there has been less favourable treatment, comparisons between two people must be such that the relevant circumstances are the same or not materially different. The tribunal must be astute in determining what factors are so relevant to the treatment of the complainant that they must also be present in the real or hypothetical comparator in order that the comparison which is to be made will be a fair and proper comparison.

67. If we are satisfied that the primary facts prove a difference in race and less favourable treatment, we proceed to the second stage. We direct ourselves in accordance with S136 EQA and ask whether there are facts from which the tribunal could decide, in the absence of any other explanation, that the provision has been contravened., we must find such a contravention. There may be other findings of fact beyond the mere difference in race and the less favourable treatment (in comparable circumstances) which are relevant to the reasonableness of drawing a presumption or an inference of unlawful race discrimination at this preliminary stage. If the answer here is that we could so conclude, the burden shifts to the employer.

68. At this stage, we look to the employer to determine if it can show a credible, non-discriminatory explanation or reason for such less favourable treatment as has been proved. In the absence of such an explanation, proved to the tribunal's satisfaction on the balance of probabilities, the tribunal will conclude that the less favourable treatment occurred on the grounds of the applicant's race. If the tribunal concludes that a black employee has been treated less favourably than a white employee in comparable circumstances would have been treated, this must almost certainly contain an inference, expressed or

implicit, that but for his race the black employee would not have been so treated. The essential question for the tribunal is to determine the reason for the treatment.

69. Both parties prepared written submissions and added to them orally. They were helpful to the tribunal but do not need repeating as they did not dispute the legal tests to be applied.

Conclusions

70. We first must consider whether there was a dismissal under section 95(1)c) ERA. There is an allegation that there was a breach of trust and confidence as set out in the list of issues at 4.2 a. That is that the claimant was paid less than the other three white engineers. This is also relevant to his race discrimination claim which we deal with later. As a matter of fact, the claimant was paid less than LH and MN, who were in post as senior engineers. He was also paid less than PC.

71. The question is whether that is a breach of the implied term of mutual trust and confidence. We note that the claimant never raised this as an issue at the time and referred to himself throughout his employment, including his resignation letter, as an assistant engineer. All employees were paid in accordance with their contracts of employment. We consider whether there was a breach of the implied term of trust and confidence and cannot agree that there was. There is a clear explanation for the difference in pay relating to the pay grade and the fact that the comparators were TUPE'd on different pay levels than the claimant was recruited on. It is clearly within the contractual agreement between the parties.

72. We turn then to issue 4.2 b which is the respondent's alleged failure to follow the Joint Protocol. This has two main elements. The first is whether it was clear to the respondent that the claimant was raising a complaint of bullying and harassment. Although we can accept that that might be a valid interpretation of the 16 June document, the claimant did not make it clear and could himself have directed the respondent to the Joint Protocol if that is what the procedure that he believed should be followed. It was reasonable for the respondent to take the view that it was not clearly a bullying and harassment complaint but one about a breakdown in relationship. It was therefore reasonable for Mr Barrow to take the steps that he took to try to remedy the situation.

73. In any event, the main complaint is that this matter was not referred to HCC to try to resolve. The tribunal is a little confused by this argument as it seems to the tribunal that the claimant would not have benefitted from any such referral. The steps that Mr Barrow took were likely to be at least as good, if not perhaps better, than referring the matter to HCC who might have been reluctant to take steps against its own employee. In any event, the Joint Protocol does not amount to a contractual term. Any failure to follow it is not serious enough to amount to a breach of trust and confidence and it is certainly not, as is suggested by the claimant, a breach of an express term.

74. Turning then to issue 4.2 c; this is the allegation that the respondent colluded with Mr Richardson with respect to the non-signing of the project plan. The tribunal has already accepted, as a matter of fact, that there was no requirement on Mr Richardson or anyone at HCC to sign the document. The tribunal accepts that it is an Opus document and therefore needed no signature from anyone at HCC. Although the tribunal appreciates that there were occasions when other people did sign such plans and the claimant might have felt more relaxed if Mr Richardson had signed it, there was really no significant detriment to him that he did not. The project plan was in place and nothing really changed as a result of it. The claimant himself prepared that document.

75. The claimant has been unable to show a breach of his contract of employment. Even if he had been able to show a minor breach with respect to the Joint Protocol, it certainly does not amount to a fundamental breach given that it made little or no difference to how matters proceeded. The claimant simply did not leave enough time between raising concerns (maybe as a response to Mr Richardson's concerns) in June and his apparent decision to leave the respondent which appears to have been taken, if not before, in September 2017. If the claimant had met with Ms Harrington as she had tried to arrange, things might have progressed differently. The claimant cannot show that the respondent intended to be no longer be bound by the contract. Genuine attempts were made to remedy the situation before the claimant resigned and in considering his grievance after he had left.

76. Even if the claimant had shown breach of his employment contract which amounted to a fundamental breach, and he could show that it was conduct which was calculated to destroy the relationship, we would still have to answer the question about whether that was the reason for the resignation.

77. The claimant's case is very weak on this issue. He applied for a better job in mid-July 2017. He took that job following a successful interview and a satisfactory reference from the respondent. He has not satisfied the tribunal, even if he did believe there were breaches of his contract of employment, that was the reason for him leaving the respondent's employment. He is unable to show that there was a dismissal. His claim for unfair dismissal must therefore fail.

78. We therefore consider the race discrimination complaint. Here we look at the reasons for the difference in pay. First, we are satisfied that LH and MN were paid properly in their positions as senior engineers which, at least as far as LH is concerned, was after many years' employment. Both were TUPE'd and were entitled to retention of their posts as senior engineers and that led to the higher pay. We are also satisfied that they had extra responsibilities to the claimant which justified them being senior engineers whilst the claimant remained in the job he applied and accepted for as an assistant engineer. LH and MN are not suitable comparators as their circumstances are not the same as the claimant's. Their circumstances are materially different.

79. It is true that PC was also an assistant engineer and received a slightly higher salary than the claimant. The tribunal must consider the reason for the difference in pay. The tribunal have accepted that PC's pay was at that level because of TUPE. Again, PC's circumstances are not the same as the claimant and are materially different. We accept that the claimant was paid in the mid-range of level 3 and that his increases were slightly higher than PC's increases. He was therefore getting closer to being paid the same as PC. Even if the claimant was able to show less favourable treatment with respect to PC, the tribunal is satisfied by the respondent's explanation the reason for the difference in pay.

80. It is agreed by the respondent that we consider pension contributions as part of the claimant's case about difference in treatment. Here there is no question that PC's pension contributions amounted to 6% and there is therefore no difference between the claimant and PC with respect to that.

81. As far as LH and MN were concerned, their pension contributions were indeed considerably higher than both the claimant and PC. This was related to their employment with HCC and is not something the respondent could change.

82. We allowed an amendment to consider the question of contractual hours. The claimant might be able to show less favourable treatment as his contractual hours were more than his comparators. However, the same applies to this consideration as for pay and pensions because this was a contractual arrangement which the respondent were not at liberty to alter. We are satisfied that all Opus employees, including Mr Barrow who is a senior employee, were required to work 40 hours. There is no evidence of any different treatment on the grounds of race. The claimant is unable to shift the burden of proof with respect to that and, if he did, we are satisfied that the respondent's explanation lies entirely with the fact that those other employees were TUPE'd.

83. Finally, we should address matters that the claimant raised in submissions. Many of those go to the generality of the claimant's issues raised in his witness statement. These appear to relate to his belief that he was better qualified and indeed more successful than his comparators. There is very little evidence and it is unlikely to be the case. The claimant may well be right in stating that his paper or academic qualifications are better than his comparators but that is not really the question before the tribunal. His comparators had worked for some time in their positions and might well have had at least as much experience as the claimant.

84. In summary then, the claimant has not satisfied the tribunal that he was dismissed. His claim for unfair dismissal fails and is dismissed.

85. His claim for race discrimination fails as he has not shifted the burden of proof to the respondent. Even if he had, we are satisfied by the respondent's explanation for those differences that there are between himself and his named comparators.

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Employment Judge Manley

Date: …28 January 20……..

Sent to the parties on: .....

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For the Tribunal Office