EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr AP Iyoriobhe **V** **Cerner Limited**

Heard at: London Central **On**: 5, 6 and 9 March 2020

Before: Employment Judge Joffe
Mrs J Cameron
Mr F Benson

Representation

For the Claimant: In person

For the Respondent: Mr T Perry, counsel

JUDGMENT

1. The claimant's claims of direct race discrimination are not upheld.

2. The claimant is ordered to pay the respondent the sum of £5500 in costs pursuant to rule 76 of the Employment Tribunals Rules of Procedure 2013.

WRITTEN REASONS

Claims and issues

1. The claimant brought complaints of direct race discrimination. The issues were agreed at a case management hearing in front of E J Stout on 6 November 2019 and are as follows:

Time limits / jurisdiction issues

(i) Were all of the claimant's complaints presented within the time limits set out in section 123(1)(a) of the Equality Act 2010 ("EQA")?

(ii) if not, would it be just and equitable to extend time under s 123(1)[b) EQA?

EQA, section 13: direct discrimination because of race

(iii) It is not in dispute that the respondent subjected the claimant to the following treatment:

a. Not permitting him to attend the training conference at the company's headquarters in Kansas City in August 2018 or thereafter (although the respondent maintains it provided virtual training as an alternative in December 2018);

b. Dismissing him.

(iv) 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 the following comparators: Satyen Gotecha, Faisal Ahmed, Richard Betteridge. Prashanth Peddaayyavaria and/or hypothetical comparators.

(v) If so, was this because of the claimant's race (the claimant is black African)?

Remedy

(vi) To what compensation, if any, is the claimant entitled?

(vii) If the claimant was discriminated against in relation to his dismissal and the remedy is compensation:

a. what, if any, deduction or limitation should be made to the award to reflect the chance or probability that the claimant would have been lawfully dismissed either at the time of dismissal or later?

b. should any deduction be made for contributory fault?

c. did the respondent unreasonably fail to comply with a relevant ACAS Code of Practice. If so, would it be just and equitable in all the circumstances to increase any compensatory award, and if so, by what percentage, up to a maximum of 25%, pursuant to section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992 ("section 207A")?;

d. alternatively, what (if any) state benefits has the claimant received following dismissal and should they be taken into account as reducing the award?

Findings of fact

2. The Tribunal heard evidence from the claimant on his own behalf and, for the respondent, Charlie Evans, senior engagement owner, Gavin Cater, director of population health analytics and performance improvement and Dan Catt, director and nursing executive. There was a bundle of some 294 pages and we read the documents to which we were referred by the parties.

3. The respondent is an information technology company which provides products and services to the healthcare sector. For the purposes of these claims, the claimant identifies his race as black African and his nationality as non British.

4. On 29 May 2018, the claimant commenced employment as a senior business intelligence developer. His previous job history included work in the NHS and his jobs immediately prior to his position with the respondent were for North West London CCG and a healthcare trust in Oxford. We understood that this role involved IT work which was concerned with analysing reports on NHS data. We also understood that that was a particular kind of data and that the claimant had some expertise in using it. Very broadly that work involved use of inter alia data interrogation tools called tableau and SQL. The claimant's evidence was that he had experience with SQL but he was not familiar with the intermediary tools used by the respondent.

5. The claimant's employment contract provided for a nine month probationary period.

6. Under the heading 'duties', there was this provision: 'The Associate's duties will be to design and develop reporting assets utilising the Enterprise Data Mart and business intelligence tools to provide consistent, reliable and automated delivery to the user.' We understood SQL and tableau to fit into the category of 'business intelligence tools'.

7. Mr Cater was one of a panel of three who appointed the claimant and was initially to be his line manager in the Population Health Analytics Team. Once a person was selected for recruitment, the arrangements, including arrangements for induction training (which training was known as 'Compass') were made by the respondent's HR recruitment team.

8. It was not clear in evidence exactly what, if any, discussions the claimant had with HR about getting a visa to go to the United States for Compass training, which at that time was delivered by the respondent in Kansas City.

9. The claimant required a visa to travel to the US as he is not a British nor a US citizen.

10. Mr Evans was the claimant's line manager from very shortly after the claimant started work. The team had been growing and was restructured. Mr Evans reported to Mr Cater.

11. The work the respondent does is highly specialist and uses specialist software. Training in the Population Health Europe team was provided on the job, in part by a team member who acted as a 'preceptor'.

12. The respondent told the Tribunal that the claimant's preceptor was Ben Bell, an experienced member of the team who had delivered onboarding training for other colleagues.

13. The claimant said that his preceptor was Richard Hume, who did not assist him and talked down to him and belittled him. He said that he raised this with Mr Evans. He said that the whole team complained about Mr Hume.

14. The claimant also said that, although Mr Bell was in his team, he worked on a different project.

15. We concluded that Mr Bell was initially the claimant's preceptor. At some point it appears that Mr Bell ceased to be the claimant's preceptor and Mr Hume took over. The claimant did complain to Mr Evans on one occasion about Mr Hume and Mr Evans had a word with Mr Hume. The claimant did not raise the issue again

16. The respondent's witnesses told us, and we accepted, that role specific training was carried out on the job by the preceptor and others in the team. This included aspects of technical training. The claimant shadowed another member of the team to develop skills with clients.

17. Mr Bell sent the claimant an email on 29 May 2018 attaching 'a list of links which are going to prove invaluable to you in the next couple of weeks.' This included links to, for example, a HealtheEDW overview. HealtheEDW was an inhouse business intelligence tool which was based on tableau and contained some SQL software.

18. The respondent's position was that, with the claimant's underlying knowledge of tableau and SQL, he should have been able to get up to speed on HealtheEDW quickly. The claimant told the Tribunal that he felt he needed training.

19. Mr Bell said further in the 29 May 2018 email that he would run the claimant through the onboarding and 'any questions please shout up, I've onboarded everybody so there aren't any stupid q's I've probably heard it before.'

20. The claimant was working on a project called the 'dashboard project' and he received specific training relating to that project. Mr Evans had a weekly one-to-one with the claimant where they could discuss training or assistance the claimant might require.

21. We were provided with the claimant's detailed training record which showed that the claimant undertook some training by way of self study (online) in early June including topic such as HealthEIntent Platform Data.

22. The claimant denied that this was 'technical training' because he said it covered theory and not the practical work.

Nature of Compass training

23. It was the claimant's case that Compass training included technical training which would have helped him to succeed in his role. He said he would have also had the opportunity to network with experts who could have assisted him.

24. It was the respondent's case that Compass training was provided for employees of all types and was not job specific. The respondent has 30,000 employees globally and there might be 100 together in a room at the same time being trained at the Compass training event. It focussed on the global group's history, ethos and values and also provided some training about company policies and procedures. Part of the purpose of the event was to welcome people to the company. It would not be possible or necessary to provide technical training on the respondent's hundreds of products to all of its employees in the course of Compass training. The expertise which the claimant needed was better provided by British colleagues working on similar projects than by US colleagues he might meet at Compass training. Others in the claimant's team were expert in using the relevant technology.

25. The Compass training itself takes two days but commonly some other training and networking opportunities would be bolted on; the extra training would

depend on whether there was some relevant training on offer at the venue at the time. The plan for the claimant when he started employment was for him to stay for five days in Kansas City for training.

26. The respondent no longer routinely sends employees to Kansas City for Compass training due to the cost.

27. The description of the training in the Compass agenda we saw did not suggest that any of the training was what could be called technical training. The claimant pointed out topic titles such as 'global approaches to healthcare' and 'delivering value' but it did not appear to us from the evidence we heard that those sessions provided any sort of technical training. We also heard that the Compass package was training provided to, for example security guards, personal trainers and HR people. The claimant said that colleagues who came back from Compass training said that they had had technical training on inhouse tools; but it appeared to be the luck of the draw what extra training was available on any particular visit to Kansas City.

Claimant's employment

28. On 11 June 2018, Mr Evans wrote to Sonia Leite Velho in recruitment asking what the process for getting the claimant to Kansas City for Compass was. He said that the claimant was unclear what steps he needed to take to get his visa and that it would be helpful to know the time frame.

29. On 12 June 2018, Ms Leite Velho wrote back to Mr Evans to say that colleagues were working on the issue and the claimant would shortly receive information. The likely timescale was mid-July but it depended when the visa came though. Ms Leite Velho suggested that they could try to send the claimant at the same time as another employee, Faisal, on 6 – 7 August. Mr Evans replied on 25 June to say it would be good for the two to go together and Ms Leite Velho thanked him for confirming the arrangement.

30. The claimant's contractual hours were 8:30 am to 5:30 pm but he was frequently late after he commenced employment. He was commuting from

Oxford. A daily call was held with the whole dashboard project team at 9 am daily (the 'scrum meeting').

31. Early in his employment, the claimant spoke to Mr Evans informally about changing his working hours due to his childcare commitments.

32. On 19 June 2018 Mr Evans wrote to the claimant saying that he had noticed the claimant had arrived at work at 10:30. He said that if the claimant was not able to get to the office before 10 he should let Mr Evans know. He would soon be starting client meetings which he could not be late for.

33. The claimant said he had joined the scrum meeting so he had let Mr Evans know.

34. The claimant wrote to Mr Evans asking to work from home one day per week to allow him to pick his child up from the childminder on time and reduce the stress of commuting from Oxford to London.

35. He asked for his normal office hours to be 10 am to 6 pm – this was a shorter working day than his contractual working day but this appears to have been an error and not an attempt to shorten his working hours; his offer was ultimately to work 10 am to 7 pm.

36. Mr Evans discussed the matter with Mr Cater.

37. On 4 July 2018, the claimant requested to work 10 am to 7 pm and from home on Fridays. Mr Cater and Mr Evans discussed the request. They were concerned that the claimant would have 90 minutes a day with no support from team members in circumstances where he had only recently started employment, but they agreed to a trial of the working pattern from end July to end August.

38. On 4 July 2018, Mr Cater wrote to Ms Leite Velho and Mr Evans to say 'Given the emergence of some fairly challenging flexible working needs from Patrick, I'd like us to consider whether we should focus on helping him to make his flexible working arrangements work first, before he goes to the US. Thoughts?'

39. Ms Leite Velho wrote back on 5 July 2018 suggesting that ‘we might have the option to do virtual Compass’ and asking if there was a need for the claimant to go to Kansas City to do other meetings / training.

40. Mr Cater then wrote back to say: ‘not that I can think of’. He said that they would normally bolt on a ‘tableau course / KT’ but that the claimant did not need that as he already had those skills.

41. On 13 July 2018 Ms Leite Velho reported to Mr Evans and Mr Cater that the claimant had a visa appointment on 3 August and was enthusiastic about the trip to Kansas City so maybe it might be beneficial for him to get to know the respondent better. She said that she had asked about virtual Compass training and that was also an option. She said that this was a decision for Mr Cater and Mr Evans

42. On 19 July 2018, Martha Presser, HR manager, wrote a letter in support of the claimant’s visa application saying:

    ‘It is imperative for all of Cerner’s new employees to attend this induction program, in order for them to meet their new colleagues, increase their knowledge about the company in regards to procedures and policies and learn basic skills for them to begin their positions within their respective entities.’

43. The letter also said:

    ‘It is essential for our company to provide the orientation in the US at the beginning of the employment period for identified positions’.

44. Ms Presser is based in the US. Neither Mr Cater nor Mr Evans played any part in drafting the letter and they did not see it at the time it was drafted and sent.

45. Mr Cater emailed Mr Evans on 23 July 2018 saying that he and Ms Leite Velho had spoken and he had asked that the claimant’s trip to Kansas City be delayed until his flexible working request had been properly trialled. A trip to Kansas City in the middle would compromise the trial and ‘also we need to

make sure that we (Patrick and Cerner) have landed on a working arrangement that works for everyone before progressing.'

46. Mr Evans said that he told the claimant in a one-to-one meeting thereafter that the trip to Kansas City for Compass was on hold until the trial period had been completed.

47. He said that the claimant would often ask during one-to-one meetings when he could go to Kansas City for Compass and he would tell the claimant that they needed to complete his flexible hours trial and and to see an improvement in his timekeeping and the quality of his work first.

48. The claimant denied that he had been told that and said that Mr Evans would purport to be intending to chase up the training. The claimant said that Mr Evans made empty promises.

49. Mr Cater told the Tribunal that he and Mr Evans felt it was important for the claimant to improve his performance and timekeeping before he had a week-long absence from work.

50. Shortly before the flexible working trial started, Mr Evans and Mr Cater had a discussion with the claimant about concerns about his ability to meet the requirements of his role during his working hours. They felt that his knowledge, quality of work and output were not what they would expect for a senior member of the team at his stage. They were concerned that his poor timekeeping and lateness were affecting his work.

51. Around the start of the trial period, Mr Evans saw the claimant working 8:30 – 5:30. In discussion it transpired that the claimant did not need to work the amended hours during the school holiday period. Mr Evans says they agreed to start the trial in September. The claimant described what happened as Mr Evans stopping the trial abruptly. Mr Evans considered it would not be a trial of the revised hours if the claimant was not working the revised hours.

52. The arrangement was then that the trial would start in early September and that was what in fact happened.

53. On 13 August 2018, in the meantime, there was messaging between the claimant and HR about the claimant having received his visa. He was told that Mr Cater was currently on holiday and would have to decide the claimant's dates for Compass training. The HR representative involved, Patricia Nosek, told the claimant that she had had to apply for a visa too and had only attended Compass a year after starting.

54. On 6 September 2018, in a one-to-one with the claimant, Mr Evans raised concerns which included the claimant being late even for his later start time and asking to take work home or take leave at very short notice.

55. In an email of the same date, Mr Evans raised concerns about the consistency of the claimant's work patterns and whether he was able to meet his work and personal commitments. He said in the email that the claimant was often late and asked to work from home or take leave at very short notice. He said that this was difficult for him to manage and unfair on others in the team. He was not able to judge the claimant's performance as he was not consistently at work.

56. Mr Evans said that the claimant must consistently meet his agreed flexible working hours 10 am – 7 pm and give adequate notice for leave and requests to work from home. The situation would be reviewed throughout the next four weeks.

57. In early October 2018, the claimant was on holiday and due back to work on 10 October. He did not appear at work and did not make contact with Mr Evans. Mr Evans called the claimant on his mobile phone and the claimant answered and said he was in Amsterdam waiting for a flight. He arrived at work at 2 pm, explaining he had lost his wallet and had to get a bus into London. The claimant sent an email later that day apologising and saying he should have found a way to communicate with Mr Evans.

58. Mr Evans took advice from HR and was advised that he should speak with the claimant about his concern that the claimant was not meeting the requirements of his role during his flexible hours and therefore the trial would be withdrawn.

59. On 11 October 2018 Mr Cater and Mr Evans had a meeting with the claimant to say that the flexible working trial had been unsuccessful.

60. On 15 October 2018, the claimant sent an email to Mr Cater and Mr Evans; he expressed his appreciation for the support they had provided to him as a single parent which he described as 'incredibly generous and helpful'. He said that it appeared that the initial arrangement to start work at 10 and finish at 7 had not worked well 'for any of us'.

61. He then made a further flexible working request: to work his contractual hours of 8:30 am – 5:30 pm with one day at home.

62. Mr Evans and Mr Cater met with the claimant after receiving the email to discuss that request and explained that they could not authorise working from home on Fridays due to the problems which had arisen during the flexible work trial. The claimant said that he would move to London, leaving his daughter with his church pastor, to make sure that he was at work on time. Mr Evans and Mr Cater told him that if they saw an improvement in his work and time-keeping, they could review the possibility of him working from home.

63. On 11 December 2018, Ms Leite Velho emailed Mr Cater and Mr Evans to say that the claimant must do virtual Compass training by the end of the year, apparently for compliance reasons. She said that the next available session was 18 December and that the claimant would need to book that day to attend and 'we usually advise to book a room for the entire day'.

64. Mr Cater replied to say that this plan seemed sensible but he would let Mr Evans respond as he had better knowledge of the claimant's commitments. There is no email in response from Mr Evans and it is not clear whether he ever read or engaged with this email.

65. There is an email we saw dated 14 December 2018 to the claimant and four others which provided an agenda for the virtual Compass training and links to access it.

66. There was then an email dated 19 December 2018 to the claimant and three others congratulating them on completing Compass training.

67. The claimant's record of training records him as having undertaken the virtual Compass training on 19 December 2018.

68. The claimant told us that he had not done the virtual training. The respondent's evidence was that the system was essentially automated. The congratulations emails would be produced when the training was completed and the entry in the training record would be made when a person who was logged in correctly completed the training. We accepted on the basis of that evidence that the claimant had in fact done the virtual Compass training.

69. There was no evidence that the claimant had asked the respondent for training apart from Compass training or identified particular training he required.

70. There were emails dated 20 December 2018 between Mr Evans and Ms Leite Velho. Mr Evans had been speaking with the claimant and the claimant had expressed concern about the problem of having a visa he had not used. Mr Evans referred to the fact that they had thought of having the claimant attend virtual Compass but asked whether the claimant could attend Kansas City when another employee, Shorifull, attended. Ms Leite Velho replied that 'for compliance reasons he will need to attend the virtual Compass session before the end of the year'.

71. On 2 January 2019, Mr Evans was asked by Lisa Butler in HR to set out details of when the claimant was working from home and what days he was late. Mr Evans replied, setting out some details of lateness and home working and also saying there were other instances of both which he had not kept records of. We were not told why these enquiries were being made but note that that claimant was reaching the end of his probationary period.

72. On 25 January 2019, the claimant was asked to attend a formal meeting to review his performance during his probationary period. The invitation email from Mr Evans informed him that extension of probation or termination of the claimant's employment were possible outcomes.

73. The claimant's evidence to us was that he had asked for a meeting with Mr Evans and Mr Cater to discuss Compass training and that is what he believed this meeting was being organised for. This was difficult to understand, given the email.

74. On 30 January 2019, Mr Evans and Mr Cater held the meeting with the claimant to review his probationary period. Ms Butler took notes. Mr Evans said that the quality of the claimant's work was not meeting the standard expected of a senior business intelligence developer and that the claimant had not taken the lead on his element of the dashboard project as expected. He said that there had been some improvement in timekeeping and attendance but these had recently become an issue again. The claimant acknowledged that his attendance and timekeeping had initially been 'scrappy' but said that these had improved.

75. Mr Evans adjourned to consider his decision. He told the Tribunal that he concluded that, based on the claimant's performance to date, he was not confident that he would be able to achieve the required improvement during any extension to his probationary period. He decided to terminate the claimant's employment and reconvened the meeting to tell him so.

76. The claimant did not mention not having received Compass training during the meeting.

77. The evidence we heard was that the claimant's managers perceived there to be a connection between the irregularities in his attendance and his poor performance. The claimant was not able to make full use of the training and support available from his preceptor and within his team because he was not always working the same hours as others.

78. After the review meeting, the claimant asked to speak with Mr Evans and Mr Cater. He said that he knew he had not performed to the level expected of a senior role and asked if he could be demoted to a more junior business developer role. There was no such role available at the time and accordingly none was offered.

79. Mr Evans sent the claimant a letter dated 1 February 2019 terminating his employment with one week's notice. He informed him of his right to appeal.

80. On 8 February 2019, the claimant sent an email setting out reasons for appeal. In essence these were:

- That he believed he had met the requirements of his role;

- That he did not believe his termination was performance related but that Charlie 'has something personal against me'.

81. On 15 February 2019, the claimant was sent a letter convening an appeal hearing.

82. On 6 March 2019, the claimant attended an appeal hearing with Dan Catt, director and nursing executive. The main points made by the claimant at the meeting were that he believed that Mr Evans panicked / was unhappy about the claimant's childcare issues and that Mr Evans had caused his Compass training to be delayed. He seemed to suggest at one stage of the appeal hearing that Mr Evans dismissed him because the claimant was putting him under pressure about the Compass training. He referred to other staff being late.

83. There was no mention of race discrimination by the claimant at the appeal hearing. He told us that he was being cautious and giving the respondent an opportunity to recognise and rectify its mistakes; he was hoping that he would be reinstated on appeal.

84. On 7 March 2019, the claimant emailed Mr Catt attaching a copy of his visa. He set out his view that the Compass training would have been beneficial to him and that it had been unfair not to provide him with it. He reiterated his belief that Mr Evans had terminated his employment because he felt pressured about the claimant's Compass requests.

85. Mr Catt them spoke with Mr Evans and Mr Cater, who explained their performance concerns and the reasons why the claimant had not attended Compass training in Kansas City.

86. On 18 March 2019, Mr Catt sent the claimant a letter rejecting his appeal.

87. The claimant did not at any stage suggest that he had been subjected to race discrimination until after his appeal was complete. He told us that he was giving the respondent a chance to fix the situation and also said that he was hooping to continue working for the respondent. When cross-examining the respondent's witnesses, he suggested that he did not know where to find relevant procedures, presumably the respondent's grievance procedure.

Lateness of other colleagues

88. The claimant said that teammates would come late to work. He named Deedar and Sudhari and Mr Betteridge. Sudhari joined Mr Evans' team from a role where she already had flexible working arrangements. These were trialled in Mr Evans' team and she had an agreed start time of 9:30. Deedar also joined from elsewhere in the business and was not on probation. He had some time management issues which were resolved after intervention by Mr Evans.

89. Mr Betteridge was managed by Mr Cater. He had occasional lateness but Mr Cater told us that he never had lateness concerns about Mr Betteridge.

Comparators

90. So far as the named comparators were concerned, all had attended Compass training in Kansas City; only one required a visa to travel – Prashanth Peddayyyavaria. He had acquired a visa by the time his employment with the respondent commenced.

91. Satyen Gotecha, who was managed by Mr Evans, was dismissed for poor performance during his probation. Faisal Ahmed was not dismissed whilst on probation; he was managed by Paresh Patel.

92. We also heard about Esther Gathogo who was a new starter of black African ethnic origin albeit British nationality. She attended Compass training in

November 2018. Her immediate line manager was Billy Short, who reported to Mr Cater.

Submissions

93. The claimant and Mr Perry made oral submissions. We have carefully taken into account all of the parties' submissions but refer to them below only insofar as is necessary to explain our conclusions.

Law

94. Direct discrimination under section 13 Equality Act 2010 occurs when a person treats another:

- Less favourably than that person treats a person who does not share that protected characteristic;
- Because of that protected characteristic.

95. For an individual to be an actual comparator for the purposes of a direct discrimination claim, there must be no material difference in their circumstances: s 23 Equality Act 2010. Whether the situations of a claimant and his or her comparator are materially different is a question of fact and degree: Hewage v Grampian Health Board [2012] ICR 1054, SC.

96. In a direct discrimination case, where the treatment of which the claimant complains is not overtly because of the protected characteristic, the key question is the "reason why" the decision or action of the respondent was taken. This involves consideration of mental processes of the individual responsible; see for example the decision of the Employment Appeal Tribunal in Amnesty International v Ahmed [2009] IRLR 884 at paragraphs 31 to 37 and the authorities there discussed. The protected characteristic need not be the main reason for the treatment, so long as it is an 'effective cause': O'Neill v Governors of St Thomas More Roman Catholic Voluntarily Aided Upper School and anor [1996] IRLR 372.

97. This exercise must be approached in accordance with the burden of proof provisions applying to Equality Act claims. This is found in section 136: "(2) if there are facts from which the Court could decide, in the absence of any other explanation, that 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."

98. Guidelines were set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258 regarding the burden of proof (in the context of cases under the then Sex Discrimination Act 1975). They are as follows:

(1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s.41 or s.42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal

will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word 'could' in s.63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense

whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

99. The tribunal can take into account the respondent's explanation for the alleged discrimination in determining whether the claimant has established a prima facie case so as to shift the burden of proof. (Laing v Manchester City Council and others [2006] IRLR 748; Madarassy v Nomura International plc [2007] IRLR 246, CA.)

100. We bear in mind the guidance of Lord Justice Mummery in Madarassy, where he stated: '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.' The 'something more' need not be a great deal; in some instances it may be furnished by the context in which the discriminatory act has allegedly occurred: Deman v Commission for Equality and Human Rights and ors 2010 EWCA Civ 1279, CA.

101. The fact that inconsistent explanations are given for conduct may be taken into account in considering whether the burden has shifted; the substance and quality of those explanations are taken into account at the second stage: Veolia Environmental Services UK v Gumbs EAT 0487/12.

102. Although unreasonable treatment without more will not cause the burden of proof to shift (Glasgow City Council v Zafar [1998] ICR 120, HL), unexplained unreasonable treatment may: Bahl v Law Society [2003] IRLR 640, EAT.

103. We remind ourselves that it is important not to approach the burden of proof in a mechanistic way and that our focus must be on whether we can properly and fairly infer discrimination: Laing v Manchester City Council and anor [2006] ICR 1519, EAT. If we can make clear positive findings as to an employer's motivation, we need not revert to the burden of proof at all: Martin v Devonshires Solicitors [2011] ICR 352, EAT.

Conclusions

Issue: In not permitting the claimant to attend the training conference at the company's headquarters in Kansas City in August 2018 or thereafter did the respondent treat the claimant less favourably that it treated or would have treated others ("comparators") in not materially different circumstances? The claimant relies on the following comparators Satyen Gotecha, Faisal Ahmed, Richard Betteridge, Prashanth and/or hypothetical comparators.

If so, was this because of the claimant's race (the claimant is black African)?

104. We concluded that those named by the claimant were not actual comparators because they were not in materially the same circumstances. Most of those named did not require a visa. There were therefore no specific inhibiting factors or reasons for delay in respect of the Compass training.

105. Only Prashanth Peddaayyavaria did require a visa, but he had obtained his by the time his employment commenced

106. So Mr Peddaayyavaria was in a position to go to Kansas City for Compass training prior to starting work and therefore had his arrangements made by the recruitment team along with those who did not require visas. This was a fairly automatic process, based on the evidence we heard. The claimant was in a different position because, once he had started work, the issue was subject to the involvement of line management and issues of convenience and scheduling. We concluded that Mr Peddaayyavaria's circumstances were materially different from those of the claimant.

The claimant not going to Kansas City prior to the start of his employment

107. The claimant said in evidence that the respondent deliberately did not assist him to get his visa before he started work because he was black. This was not a substantive complaint. Neither Mr Cater nor Mr Evans had any involvement in communications with the claimant at the point when he had been offered the post but not yet commenced employment so whatever happened about arrangements being made by the recruitment team does not cast light on subsequent decisions by Mr Evans and Mr Cater. The claimant also suggested to the Tribunal that the respondent should have waited until he got visa approval before having the claimant start his employment. Again this was not a substantive complaint and our understanding of the evidence was that these arrangements did not in any event involve Mr Evans and Mr Cater.

Lack of Compass training in Kansas City from August onwards: the claimant's substantive complaint

108. There was cogent contemporaneous documentary evidence which supported the conclusion that the respondent's purported reasons for not sending the claimant to Kansas City were their actual reasons – the trial of flexible

working followed by the ongoing attendance and performance concerns leading ultimately to some urgency about the claimant completing the training before year end for compliance reasons which in turn led to the virtual Compass training.

109. Our conclusion was that this was not a case where we had to have resort to the burden of proof because we were able to make positive findings about the reasons why the claimant did not get Compass training in Kansas City.

110. In the alternative, and as a check on our conclusions, we performed the exercise of considering the matter on the basis of the application of s 136.

111. Were there any facts other than a difference in race between the claimant and a hypothetical comparator which might cause the burden to shift, i.e. facts from which we could properly conclude that the claimant's race had played a part?

112. We found no direct evidence which showed race playing a role in the decisions about Compass training. Was there any material from which we could draw inferences?

113. The claimant pointed to the contents of the visa letter as showing that the Compass training was essential to his role. If he was right about that, it might demonstrate unreasonable treatment of the claimant, which, if unexplained, might be a fact or part of a set of facts which caused the burden to shift.

114. However, we found that the agenda and other evidence satisfied us that the Compass training in Kansas City was desirable but not necessary and in particular was not necessary to the claimant's ability to perform his role and understand the technology he was required to use. The training could be delivered remotely. The visa letter, we accepted, had been written by an HR person located in the United States, with a view to obtaining a visa for the claimant and was tailored towards the criteria such an application was required to meet. It was no doubt necessary in order to obtain the visa to suggest that the training was essential. The reference in the letter to 'basic

skills' clearly could not refer to job skills given that the training was provided to everyone from security guards to management.

115. We did not find evidence which we considered would cause the burden of proof to shift. But even if we had, as we have said above, we were satisfied by the respondent's explanations for not sending the claimant to Kansas City for Compass training.

Issue: In dismissing the claimant, did the respondent treat the claimant less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? If so, was this because of the claimant's race?

116. The claimant accepted at various stages, during his employment and at the hearing, that there were issues with his performance, but his case to us was that these arose from the fact that he did not receive Compass training. The claimant's real complaint about the dismissal was that it was the result of what he alleged was the discriminatory failure to send him on Compass training, which he says meant that he did not have the skills to perform his role.

117. We have not found that there was unlawful discrimination in relation to the Compass training and we have not found that the Compass training would have provided the claimant with training necessary to his role.

118. We nonetheless went on to consider whether the dismissal itself was an act of race discrimination.

<u>Does the burden of proof pass?</u>

119. We considered the comparators put forward. Satyen Gotecha was dismissed for poor performance whilst on probation so there was no difference in treatment between Mr Gotecha and the claimant. Faisal Ahmed was in materially different circumstances as he had a different manager making decisions. Richard Betteridge and Prashanth Peddaayyavaria reported to

Gavin Cater but, given the line management chain and Mr Cater's role in the decision to dismiss claimant, they seemed to us to be in sufficiently similar circumstances to be actual comparators.

120. Are there any facts apart from difference in race and difference in treatment which might cause us reasonably to conclude, absent an explanation, that the claimant was treated less favourably than his comparators because of race?

121. There was no evidence of performance issues in relation to either Mr Peddaayyavaria or Mr Betteridge. The claimant pointed to Mr Betteridge's lateness issues but we accepted that these were not significant and did not arise in the same context as the claimant's lateness, which was part of a picture where the claimant was not able to access the training and support he required because of his generally irregular attendance and simultaneously was experiencing performance problems. We therefore did not find that we could draw any relevant inferences from Mr Betteridge's lateness.

122. We considered the fact that the performance issues were relatively lightly documented; we would expect to see a more formal process followed and properly recorded in the case of an established employee who was being performance managed. However, it is not surprising to see a less formal process followed where an employee is still on probation and we did not consider that this was a fact from which we could reasonably draw any inferences, either of itself or in the context of our other findings.

123. We did not find any facts from which we could properly conclude that the claimant's race played a role in his dismissal.

124. If we had found the burden passed, we would have found that the respondent had satisfied us that the dismissal was not in any way connected with the claimant's race but was because of the performance and attendance issues put forward.

125. We considered that, overall, Mr Evans and Mr Cater were supportive and flexible and wanted to make the claimant's employment work if possible, as evidenced by the trialling of the flexible work arrangement.

Other issues

126. Because of our conclusions, set out above, on substantive issues, we did not have to go on to consider the issues relating to time limits or remedy.

Conclusion

127. For the above reasons, we dismissed the claimant's claims.

Costs

138. After we delivered our oral judgment and reasons, the respondent made an application for costs pursuant to rule 76 of the Employment Tribunal Rules 2013 on the basis that it said that there had been unreasonable conduct by the claimant since 3 December 2019, when it sent a 'without prejudice save as to costs letter' to the claimant. This was sent after disclosure of documents and made a number of points about why the claimant's case would not succeed, which points substantially mirror the findings made by the Tribunal. The claimant was invited to withdraw his claims. We were told that solicitor's fees and disbursements from that point were £11,148.48.

139. We reminded ourselves that we had first to consider whether the conditions for making a costs order were met and then whether we should exercise our discretion to make such an order.

140. We asked ourselves whether, as at the date of the costs warning, the claimant should have realised that his claims had no reasonable prospects / were unmeritorious, based on the documents disclosed. We bore in mind that the claimant is an educated professional person able to command substantial salaries.

141. We have found that there were almost no facts from which we could potentially have drawn inferences of race discrimination and ultimately no facts from which we could properly do so. The documents showed that the

respondent had, as we have found, reasons for the claimant's treatment which were not related to race.

142. The claimant's submissions to us suggested that his view is and was at the material time that all he had to show in order to succeed was a difference in treatment and difference in race, a view which legal advice or research would have disabused him of.

143. We note that the claimant was encouraged in the without prejudice save as to costs letter to take legal advice. If he had done so, we think that advice would have been that his claims had no reasonable prospect of success.

144. We looked also at the claimant's ability to pay a costs order. The claimant is the sole shareholder and employee of a company. He pays himself £1000 per month as a salary but the company receives £8500 per month. The claimant said he did not pay himself a dividend but clearly the company he owns is bringing in significant sums.

145. Bearing all of those matters in mind, we concluded that the claimant's conduct in pursuing his claims to a full hearing after receipt of the respondent's without prejudice letter was unreasonable and that it would be appropriate for us to exercise our discretion to make an order for costs.

146. We took account of the claimant's ability to pay by bearing in mind that his work through his own company may not be secure, given the nature of the industry in which he works, and we also bore in mind his position as a single parent. We accordingly concluded that the appropriate sum to award by way of costs was £5,500.

Employment Judge Joffe
London Central Region
09/07/2020

Sent to the parties on:
11/07/2020

For the Tribunals Office