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EMPLOYMENT TRIBUNALS

Claimant: **Ms A Nkemnacho**

Respondent: **L & Q Living Limited**

Heard at: **East London Hearing Centre**

On: **18, 19 and 20 February 2020**

Before: **Employment Judge Burgher**

Members: **Mr P Quinn**
Mr M Rowe

Representation

Claimant: In person

Respondent: Ms C Jennings (Counsel)

JUDGMENT

The unanimous judgment of the Tribunal is that the Claimant's claims fail and are dismissed.

REASONS

1. The Claimant, black Nigerian heritage, worked as an agency support worker assigned to the Respondent's Beverley Lewis House scheme. She brings claims arising from her treatment at Beverley Lewis house and the termination of her assignment there. At outset of the hearing the allegations the Claimant makes and the issues were clarified as follows:

Direct discrimination section 13 Equality Act 2010 (EqA)

Issue 1

2. Sarah Hellawell, Agnieszka Kramarczyk, Zalia (members of staff), Tenant A and Tenant B made offensive statements regarding the smell of African food and referred to African food being "stinky" and "very smelly"

2.1 The comments were made by Tenant A and Tenant B who wrote a complaint;

2.2 The remarks were made by Zalia and Pauline Beckford (both support workers) after the 9 February 2019. They said 'don't eat here your food is smelly, your food stinks go to the sleeping room"

2.3 On 9 February 2019 Ms Kramarczyk made remarks about the Claimant and other African employees (Confidence and Femi) food smelling, including saying "African food stinks, don't eat your food herefdsf

Issue 2

3. The Claimant was told to eat in the sleeping room. After 9 February 2019 Ms Hellawell told the Claimant and other African staff that they should eat their food in the sleeping room because their food was smelly.

Issue 3

4. The Claimant was not permitted to eat in the lounge. After 9 February 2019 Ms Hellawell shouted at the Claimant saying "I told you not to eat there"

Issue 4

5. The Claimant alleges that the request to terminate her assignment arose directly from her refusal to eat in the sleeping room. The request was sent in an email on 18 February 2019. Confidence another black African member of staff was asked to leave as a result of the incident on 9 February 2019. This was discussed on Monday 16 February 2019 and the Claimant remarked that she would not eat in the sleeping room, and she alleges that the email terminating her assignment was sent as a result.

Harassment related to race – section 26 EqA

Issue 5

6. The Claimant is black Nigerian origin and alleges that she was less favourably treated than staff of non-Nigerian origin because of her race: she, and other Nigerian staff who ate African food were told to eat in the sleeping room and were not allowed to eat in the lounge or the dining room whereas non-Nigerian staff or staff eating non-African food were allowed to eat in the lounge and the dining room

Issue 6

7. The Claimant alleges that she was less favourably treated and or harassed by being shouted at by the comments made in respect of African food being stinky or smelly.

7.1 She believes that if she was not black Nigerian she would not have had this problem.

7.2 The Claimant believes the comments set out above violated her dignity and or had the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

Evidence

8. The Claimant gave evidence on her own behalf and referred to her ET1 narrative (bundle pages 16 and 17) her further better particulars dated 22 August 2019 (32A and 32B) and her email narrative dated 11 February 2020. The Claimant confirmed truth of these documents and stated that she was content for these documents to collectively stand as her evidence in chief.

9. The Respondent called Ms Sarah Hellawell, Positive Behaviour Support Lead, Ms Tracey McCormack Regional Business Manager, and Ms Agnieszka Kramarczyk, former Support Worker to give evidence on its behalf. Ms Kramarczyk gave evidence by way of video link from Poland. All witnesses were subject to cross examination and questions from the Tribunal.

10. The Tribunal was also referred to relevant pages in a bundle consisting of over 65 pages and permitted additional pages to be inserted relating to a positive behaviour support plan for Tenant A, dated 7 December 2018.

11. The Claimant's evidence was confused and unfocused. She tended to avoid questions by restating her firmly held belief that service users and non-agency staff that she worked with continuously made offensive remarks about too many blacks, African food, Nigerian food, and that Nigerian workers were required to eat their food in a location away from non Nigerians. We found that that the Claimant's evidence to be generally unreliable, she has referred at various times interchangeably to comments made at work about "foreign food" "African food", "Nigerian food" and "smelly food" and when pressed for what was actually allegedly said by others stated '*lets say African food as they are all the same*". As a general observation, the Claimant's opinions and beliefs regarding her discriminatory treatment had very little objective evidential support. She necessarily revised her claim to focus on Nigerian as opposed to black or African heritage when considering the allegations against Pauline Beckford, who is black Caribbean heritage and Zalia, who is black African from Zimbabwe.

12. The thrust of the Claimant's belief was that Tenants had too much power and that they held racist beliefs and expressed unfounded opinions regarding working with Nigerian agency staff. She asserted that there were two particular tenants with racist opinions regarding "black African" staff and these tenants were pandered to by the Respondent resulting in the termination of her assignment and that of two other Black Nigerians, Remi and Confidence over food related matters. Many of the additional matters that the Claimant raised in her oral evidence were not actual issues before the Tribunal but the Tribunal considered such matters, to the extent that they could clarified, as relevant background to the matters the Tribunal was required to deal with.

13. In contrast, we found the evidence of Ms McCormack and Ms Hellawell to be measured and professional in narrating their involvement regarding events. Ms Kramarczyk gave evidence by video link and we found that her evidence was credible, she gave a consistent and frank account of her interaction with the Claimant and Confidence on the 9 February 2019.

Facts

14. The Tribunal has found the following facts from the evidence.

15. The Respondent is a registered provider of social housing. It receives public funds and delivers care and support services to people of a diverse range of support needs. It operates a number of residential schemes that deliver care and support services. It engages workers and employees to provide support work and from time to time engages agency workers through employment agencies to meet its operational needs.

16. Beverley Lewis House (BLH) is one of the Respondent's residential schemes. This is a specialist refuge service for women with learning difficulties and vulnerabilities. In BLH there could be up to 19 support staff on the rota at any given time. At the relevant time the statistics show that the ethnic breakdown for staff was 12 Black African; 3 Eastern European; 2 Black Caribbean; and 2 Pakistani (57 and 58).

17. The Claimant identifies as black Nigerian. She was an agency worker supplied by Brook Street Social Care and undertook ad hoc shifts providing support at BLH scheme. The majority of agency staff supplied to BLH at the relevant time happened to be of black African heritage. These agency staff tended to bring their lunch into work to heat in the microwave before eating.

18. All tenants have a Positive Behaviour Support Plan designed to outline risks and triggers that they may face in their day-to-day lives. The support workers were required to review the Positive Behaviour Support Plans and satisfy themselves that they were managing their own as well as the tenants risks.

19. At BLH the Claimant was required to work around women some of whom had learning disabilities, autism or post-traumatic stress disorder symptoms. Tenant A had a Positive Behaviour Support Plan dated 7 December 2018 that included, amongst other things, having an environment that is not too noisy, not too bright and not too smelly. It was recorded that Tenant A is hypersensitive senses and can hear, see and smell lots of things which others could not and that she finds smells hard to cope with, especially when she is already stressed or anxious (58L). The routine plan for Tenant A stated that there was some of the risk associated with supporting her as her mood changes and she gets angry when unplanned events occur, strong smells and loud noises in communal area (58E).

20. A key objective for the Respondent was to empower and create independence for its tenants. In December 2018, Ms McCormack held a meeting with staff asking for frank feedback for areas of development and improvement at BLH. During this meeting the Claimant stated that she felt the tenants in the service had too much control. This concerned Ms McCormack who challenged this during the meeting and informed the Claimant and other members of present that BLH is a service where tenants have gone through a significant trauma and were in vulnerable positions and it was important for these individuals to feel like they had control.

21. Remi, a black African support worker had her assignment at BLH terminated with the Respondent following a few incidents where she was the focus of shouting and swearing from tenants. The Claimant relied on unsigned appendix to her email evidence of 11 February 2020 purportedly from Remi Oshinowo which stated that "one of the clients was not too happy that she ate garlic, resulting in her throwing a phone me and it hit me on the hand and became swollen".

22. The Respondent referred to a documentary account stating that it is apparent that Remi had been shutting herself in the office when matters occurred to remove herself from these situations started and both the Respondent and Remi were concerned for Remi's safety when lone working resulting in the cancellation of shifts (47).

23. The Claimant was required to work with Tenant B on 6 February 2019. Tenant B was a vulnerable woman who had a Positive Behaviour Support Plan that required her to be carefully managed and accompanied to prevent her being exposed to compromising situations. A discussion about Tenant B's needs took place in the morning of 6 February 2019 and the Claimant accompanied her throughout the day. Later in the day there was an incident in the office where the Claimant made a couple of comments about how Tenant B was counting money wrong and how it may help if she did it differently. Ms Hellawell was in the office at the time. Tenant B got frustrated and upset that she may have counted the money wrong and shouted at the Claimant to questioning why she was being watched and that she wanted to be left to do it. Shortly after this incident the Claimant approached Ms Hellawell to complain about the way Tenant B had shouted at her. The Claimant contended that Ms Hellawell should have pulled Tenant B up on this. Ms Hellawell explained that Tenant B had told the Claimant to leave the office because she was getting agitated and she was trying to concentrate on doing something and that the Claimant watching her and giving input frustrated her. Ms Hellawell observed that when an individual is trying to concentrate on a task and someone is watching them the task can be made even more difficult and whilst Tenant B perhaps did not need to shout at the Claimant in that moment that is how Tenant B reacted to the situation. With her Positive Behaviour Support Plan in mind Tenant B was communicating what she needed to at that time. Ms Hellawell fed this incident back to Ms McCormack.

24. The central element of the Claimant's case is that she was discriminated against because offensive words were used by L&Q permanent staff managers and Tenant A and Tenant B and only African/Nigerian food was being referred to as stinky and very smelly. The Claimant alleged in her email narrative that this is beyond racist and extremely rude. The Claimant developed this in her oral evidence and stated that it was only Africans who were told that their food was smelly. We do not accept that the Respondent's employees referred to African or Nigerian food as stinky and very smelly. The Claimant's evidence in this regard is unreliable.

25. On the evidence, we accept that Tenant A and Tenant B commented on the strong smell of the food brought in by agency staff, who were predominately black African. As the Claimant stated, permanent staff tended to bring in sandwiches or ate food that did not have an overpowering smell whereas black African agency staff, who she stated were not paid very much, brought in their own food to heat for lunch. We find that comments made by Tenant A and Tenant B were commenting on the strong smell of the food when heated up and not on the fact that it was African food, Nigerian food or stinky food. BLH was their living environment and they were commenting on matters that affected them living there.

26. Matters came to a head on 9 February 2019. Prior to this date there was a general understanding that the tenants needs would be respected in the lounge which was their environment. We find that there may have been occasions prior to 9 February 2019 where tenants expressed their unhappiness with smells of various foods to staff concerned staff at BLH and staff were told that they needed to eat their food in the

sleeping/resource room to accommodate the needs of the residents. The sleeping/resource room had a sofa table and chairs an night staff could sleep in it and activities and massages could take place in it.

27. As mentioned above, the needs of Tenant A were specifically recorded in her Positive Behaviour Support Plan which included her reaction to some strong smells. The Claimant and other workers ought to have been aware of this, however the Claimant stated that she only read the risk assessment part of Tenant A's files.

28. On 9 February 2019 there was an argument between Tenant A and Confidence, a black Nigerian agency support worker regarding the smell of food. The Claimant was not at the initial part of this argument but she was informed by Confidence and accepted her account. The document appended to the Claimant's email of 11 February 2020 includes words purporting to be a statement from Confidence. This is unsigned and undated and does not have a full name of Confidence. It implies that Confidence was spoken to rudely and unprofessionally by Ms Kramarczyk (a permanent member of staff employed as a support worker) in the presence of Tenant A concerning the smell of Confidence's food and that Confidence should not eat in the house. There was no mention in Confidence's purported statement about the origin or nationality of the food.

29. However, the Claimant gave evidence to us that she was informed by Confidence that Ms Kramarczyk and Tenant A had told Confidence that "African food smells".

30. The Claimant was asked to write a statement to her agency regarding the incident of 9 February and there was no mention of African food. In fact, the Claimant's statement in this regard was that Ms Kramarczyk said this is not the first time this incident is happening in the scheme regarding smelling food.

31. An investigation into the argument and distress to Tenant A was undertaken. Ms Kramarczyk wrote a report on 9 February 2019 setting out her version of events (46C and 46D). She writes:

> *At about 1230 Tenant A came downstairs from her flat, straight into the staff office to report that really cannot stand the smell of fish coming out of the lounge which makes her sick.*

32. Tenant A wrote a two-page complaint about the incident on 9 February 2019 and stated

> *"…as soon as I entered the communal lounge, I could smell a very strong overpowering odour of fish. There was an agency lady called Confidence in the kitchen washing up her container, I wanted to tell her and explain it was too much but I just felt like I couldn't. Also, I have autism which means that all of my senses are very high, and I can get very anxious and stressed if there are strong smells or loud sounds. I try to deal with the smell, but it was just too much, I then went into the office where [Ms Kramarczyk and Pauline Beckford] were, and said I did not feel very well and there was a really strong smell of fish in the communal lounge and it was making me feel a lot worse."*

33. Tenant A then goes on to write that Ms Kramarczyk raised the matter with Confidence on Tenant A's behalf and an argument ensued. The Claimant approached

Tenant A saying that it was ridiculous and it was getting silly. Tenant A tried to explain to the Claimant why she struggles with things like this and that she has autism and it feels a lot more overpowering to her than most people. The argument between Confidence and Ms Kramarczyk upset Tenant A as she felt that she was responsible for the argument and she felt upset that some staff did not seem to understand autism. Ms Kramarczyk's contemporaneous incident report as well as Tenant A's incident complaint were referred forwarded to management under an Accident/Incident report form on 11 February 2019 (44).

34. The Tribunal observe that during the Claimant's evidence she initially stated that Tenant A did not have autism before going on to qualify that Tenant A had mild autism but was not as bad as she made out. The Claimant also made what was wholly unacceptable criticisms of the morality of Tenant B's behaviours seemingly dismissive of her stated vulnerabilities. The Tribunal was concerned that a person someone working in such a support role would seek to trivialise and/or disregard the diagnosis of people she was there to support and care for.

35. Following the incident of 9 February 2019 all staff, including the Claimant, were advised that they should not eat in the lounge and that they were required to eat their food either in the resource room/sleeping room or outside area of the property. We accept that the Claimant was informed about this by Zalia, black Zimbabwean, and Pauline Beckford, black Caribbean, and that she was told that eating food in the lounge was not advisable in order to avoid trouble. The Claimant asserted this was not a rule but was given more as friendly advice to her as to where to eat going forward.

36. On 18 February 2019 there was a tenant meeting for residents at BLH [52A] where they expressly recorded that that no staff should be eating in the communal lounge. It was recorded that Tenant B stated that she was upset about staff eating in the lounge and said that staff were disrespectful. The action point recorded was that staff can eat in the lounge, with the permission of the tenants who are present at the time and staff should be aware that some strong smelling food may be offensive to some tenants.

37. Curiously, the Claimant stated that she did not eat in the lounge following the incident of 9 February. However, issue 4 relates to the Claimant having her placement terminated for refusing to eat in the sleeping/resource room. Further, issue 3 relates to the allegation that she was told by Miss Hellawell was that she was told not to eat in the lounge. When questioned on this the Claimant stated that Miss Hellawell must have been mistaken when the Claimant was heating her food rather than the actually eating in the lounge. In any event we accept Ms Hellawell's evidence that she did not tell the Claimant not to eat in the lounge as she did not have a coinciding shift with the Claimant following the 9 February 2019 until the Claimant's dismissal.

38. Tenant A sent an email to Ms McCormack on 17 February 2019 specifically complaining about the Claimant (51 – 52). In this email Tenant A stated that:

> *"…I am extremely disappointed at the management for allowing a person like this back on shift and I do NOT feel safe around her and I defiantly [sic] will never trust her again. I understand that she will not work with me but that is not the point. Since the incident she has been bringing it back up in conversation with me and Tenant B, blaming the whole thing on [Ms Kramarczyk] and winding the situation up again, which was not necessary, she is actually made me and Tenant B quite upset again, this shouldn't happen. Her new tactic on trying to annoy me once*

again is just to completely ignore me and pretend I am not even there she just gives me this death stare and just doesn't even bother to talk to me. Again this is wrong.

I feel extremely upset and I feel like this place is failing to keep the ones who need it safe from people like her, she clearly doesn't have any respect for the code of conduct whilst being at work, she has already told me that she will not follow the rules regarding staff eating in the lounge, she says she doesn't care. Well this is our home not hers and I will not have it. It's not fair on any of us including the staff.

…I have counted about four new staff which is great and they all seem very nice and pleasant so why are we still getting agency coming in here especially ones like [the Claimant] who are just not right for this place. Yes some of the agency are amazing and do there [sic] job very well, but there are still a small amount he just shouldn't be working in an environment like this. They don't understand our needs and they don't even understand autism, there are growing amount of people like me who have autism so they should be trained before coming here."

39. Following this email Ms McCormack wrote an email to the Claimant's employer advising that the Respondent will not have the Claimant back in the service until she has given a statement regarding the complaint made by Tenant A and until she had received some additional training [53]. Ms McCormack set out a number of areas of concern relating to the Claimant's behaviour taken from the Tenant A's complaint that required investigation into the following matters.

39.1 The Claimant stating Ms Kramarczyk was to blame for the incident of 9 February 2019.

39.2 The Claimant stating that she would not follow rules relating to eating in the lounge.

39.3 That the Claimant has started to ignore Tenant A and gives her death stare.

40. By way of context Ms McCormack set out that there were two matters to highlight regarding the Claimant stating that tenants have too much control, which was challenged, and the Claimant's reaction on 6 February 2019 regarding the interaction with Tenant B.

41. Ms McCormack stated that management will be completing an investigation of the allegations. The investigation was not completed because the Claimant was not contacted by her employer Brook Street Social Care for her version for events.

42. The Claimant was very upset that she was not provided with any opportunity to put her case in relation to the complaint and feels that she had been very unfairly treated and is understandably aggrieved by this. The Claimant was in the dark in respect of her termination assignment and made a claim for unfair dismissal against her employer Brook Street which was struck out but has pursued her claims for race discrimination and harassment against the Respondent.

43. On the evidence we find that the Claimant did indicate that she would refuse to comply with the rule against eating in the lounge. The content of the Tenant A's email complaint on 17 February 2019, the notes of the tenant meeting of 18 February 2019 and the content of issue 4 relating to the Claimant's refusal demonstrate this.

Law

44. The Tribunal applied the following statutory provisions, appellate court authority and guidance when considering the issues of the case.

45. Section 13 Equality Act 2010 (EqA) defines direct discrimination.

> ‘(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
>
> (2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.
>
> (3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.
>
> (4) If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.
>
> (5) If the protected characteristic is race, less favourable treatment includes segregating B from others.
>
> (6) If the protected characteristic is sex—
>
> (a) less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;
>
> (b) in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth.
>
> (7) Subsection (6)(a) does not apply for the purposes of Part 5 (work)’.

46. Section 9 EqA defines race as a protected characteristic. The Claimant asserts that she is treated less favourably because she is black Nigerian.

47. Section 26 EqA defines harassment.

> ‘(1) A person (A) harasses another (B) if—
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (c) the conduct has the purpose or effect of—
>
> (i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) A also harasses B if—

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

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

(3) A also harasses B if—

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

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

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

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

(a) the perception of B;

(b) the other circumstances of the case;

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

(5) The relevant protected characteristics are—

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

48. When considering harassment the Tribunal had regard to the Equality and Human Rights Commission guidance.

'…harassment of a worker occurs when a person engages in unwanted conduct which is related to a relevant protected characteristic and which has the purpose or the effect of:

• violating the worker's dignity; or

• creating an intimidating, hostile, degrading, humiliating or offensive environment for that worker.

7.7 Unwanted conduct covers a wide range of behaviour, including spoken or written words or abuse, imagery, graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, acts affecting a person's surroundings or other physical behaviour.

7.8 The word 'unwanted' means essentially the same as 'unwelcome' or 'uninvited'. 'Unwanted' does not mean that express objection must be made to the conduct before it is deemed to be unwanted. A serious one-off incident can also amount to harassment.

7.9 Unwanted conduct 'related to' a protected characteristic has a broad meaning in that the conduct does not have to be because of the protected characteristic.'

49. In respect of third party action, such as Tenant A and Tenant B's alleged actions, it is necessary for the Tribunal to consider whether the Respondent 'created' an intimidating, hostile, degrading, humiliating or offensive environment in being responsible for them to act as they did.

50. When considering vicarious liability the Tribunal considered section 109 EqA.

'Liability of employers and principals

(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.

(2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.

(3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval.

(4) In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A—

(a) from doing that thing, or

(b) from doing anything of that description.

(5) This section does not apply to offences under this Act (other than offences under Part 12 (disabled persons: transport)).'

51. Section 136 EqA provides the burden of proof provisions.

(1) This section applies to any proceedings relating to a contravention of this Act.

(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.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

(5) This section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to—

(a) an employment Tribunal;…

52. The Court of Appeal, in Madarassy v Nomura International Plc [2007] EWCA Civ 33, stated at paragraph 56.

> "The court in Igen v Wong expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the Tribunal could conclude that the Respondent 'could have' committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal 'could conclude' that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination). It was confirmed that a Claimant must establish more than a difference in status (e.g. race) 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."

53. The burden is therefore on the Claimant to prove, on a balance of probabilities, a prima facie case of discrimination.

Conclusions

Direct race discrimination Section 13 EqA

Issue 1

54. It is alleged that Ms Hellawell, Ms Kramarczyk, Zalia, Tenant A and Tenant B made offensive statements regarding the smell of African food and referred to African food being "stinky" and "very smelly". In respect of Tenants A and B we conclude that they were prone to make statements about smelly food in the lounge. This was their communal living space. Whilst the comments about food could be seen to be upsetting to the Claimant about the food she eats we do not conclude that the comments were on the grounds of race or related to African/Nigerian food.

55. Tenant A wrote a complaint relating to the smelly odour of fish on 9 February 2019. Tenant B had an argument with Remi relation to the smell of garlic in food. We do not conclude that these complaints or issues were because of race. The Claimant ought to have been aware of the sensitives and needs of the tenants and put them first and could not reasonably have perceived that their comments about smelly food were based on her race. Specifically, garlic regarding the Remi incident was not race based and smelly fish regarding the Confidence incident was not race related. It was smelly food related.

56. We considered whether Tenant A and/or Tenant B were inherently discriminatory in complaining about the Claimant and, if so, whether the Respondent adopted such discriminatory conduct. On the evidence we are unable to do so. There was no discriminatory content or account in any of the complaints raised by the tenants who were at pains to ensure that their living arrangements suited them and accommodating their needs recorded in their Personal Behaviour Support plans. None of the documentation or statements, including the Claimant's account given at the time, provided any contemporaneous accounts of an ethnic basis for food complaints. There was no basis for the Respondent to suspect that there was a racial undercurrent for Tenant A and Tenant B's complaints.

57. If we had found Tenant A or Tenant B to have been discriminatory in singled out African/Nigerian food, we would not have concluded that the Respondent created or facilitated an environment where African/Nigerian food was singled out for objection in order for it to be liable for their potentially discriminatory conduct.

58. We have not found that Zalia, Ms Kramarczyk or Ms Hellawell made any derogatory comments about African/ Nigerian/ Black food stinking or where African food should be eaten.

59. In respect of the allegations against Zalia, who is black Zimbabwean, we accept that she gave the Claimant friendly advice about not eating smelling food in the lounge. We do not accept that this friendly advice was couched in aggressive, negative or derogatory terms such as "don't eat here, your food is smelly, your food stinks go to the sleeping room". We do not accept the Claimant's allegation in this regard.

60. Following 9 February 2019 we accept that the Claimant was advised Ms Kramarczyk that she should not eat smelling food in the lounge and that it should be eaten in the sleeping room/resource room. This instruction applied to all staff. We accept Ms Kramarczyk's evidence that she complied with the rule, she stated how could she have told someone else to do it when she was not doing it herself. We do not accept that she said "African food stinks, don't eat your food here".

Issue 2

61. Following 9 February 2019 we accept that the Claimant was advised that she should not eat smelling food in the lounge and that it should be eaten in the sleeping room/resource room. This instruction applied to all staff.

62. On the evidence before us we do not accept that Ms Hellawell made any comments about African/Nigerian food being stinky or smelly. We conclude that the message was made clear to the Claimant and all other members of staff that instruction from Ms Hellawell in management was that no staff should eat smelling food in the lounge and they should eat in the sleeping/resource room. This instruction was given on 9 February 2019. The Claimant's evidence was unreliable. Initially, she was not able to specify the food that she was said to have been eating. Her claim came across as a proxy for the problems that she alleged Remi and Confidence got into relating to food and there were no particulars of when the Claimant was told that her food was said to have been smelly. However, when pressed she stated the comments regarding her food were when she had jallof rice, beans and swayam (a potato stew). We did not accept the Claimant's evidence.

Issue 3

63. On the evidence before us we do not accept that Sarah Hellawell gave any instruction to the Claimant. The rule relating to food and where to eat smelling food was clear to the Claimant and all other members of staff following instruction from Sarah Hellawell in management. This instruction was given on 9 February 2019. Ms Kramarczyk advice the Claimant of this and Zalia and Pauline Beckford gave the Claimant friendly reminders about where to eat smelling food.

64. We do not conclude that Ms Hellawell told the Claimant that she was not able to eat in the lounge or that she shouted at the Claimant telling her "I told you not to eat there". The Claimant's own evidence was that she did not eat in the lounge following the incident of 9 February 2019.

Issue 4

65. The Tribunal find that the Claimant's assignment at BLH was ended following the serious complaint on 17 February 2019 from Tenant A. This has been fully quoted above. In reality, the Respondent had very little option but to undertake an investigation which they did. Unfortunately for the Claimant her employer, Brook Street Social Care, did not engage with this investigation leaving her in the dark. Subject to investigation the Claimant may have been able to resume at BLH if she had received further training. However, the investigation could not conclude because her employer did not provide the Respondent with the statement for them to consider the bona fides of Tenant A's complaints.

66. We do not conclude that the end to the Claimant's placement in these circumstances amounted to less favourable treatment because of her race.

Harassment related to race – Section 26 EqA

Issue 5

67. We accept that talking about a nations food in a disparaging manner could amount to harassment related to race. However, in relation to the Claimant's harassment complaints we have not found that there were comments made relating to African/Nigerian staff or African/Nigerian food or those who ate African/Nigerian food.

68. The Claimant believed that the rule regarding eating strong smelling food was only implemented following complaints over African food. The rule was implemented following 9 February 2019 to accommodate the needs and wishes of tenants. Had the Claimant accepted this and put the tenants need first, as was her job, it is perhaps unlikely that Tenant A would have written the complaint of 17 February 2019 that led to the Claimant's removal from BLH. We conclude that the rule was implemented following the need to accommodate the needs and requests of tenants in their homes and not related to race.

Issue 6

69. We do not conclude that the Claimant was shouted at or that comments were made to her in respect of African food being stinky or smelly or that specifically African/Nigerian staff were not allowed to eat in the lounge or dining area.

Outcome

70. The Claimant has not established any of her allegations that there was less favourable treatment because of her race or that she was subject to harassment relating to her race. Therefore the Claimant's claims fail and are dismissed

Employment Judge Burgher

28 February 2020