EMPLOYMENT TRIBUNALS

Claimant: Mr P Isaacs

Respondent: London Underground Limited

Heard at: London Central

On: 8, 9 & 10 January 2020

In chambers: 10 February 2020

Before: Employment Judge Khan
Ms J Clark
Ms L Jones

Representation
Claimant: Ms K McCarthy, lay representative
Respondent: Mr N Bidnell-Edwards, Counsel

JUDGMENT

The unanimous judgment of the tribunal is that the claim fails and is dismissed.

REASONS

1. By an ET1 presented on 23 March 2019 the claimant brought a claim for race discrimination. The respondent resisted this claim.

The Issues

2. The issues we were required to determine were set out in the tribunal's Order dated 31 October 2019:

    2.1 EQA, section 13: direct discrimination because of race

        2.1.1 Has the respondent subjected the claimant to the following treatment?

(a) Failure by Mr Ago Magnante and/or Mr Martyn Cain to investigate, or adequately investigate, respectively, the claimant's formal complaint made verbally on 16 January 2018 and/or his grievance dated 14 August 2018?

2.1.2 Was that treatment less favourable treatment i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others (comparators) in not materially different circumstances? The claimant relies on a hypothetical comparator.

2.1.3 If so, was this because of the claimant's race i.e. being of Afro-Caribbean heritage?

2.2 EQA, section 26: harassment related to race

2.2.1 The respondent agrees that it recruited Mr Phil Potter as an employee despite the claimant's allegations of racial harassment against him.

2.2.2 Was this conduct unwanted?

2.2.3 If so, did the recruitment of Mr Potter relate to the protected characteristic of race?

2.2.4 Did the conduct have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant (taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect)?

2.3 Jurisdiction / time limits

2.3.1 Were all of the claimant's complaints presented within the time limits set out in section 123(1)(a) & (b) EQA?

2.3.2 If not, was there an act and/or conduct extending over a period and / or a series of similar acts or failures?

2.3.3 If not, should time be extended on a just and equitable basis?

2.3.4 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 5 January 2019 is potentially out of time, so that the tribunal may not have jurisdiction to deal with it .

The Evidence

3. The claimant gave evidence himself. He also called Darren Cudjoe-Cole, formerly engaged by the respondent as an agency Forklift Operator.

4. The respondent called: Ago Magnante, Operations Manager; and Martyn Cain, Production Manager.

5. The claimant sought to rely on the witness statement of Martin Ellis, Mechanical Fitter, who was unable to attend the tribunal because of ill health although no evidence for this was provided. As the respondent was unable to question this witness we placed little weight on his evidence.

6. There was a bundle which exceeded 200 pages. We read the pages in this bundle to which we were referred.

7. We also considered closing submissions from both parties.

The Relevant Legal Principles

Direct discrimination

8. Section 13(1) EQA provides that:

> A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably that A treats or would treat others.

9. There are two elements in direct discrimination: the less favourable treatment, and the reason for that treatment (see Glasgow City Council v Zafar [1998] IRLR 36).

10. It is unnecessary for the protected characteristic to be the sole basis for the less favourable treatment complained of provided it had a significant influence on the outcome (see Nagarajan V London Regional Transport [2000] 1 AC 510).

Detriment

11. Section 39(2) EQA provides that:

> An employer (A) must not discriminate against an employee of A's (B) –
> …
>
> (a) by subjecting him to any other detriment.

12. A complainant seeking to establish detriment is not required to show that she has suffered a physical or economic consequence. It is sufficient to show that a reasonable employee would or might take the view that they had been disadvantaged, although an unjustified sense of a grievance cannot amount to a detriment (see Shamoon v Chief Constable of RUC [2003] IRLR 285, HL).

13. The EHRC Employment Code provides that "generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage".

14. Any alleged detriment must be capable of being regarded objectively as such (see St Helens MBC v Derbyshire [2007] ICR 841).

Harassment

15. Section 26(4) EQA provides that:

> (1) A person (A) harasses another (B) if –
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
> (b) the conduct has the purpose or effect of –
> (i) violating B's dignity, or
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
> …
>
> (4) In deciding whether conduct has the effect referred to in section (1)(b), each of the following must be taken into account –
> (b) the perception of B;
> (c) the other circumstances of the case;
> (d) whether it is reasonable for the conduct to have that effect.

16. In deciding whether the conduct "related to" a protected characteristic consideration must be given to the mental processes of the putative harasser (see GMB v Henderson [2016] IRLR 340, CA). Further guidance has been provided more recently in Unite the Union v Nailard [2018] IRLR 730, CA, a third-party harassment complaint, when the Court of Appeal held that an employer would not be automatically liable where it was culpably inactive, whether or not it knew that an employee was subjected to continuing harassment, unless the mental processes of the individual decision-taker had been found to have been significantly influenced, consciously or unconsciously, by the relevant characteristic.

17. In Pemberton v Inwood [2018] IRLR 542, CA Underhill LJ re-formulated the guidance in Richmond Pharmacology v Dhaliwal [2009] IRLR 336, EAT as follows:

> "In order to decide whether any conduct falling within sub-paragraph (1)(a) of section 26 EqA has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section 4(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section 4(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also take into account all the other circumstances (subsection 4(b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so."

The claimant's subjective perception of the offence must therefore be objectively reasonable.

Discrimination – burden of proof

18. Section 136 EQA provides

> …
>
> (1) 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.
> (2) But subsection (2) does not apply if A shows that A did not contravene the provision.

19. Where the two-stage approach envisaged by section 136 is adopted a claimant must at the first stage establish a prima facie case. This requires the claimant to prove facts from which a tribunal could conclude that on the balance of probabilities the respondent had committed an unlawful act of discrimination (see Madarassy v Nomura International plc [2007] ICR 867, CA).

20. In many cases it will be appropriate to focus on the reason why the employer treated the claimant as it did and if the reason demonstrates that the protected characteristic played no part whatsoever in the adverse treatment, the complaint fails (see Chief Constable of Kent Constabulary v Bowler UKEAT/0214/16/RN). Accordingly, the burden of proof provisions have no role to play where a tribunal is in a position to make positive findings of fact (see Hewage v Grampian Health Board [2012] IRLR 870, SC).

21. In exercising its discretion to draw inferences a tribunal must do so on the basis of proper findings of fact (see Anya v University of Oxford [2001] IRLR 377, [2001] ICR 847, CA).

22. Tribunals must be careful to avoid too readily inferring unlawful discrimination on a prohibited ground merely from unreasonable conduct where there is no evidence of other discriminatory behaviour on such ground (see Igen Ltd v Wong [2005] IRLR 258, CA).

23. Only if discrimination is inherent in the act complained of is the tribunal released from the obligation to enquire into the mental processes of putative discriminator.

The Facts

24. Having considered all of the evidence, we make the following findings on the balance of probabilities. These findings are limited to points that are relevant to the legal issues.

25. The respondent provides a rapid transit system serving Greater London and adjacent counties.

26. The claimant has been employed by the respondent since 19 October 2009 as an Electrical Mechanical Fitter. He is based at the Rail Engineering Workshop (“REW”) in Acton, London. He works in the Wheel

Section and was one of approximately 20 staff in this team who worked on the day shift. Around 70 – 75% of the team are White. The claimant is of Afro-Caribbean heritage.

Racist effigy

27. A racist effigy in the form of a doll/keyring was left close to the claimant's locker in the REW locker room in March 2016. It had been found on the floor by another colleague, Laurence Austin, who hung it up in an obvious place for its owner to find. Mr Austin was unaware of the racial connotations of this object or the offence it was likely to cause the claimant.

28. Upset by this effigy, the claimant reported this to his line manager Adrian McLean, Production Manager, although he did not want any action to be taken against Mr Austin as he accepted that he had not meant any offence.

29. This prompted the respondent to highlight the provisions of the Bullying and Harassment Policy to staff at a team brief on 7 April 2016. We accept the claimant's unchallenged evidence that no reference was made to the racist effigy itself at this meeting. This was also consistent with the respondent's record of this meeting which made no reference to an effigy.

Malicious rumours

30. Two of the claimant's colleagues, Darren Cudjoe-Cole and Dyvia Metha told him that a third colleague, Phil Potter (White and British), had suggested that the claimant had put the effigy in the locker room. We accept Mr Cudjoe-Cole's evidence that Mr Potter made this comment to him around the same time as the effigy appeared i.e. in March 2016 and he reported this to the claimant within a few weeks. We find that Mr Metha also reported this to the claimant at around the same time, although the claimant says that this was in 2017, because the claimant was unclear about the timeline and there was no obvious reason why Mr Metha would have waited a year to tell him.

31. Consequently, the claimant felt that Mr Potter was spreading what he deemed to be malicious rumours about him amongst his colleagues. In his evidence to the tribunal, the claimant said Mr Potter's suggestion that he had been the one to put the effigy in the locker room was related to his race. We agree. If true, Mr Potter, who was White, was alleging that the claimant, a man of Afro-Caribbean heritage, had placed a racist effigy in the locker room.

32. We find that the claimant did complain about this to Mr McLean although he was unable to say when he made this complaint. When Mr McLean was subsequently interviewed he agreed that the claimant raised the effigy issue with him in 2016 but said that he did not want him to investigate it. Mr McLean had not therefore looked into this allegation.

Phone charger incident

33. The claimant also complained to Mr McLean that Mr Potter broke into a locked drawer in which he kept his personal protective equipment ("PPE") and took his phone charger. Although the claimant was unable to recollect when he made this complaint to Mr McLean, we find that he did so in 2017 because this is the date that Mr McLean recalled when he was interviewed about this incident.

34. The claimant knew that Mr Potter had taken his charger because around two weeks after it had gone missing from his drawer he saw his charger hidden behind a radio attached to Mr Potter's phone in the changing room. After Mr Cudjoe-Cole and Martin Ellis, Mechanical Fitter, another colleague, that the charger was his he called Mr Potter over and asked him where he had got the charger from. Mr Potter told him he had taken it from his home.

35. When the claimant reported this to Mr McLean he was told that Mr Potter had already made an allegation of assault against him which Mr Potter did not wish to pursue. Mr McLean's recollection when interviewed was that Mr Potter had alleged that the claimant had poked him in the chest in his finger when he had confronted him about the theft of the phone charger. Mr McLean had asked Mr Potter if he wanted to take this matter further and if there were any witnesses and he said no to both.

36. The claimant denied that he had assaulted Mr Potter. He felt that Mr Potter had fabricated this allegation in order to turn the focus away from his own actions. He also felt that this allegation was related to his race because Mr Potter was playing on a racial stereotype that Afro-Caribbean men were aggressive. The claimant also says that Mr McLean attached more weight to this allegation for the same reason. We found no evidence for this. Mr McLean asked Mr Potter if he wished to pursue this allegation and when he said he did not, took no further action. We find that the claimant did not complain about this assault allegation to Mr McLean at the time. Once again the claimant was unclear on dates. When Mr McLean was subsequently interviewed he referred only to the claimant's allegation of theft against Mr Potter.

37. When Mr McLean put the claimant's allegation of theft to Mr Potter he denied it. Mr McLean took no further steps nor did he revert to the claimant. The claimant therefore understood that this complaint remained outstanding when Mr McLean was suspended for reasons unrelated to this claim in late September 2017. Mr McLean remained suspended until July 2018. It is accepted that between late September 2017 and January 2018, the claimant did not have a direct point of contact with whom he could follow up his complaint about Mr Potter.

Formal complaint – Magnante investigation

38. The claimant complained about Mr Potter to Ago Magnante, Operations Manager, on 16 January 2018. No one else was present. Although Mr Magnante took a note of this meeting he lost his notebook.

39. We find that the claimant raised the following three complaints about Mr Potter at this meeting:

    (1) He had falsely accused the claimant of putting the racist effigy in the locker room (the "effigy allegation").
    (2) He had vandalised and broken into his drawer and taken his phone charger (the "charger allegation").
    (3) He had falsely accused the claimant of assaulting him (the "assault allegation").

    It is accepted that the claimant raised the charger and assault allegations. Although Mr Magnante did not recall whether the claimant also raised the effigy allegation at this meeting, we accept the claimant's evidence that he did. This was consistent with the fact that the claimant referred repeatedly to this and all three allegations in his subsequent correspondence with his managers, including to Mr Magnante on 19 July 2018. We found that Mr Magnante's evidence on this point was equivocal as he was unable to recall whether and if so, how, the claimant put the effigy allegation. For the same reasons we also prefer the claimant's evidence that he told Mr Magnante that Mr Ellis and Mr Cudjoe-Cole were witnesses to some of these allegations.

40. The claimant made no other complaints about Mr Potter. He says that there were no other incidents.

41. We find that in bringing these complaints to Mr Magnante, the claimant's intention was to proceed with a formal grievance. We accept the claimant's evidence that he was unfamiliar with the respondent's Grievance Procedure, although it was accessible via the intranet, and he understood that a formal grievance could be made orally or in writing. He had made three allegations which he felt were serious and he gave Mr Magnante the names of two witnesses. When Mr Magnante agreed to look into his complaints the claimant understood that Mr Magnante had agreed to conduct an investigation into his grievance.

42. It is notable that despite Mr Magnante's seniority and the fact that he had been employed by the respondent for some 40 years, he had not previously conducted any investigations under the Grievance Procedure. In his evidence, Mr Magnante said that he had undertaken some diversity training via the intranet. He made no reference to having had any training on conducting grievance investigations.

43. We find that the complaints that the claimant raised were potentially serious and warranted investigation. In his evidence to the tribunal, Mr Magnante agreed that the effigy and charger allegations were capable of amounting to criminal acts and / or gross misconduct although he did not perceive this to be the case at the time. We accept Mr Magnante's evidence that he understood that it was not the claimant's intention to bring a formal complaint in the circumstances in which the claimant had raised these issues i.e. at a one to one to meeting and without a written complaint; and because these allegations were historic in that they took place in 2016 and 2017, and the claimant had worked alongside Mr Potter otherwise without incident throughout this intervening period.

44. Equally, Mr Magnante did not view the effigy allegation as one of racial harassment. This was or should have been self-evident. The respondent conceded that the comments alleged to have been made by Mr Potter were both insensitive and offensive and this complaint amounted to a complaint of racial harassment.

45. The claimant spoke to Martyn Sarkies, who was now his acting line manager, in late February 2018 to enquire about the progress of Mr Magnante's investigation. He was accompanied by Mr Ellis who had yet to be interviewed by Mr Magnante. Mr Cudjoe-Cole was no longer working for the respondent by this date. We find that had he still been employed, Mr Cudjoe-Cole would also have been in attendance to support the claimant. We accept his evidence that the claimant was like a big brother to him.

46. We find that Mr Magnante conducted a limited informal investigation. Although the claimant disputes this, we find that Mr Magnante spoke with Mr Ellis and Mr Potter. This is because Mr Magnante subsequently provided some specific details of his discussions with both men to Martyn Cain, Production Manager, on 15 October 2018. Although Mr Magnante did not retain any records of these discussions, we find that it is unlikely that he invented these details.

47. Mr Magnante only questioned Mr Ellis about the assault allegation when Mr Ellis told him that there had not been an assault. Mr Magnante did not ask him about the charger allegation. Mr Magnante only questioned Mr Potter about the assault and charger allegations. In relation to the assault allegation, Mr Potter told him that the claimant had touched his elbow and he did not regard this as an assault, and he did not consider making a complaint about it; he denied breaking into the claimant's drawer and said that the charger had already been plugged in so he had used it. Mr Magnante did not question Mr Potter about the effigy allegation. Mr Magnante concluded that there was no case to answer.

48. Mr Magnante was unable to recall exactly when these interviews took place other than to say that they were within a few weeks of his meeting with the claimant in January 2018. We find that Mr Magnante interviewed Mr Ellis and Mr Potter no earlier than March 2018. This is because we find that he interviewed both men at around the same time and he did not interview Mr Cudjoe-Cole as he had had already left the respondent by late February 2018. This was the extent of his investigation. He did not interview Mr McLean at the same time because of his suspension. As his line manager, Mr Magnante could have instructed Mr McLean to attend work from suspension if he felt this was necessary. Nor did Mr Magnante consider questioning Mr McLean when he returned to work in July 2018.

49. Having waited until July 2018 for an outcome, and chased this via Mr Sarkies, the claimant wrote to Mr Magnante on 19 July 2018:

> "I'm following up on the compliant [sic] I made to you on 16/1/18 in regard to the vandalising of the company property and my missing charger found in phil potter's possession. Also of him accusing me of assaulting him and that I was the one putting racist effigies in the changing room…"

50. This prompted Mr Magnante to respond on 3 August 2018 to confirm the outcome of his investigation:

> "I looked into the issues that you raised when we met and my enquiries showed that there was no evidence to support them. Please advise if you now wish to make this formal complaint."

51. Mr Magnante accepted that by failing to secure his notes of his meetings with the claimant on 16 January 2018 and his discussions with Mr Ellis and Mr Potter he had breached the requirement under the Grievance Procedure to "ensure that all records and documentation will be treated as strictly confidential and that all records will be held securely" and he agreed that in this respect his investigation was inadequate.

52. We find that Mr Magnante's investigation was also defective because he failed to establish all of the facts by not investigating all of the claimant's allegations with each potential witness:

    (1) He failed to question Mr Cudjoe-Cole who was a witness to the effigy and charger allegations.
    (2) He failed to question Mr Ellis about the charger allegations.
    (3) He failed to question Mr Potter about the effigy allegation.
    (4) He failed to interview Mr McLean.

53. We accept Mr Magnante's unchallenged evidence that the team he managed doubled in size over this period which impacted on his workload. We also accept his evidence that having made his decision following his meetings with Mr Potter and Mr Ellis he had not conveyed the outcome of his investigation sooner because he had misplaced his meeting notes and also because of workload pressure we find that the resulting delay was unreasonable. This delay was a further deficiency of his investigation.

54. We find that there several reasons for these defects:

    (1) Mr Magnante lacked experience and training in conducting grievance investigations.
    (2) He did not perceive that the claimant's complaints were serious, nor that they related to the claimant's race nor that they warranted a thorough investigation. Nor did he understand that the claimant was intent on a formal process.
    (3) He was busy and failed to prioritise this investigation.

    We do not therefore find that the reason for the inadequacy of this investigation was the claimant's race.

    <u>Substantive appointment of Mr Potter</u>

55. Mr Potter was engaged by the respondent as an agency worker when the allegations which the claimant complained about are said to have taken place. In 2018 Mr Potter successfully applied for a substantive role and his appointment took effect on 6 August 2018. This decision was confirmed on 14 May 2018.

56. Although Mr Magnante took no part in this selection process, as the recruiting manager he had the authority to block Mr Potter's appointment, if he felt this was warranted. He did not actively consider intervening in Mr Potter's appointment. We do not find that Mr Magnante's inaction in failing to block Mr Potter's substantive appointment was significantly influenced, consciously or unconsciously, by the claimant's race. We have found that Mr Magnante did not understand that the claimant was complaining of racial harassment nor did he investigate the effigy allegation. We have found that this was not because of the claimant's race. Having completed his limited investigation into the claimant's complaints, he had concluded by the date of Mr Potter's appointment that these complaints were unfounded. Mr Magnante therefore had no cause for concern in relation to Mr Potter.

57. The claimant says that he became aware of Mr Potter's appointment when he saw Mr Potter at work dressed in the respondent's uniform which he would not have worn when he was an agency worker. Although the claimant was unclear on the date, it is likely that it was around August 2018. We accept that this was unwanted by him. He had made several complaints about Mr Potter including one which the respondent accepted amounted to racial harassment. He felt that Mr Potter's conduct was being condoned and rewarded.

58. Mr Potter was recruited for night work which meant that he and the claimant, who worked on the day shift, did not work the same shifts. Mr Potter was deployed to day shifts between 14 July – 2 September 2019 for training purposes. The claimant says that this precipitated a period of sickness absence between 8 – 30 July 2019 and 19 August – 8 September 2019 with stress and anxiety. However, as can be seen from these dates, the claimant was already on sick leave when Mr Potter was redeployed temporarily on the day shift. He then worked alongside Mr Potter for almost three weeks before he had a second episode of sickness absence. This was more than a year after Mr Potter's appointment.

Formal grievance – Cain investigation

59. The claimant submitted a formal written grievance on 14 August 2018 in which he made the same three complaints against Mr Potter that he had made to Mr Magnante on 16 January 2018. In lodging this grievance the claimant wrote "As a person of Afro Caribbean Ethnicity…[Mr Potter] knew exactly what he…was doing when he accused me of assaulting him, after being caught out". This was the first time the claimant referred directly to his race in the context of his complaints.

60. For reasons which were not explained, Mr Magnante waited over a month to instruct Mr Cain to conduct a grievance investigation. Mr Cain was one of his direct reports and was selected because he was based in the Train Modification Unit and had had no direct involvement with the claimant or Mr Potter. Mr Magnante was unable to provide Mr Cain with any records of his own investigation as he had not retained his notes.

61. In his evidence, Mr Cain said that he had had training on conducting grievances some eight or nine years before. As this was only his second

grievance investigation Mr Cain relied on Qaiser Mahmood, a People Management Advice Specialist, for advice on conducting this process. Mr Mahmood suggested he meet with the claimant to explore an informal resolution of his grievance. The claimant complains about this. He says that this was not appropriate: he had raised a formal complaint with Mr Magnante in January 2018 and had waited seven months for his outcome and he had lodged a formal grievance, as Mr Magnante had advised. We do not find that this was a detriment. The suggestion to explore an informal resolution of the claimant's grievance was sensible and made by Mr Cain following HR advice. The claimant was under no compulsion to agree to this and it did not, in our view, put the claimant at a disadvantage.

62. This informal meeting took place on 24 September 2018 when the claimant confirmed that he wanted to proceed with his formal grievance. This meeting then became a formal investigation although Mr Cain did not take a formal record of it. Mr Cain found that the claimant was reluctant to provide dates for his allegations. As we found when he gave evidence, the claimant was not so much reluctant as incapable of providing a clear timeframe for his allegations. We accept that this lack of clarity in relation to the timeframe presented its own challenges to Mr Cain as it had to Mr Magnante before him. The claimant was, however, able to provide specific details for each allegation and he referred to witnesses to two of these allegations.

63. Mr Cain's initial investigation consisted of meetings with Mr Magnante and Mr McLean in late September 2018 with each manager sending him a written account of the steps they had taken, on 15 October 2018.

    (1) In respect of the assault allegation, Mr McLean said that Mr Potter had accused the claimant of assaulting him and the claimant had denied this allegation, whereas Mr Magnante reported that Mr Potter had denied making this allegation and Mr Ellis's evidence had been that the claimant had not assaulted Mr Potter. Mr Potter had therefore given conflicting accounts to these managers in relation to this allegation.
    (2) Both managers reported that Mr Potter had denied taking the claimant's charger from a locked drawer.
    (3) Mr McLean told Mr Cain that the effigy incident had been dealt with in the team brief in April 2016.

64. Instead of investigating these issues further, Mr Cain concluded that there was insufficient evidence to uphold the claimant's grievance. In essence, he concluded that Mr McLean had investigated the charger and assault allegations and the effigy allegation had been dealt with at the team brief. Mr Cain drafted an outcome letter on 10 October 2018 to this effect although he did not send this to the claimant immediately. He instead wrote to the claimant to invite him to a grievance outcome meeting later that month.

65. This did not amount to an adequate investigation. Like Mr Magnante, Mr Cain had failed to establish all the facts as he had not investigated all of the claimant's allegations with each potential witness. Save for Mr McLean, Mr Cain had not interviewed any of the potential witnesses whom

the claimant had identified in his grievance i.e. Mr Cudjoe-Cole, Mr Ellis or Mr Metha, nor had he interviewed the alleged perpetrator, Mr Potter. Further, as we have already found, the reports from Mr McLean and Mr Magnante demonstrated that there was a conflict in the limited evidence which had Mr Cain obtained that warranted further scrutiny. Mr Cain, as with Mr Magnante, failed at least initially to grasp that the claimant had made serious allegations against Mr Potter which required investigation under the Grievance Policy. This led to unreasonable delay. The claimant had submitted his formal grievance more than three months earlier.

66. We find that the reasons for this failure to complete an adequate investigation at this stage were that Mr Cain did not initially perceive that these complaints were serious nor did he believe that they warranted a thorough investigation, and also that Mr Cain was inexperienced in conducting grievance investigations and had relied on HR advice. We do not therefore find that this was because of the claimant's race.

67. The claimant replied to Mr Cain on 15 October 2018 when he questioned whether an investigation had been undertaken and queried the value of an outcome meeting in the absence of one. His evidence to the tribunal was that he was in effect refusing to have an outcome meeting without an investigation. The claimant also referred to the appointment of Mr Potter:

> "As you can imagine my concerns are real, had this investigation taken place when reported on the 16th 01/18 then any offers of full contractual employment to the person with whom racially acted/bullying inappropriate [sic], stole and continued to victimised [sic] me by spreading rumours, would never have taken place whilst this matter was ongoing. Regardless of any interaction since these events between myself and named person the fact is these acts cannot be condoned…"

68. Mr Cain decided to proceed with the outcome meeting. This was rescheduled on 22 November 2018 when the claimant was given an outcome letter which was identical to Mr Cain's draft letter dated 10 October 2018. When the claimant challenged Mr Cain's investigation he agreed to withdraw his outcome letter and to proceed with an investigation, and interview the witnesses that the claimant had identified.

69. Mr Mahmood wrote to the claimant on 4 December 2018 to confirm that "As you pointed out that the investigation has not been as thorough, we have decided to investigate your complaint further." Mr Mahmood erroneously referred to this as a grievance appeal. This was incorrect as Mr Cain had withdrawn his initial grievance outcome. Although this mischaracterisation was misleading it did not impact on the grievance process itself.

70. The claimant wrote to Mr Mahmood on 10 December 2018 when he noted in relation to the assault allegation "Although I am of Afro-Caribbean descent, I am not a violent or aggressive person as Phil Potter is trying to portray me."

71. More than four months after the claimant's grievance was initially referred to Mr Cain, he interviewed the following people between 17 January – 13 February 2019:

(1) Mr Potter who: denied breaking into the claimant's drawer and taking his charger and said he had just moved the charger from one power point to another; denied alleging that the claimant had put the racist effigy in the changing room; said that he had denied that the claimant assaulted him when asked by Mr McLean; said that he and the claimant had a mutual dislike of each other.

(2) Mr Austin who confirmed that he had found the effigy in the changing room and did not understand that it was a racially offensive object.

(3) Mr Metha who said that Mr Potter had accused the claimant of putting the effigy in the locker room.

(4) Mr Cudjoe-Cole who said that: Mr Potter had told him that the claimant may have put the effigy in the locker room; the claimant's phone charger had gone missing for two weeks and reappeared in Mr Potter's possession and when confronted about this he denied stealing the charger and said that it was his own charger; Mr Potter had a reputation for stealing and was not challenged by his supervisors.

(5) Mr McLean who said that: Mr Potter had accused the claimant of assaulting him; he believed that Mr Potter had used the claimant's charger without permission; he had heard the rumour that the claimant had placed the effigy in the locker room. Mr McLean concluded:

> "Looking back, I believe that it is a combination of little things that has led Neil [the claimant] to raise this grievance. There was the back talk about the rumour, the phone charger, someone weeing near where he worked and his toolbox station being tampered with. There is no proof to accuse anyone of these things but it is a combination of all of these things. Neil raised this to Ago [Magnante] but it was not dealt with correctly and there was a lack of action."

72. Mr Ellis declined to be interviewed.

73. The claimant agreed in his evidence to the tribunal that at this point Mr Cain's investigation was thorough. We agree that the investigation which Mr Magnante eventually conducted was adequate.

74. Mr Cain drafted an outcome letter on 15 February 2019 in which he upheld all of the claimant's complaints which he recited as follows:

(1) The alleged theft of a phone charger from the claimant by Mr Potter.

(2) The alleged spreading of a rumour by Mr Potter that the claimant was responsible for the placing of a racist effigy in the locker room. Mr Cain accepted that the team brief had not dealt with this issue.

(3) The alleged assault upon Mr Potter by the claimant. Mr Cain noted that Mr Potter had stated that no assault had taken place.

75. This draft outcome letter was redrafted several times between 21 – 26 February 2019 to refer to the claimant's right to appeal and a recommendation that Mr Potter was offered inclusion and diversity training.

76. In the final version of the outcome letter dated 28 February 2019 Mr Cain set out the following findings:

    (1) The charger allegation was amended from one of theft to "a phone charger (which belonged to you) had gone missing". This was upheld.
    (2) The effigy allegation was also upheld.
    (3) The assault allegation was not upheld although Mr Cain confirmed that there was no evidence to suggest that the claimant had assaulted Mr Potter. This conclusion appeared to exonerate the claimant by finding there had been no assault but it revealed that Mr Cain had failed to grasp that the claimant's complaint was that Mr Potter had falsely accused him of assault. Mr Cain also failed to identify the conflict between Mr Potter's evidence that he had not made this allegation with Mr McLean's evidence that he had.

    The outcome letter also referred to an offer of in-house mediation to both parties and "suitable management action to be taken" i.e. in relation to Mr Potter although this was not specified. In his evidence, Mr Cain said that these amendments had been made by Mr Mahmood.

77. The grievance outcome therefore downgraded the charger allegation from theft and failed to address the assault allegation. It also failed to recognise that Mr Potter's actions in relation to the effigy amounted to racial harassment. In his evidence to the tribunal, Mr Cain said that he saw this as a conflict between two individuals who disliked each other. He did not understand at the time of his investigation that this allegation was capable of amounting to racism, although he now accepted it could.

78. The claimant wrote to the respondent on 6 March 2019 to confirm that he was satisfied with the findings but wished to appeal against the

    > "remedies and resolution to bring the case to an end…I am disheartened by the way this complaint has been handled and feels [sic] that there is an attempt to over look the actions and failings of the company. By delaying matters I have remained in an environment that clearly has made me unsettled at work. I have been uncomfortable and victimised which is very serious, my health has deteriorated due to stress of issues you have accepted. Mr Potter has continued to make false statements…"

79. The claimant does not complain in this claim about the findings of this investigation or its outcome or resolution.

Conclusions

Direct discrimination because of race

The investigations conducted by Mr Magnante and Mr Cain

80. We have found that Mr Magnante conducted an investigation which was inadequate. This amounted to a detriment. The effect of this was that the claimant's complaints were not investigated thoroughly, they were found to be unsubstantiated and an outcome was delayed. We have found that this was not because of the claimant's race but was because: Mr Magnante

was inexperienced and lacked training in conducting grievance investigations; he failed to understand that these complaints were serious or that they related to the claimant's race; nor did he understand that the claimant was intent on a formal process; he was a busy manager whose team had doubled in number over this period.

81. We have also found that the initial investigation conducted by Mr Cain was inadequate. This amounted to a detriment. The effect of this was that the claimant's grievance was not initially investigated thoroughly and he had to wait another four months for such an investigation to be conducted. We have found that this was not because of the claimant's race but was because: Mr Cain did not perceive that these complaints were serious nor did he believe at least initially that they warranted a thorough investigation; he was also inexperienced in conducting grievance investigations and relied on HR advice.

82. For completeness, applying the burden of proof provisions we do not find that the claimant has established a prima facie case and we do not conclude that there are any facts from which we could infer that Mr Magnante or Mr Cain would have taken any different action had these complaints been made by a White British person against an Afro-Caribbean colleague. We find that Mr Magnante would have conducted the same inadequate investigation, and Mr Cain would similarly have conducted the same inadequate initial investigation, had the claimant been of a different racial group. It is also notable that in Mr Cain's case he went on to conduct an investigation which the claimant agreed was thorough and whose findings the claimant accepted.

83. Having found that Mr Magnante and Mr Cain failed to treat Mr Potter's conduct as serious misconduct, we have no hesitation in finding that the effect of Mr Magnante's investigation and Mr Cain's initial investigation was likely to have made the claimant feel that his complaints were not taken seriously by his managers. However, we have found that the reason that these investigations were deficient was not because he was of Afro-Caribbean heritage for the reasons given.

84. This part of the claim fails.

Harassment related to race

<u>The substantive appointment of Mr Potter</u>

85. The respondent agrees that it recruited Mr Potter despite the claimant's allegation of racial harassment against him. We have found that this was unwanted by the claimant.

86. We have found that this was not related to the claimant's race. Objectively there is no link between the selection of Mr Potter for the substantive appointment and the claimant's race. The claimant's complaint is that Mr Magnante failed to intervene to block Mr Potter's appointment. We have found that Mr Magnante failed to understand that the claimant was complaining of racial harassment and having concluded his limited investigation by finding the claimant's complaints unsubstantiated, did not

therefore feel that these complaints were relevant to Mr Potter's appointment. We therefore found that Mr Magnante's inaction in failing to block this appointment was not significantly influenced, consciously or unconsciously, by the claimant's race.

87. This part of the claim also fails.

Jurisdiction

88. It is not necessary to make any findings on jurisdiction because of our findings above.

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Employment Judge Khan

24/04/2020

REASONS SENT TO THE PARTIES ON

.27/4/2020

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FOR THE TRIBUNAL OFFICE