EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss F Ajala	**v**	**1. Herts Young Homeless Group** **2. Mr John Robinson**

Heard at: Watford **On**: 24 to 27 February 2020

Before: Employment Judge Smail
Members: Mrs L Thompson
Mr M Bhatti MBE

Appearances

For the Claimant: Mr J England, Counsel
For the Respondent: Mr K Sonaike, Counsel

Judgment having been promulgated on 22 April 2020, and upon the application of the Claimant on 27 April 2020, the Tribunal provides the following –

REASONS

The Claimant's application to amend the claim to add victimisation.

1. An application to amend the claim has been made at the beginning of the full merits hearing. It was first made by letter dated 5 February 2020 and it is certainly right that in the context of the case it is a late application. The claim was issued on 1 September 2017. The application is a part of a refinement of the issues. A very helpful list of issues, subject to this amendment, has been compiled, with the first draft by the Claimant and agreed with the Respondent, and so the intervention by the newly instructed Claimant solicitors has, overall, been most welcome. Clear criticisms of the manner in which the grievance was conducted was in the original claim and is presented as being relevant to an uplift. The amendment seeks to add it as a claim of victimisation. The grievance most certainly did raise race and the criticisms of how the grievance was handled are put forward now as detriments in the form of victimisation. To our mind, that is a re-labelling. The Respondents have dealt with the grievance in their witness statements. They will be able to give an explanation for how the grievance was handled in any event. So, we are minded to exercise our discretion to allow the

amendment at 18.3 of the list of issues, recognising that there was a protected act on 15 May 2017 in the form of the written grievance.

2. The other detriments put forward at 18.1 and 18.2 rely upon there having been a protected act on 25 April 2017, a verbal one, where the Claimant says she had raised her intention to raise a grievance of discrimination by Mr Robinson. The status of that protected act is not as clear cut. Whilst there is some allusion to the meeting on 25 April in the claim form, it is not set out as a protected act and it is not set out that there were clear detriments flowing from that. To our mind, the Respondent would be evidentially prejudiced from those allegations.

3. Accordingly, we do not allow the amendment at 17.1, 17.2, 18.1 and 18.2 so we will delete those. We allow 17.3 and 18.3.

The Substantive Claims

4. By a claim form presented on 1 September 2017, the Claimant claimed race discrimination, unfair dismissal and holiday pay. The Claimant was employed by the First Respondent from 2008 until 4 June 2017. She was a Finance Manager. The Claimant is black and of Nigerian origin. She is British of nationality.

5. The First Respondent is a charity that provides services to young homeless or those at risk of homelessness in Hertfordshire. The Second Respondent all material times, was a Trustee and the Treasurer of the First Respondent. He has since become the Chair of it. His role is voluntary. He has financial experience in the City and has worked extensively in Africa. He is a white person.

6. At a preliminary hearing on 21 May 2018, Employment Judge Jack held that there had been no transfer of an undertaking between the First Respondent and Visionary Accountants when the First Respondent outsourced some of its finance functions to that company. The reason why there was no transfer was because the work was not fundamentally the same when comparing the work undertaken by the Claimant with the work undertaken by Visionary Accountants. The work done by Visionary Accountants was less than the totality of the work done by the Claimant. Accordingly, Visionary Accountants were released from the proceedings, leaving two Respondents.

7. At that preliminary hearing, Employment Judge Jack also held that the Claimant had been an employee of the First Respondent between 2008 and 1 January 2015 from when the First Respondent had always acknowledged she was an employee. Until 1 January 2015, the Claimant was treated as self-employed, a contractual arrangement had been entered whereby the First Respondent dealt with the Claimant's company. Judge Jack held that in truth, she was an employee all along.

8. This case concerns, at its heart, the alleged redundancy of the Claimant when she was given notice of dismissal on or around 25 April 2017. She was told that her fixed term contract would not be renewed. That of course is a dismissal. Her fixed term contract had been extended on 13 February 2017, from 31 March 2017 to 30 June 2017. She was placed on garden leave following raising a grievance and an appeal against selection for redundancy on 12 May 2017. She left on 4 June 2017 which is the effective date of termination. Whilst the redundancy is at the heart of the case, the Claimant raises earlier issues as well. This is where I adopt and insert the list of issues.

Findings of fact

Nigerian Banks

9. The Claimant alleges that on three occasions between 2010 and 2015, Mr Robinson said words to the effect, whatever you do, do not deposit money in Nigerian banks. The Claimant suggests these words were directly aimed at her because she is Nigerian and/or black. She says there was no need to say these words because the investment policy of the First Respondent was documented and was expressly to invest only in UK regulated banks and with no more than a £75,000 exposure in line with government guarantees. The Claimant tells us these comments were made at finance meetings which would include between four and five members of staff. The Claimant perceives the context of these statements as being consistent with her view that Mr Robinson believed she was suited only to a junior financial role and betrayed an unconscious bias against Nigerians in respect of financial probity. The Claimant is clear in her belief that Mr Robinson had an inherent mistrust in her as a black person of Nigerian ethnic origin. She says that others commented on the inappropriateness of these comments at the time. We do not however have any witnesses about this other than the Claimant and Mr Robinson's own evidence. Mr Robinson does not dispute that he made negative comments about Nigerian banks but he gives the context as being concerned as to where the First Respondent might invest in terms of managing risk. He says Icelandic banks would also have been mentioned as well as new starter banks such as Metro Bank. The Claimant accepted that Metro Bank may also have been mentioned in these discussions. She did not accept that Icelandic banks were. The Claimant accepts that she did not raise any concern at the time about these comments. We return later to our conclusion as to whether there was direct discrimination or harassment in these comments and we deal below with the extent to which the remainder of her complaints disclosed any possibility of a claim of direct discrimination or harassment. There is, of course, the victimisation claim arising from the treatment of the appeal against redundancy and the grievance.

Redundancy

10. In December 2015, it had become clear that the First Respondent was facing a significant reduction in funding. The First Respondent's funding from Hertfordshire County Council was to be reduced by 50 per cent. In mid-2016, the Chief Executive, Helen Elliott, put a proposal to the board to restructure the charity. She recommended a two-stage process of restructuring. The first stage would start in 2016 and the second in 2017. There was a board meeting on 22 June 2016, which set out her proposals and time scale. She wrote a report setting out Phase 1 as involving a restructure of the Senior Management Team and Phase 2, a restructure of front line and support workers. The Senior Management Team was to consist of a Director of Operations, a Director of Business and a Fundraising Manager. The existing managers in the analogous posts were invited to apply for Director roles. There was no advert internally or externally and at the meeting we know from the minutes that it had been agreed to fully cost the second phase before it had taken place.

11. While the Claimant has maintained she should have been considered for the Director of Business role, we find that it was reasonable for the Respondent to have given a prior opportunity to the existing manager, Debbie Wood, first, whose job was at risk at that point. The Claimant did not have the requisite qualifications of a degree and a post graduate qualification. She does hold an HNC and BTEC in Finance and Business. She has also part-qualified as a Company Secretary, but, in so far as these qualifications go, they are a little short of the required qualifications for the Director of Business. Further, the Claimant did not have requisite depth of experience in commissioning in this area and we well understand why it was that the opportunity was given, in the first instance, to Debbie Wood. We do not find that the only reasonable course for the Respondent was to have pooled the Claimant alongside Debbie Wood. It was reasonable to limit it to Debbie Wood. Therefore, there was no need for selection criteria between candidates because there was no pool. There was of course, the job specification and key requirements.

12. There was a board meeting on 21 July 2016 which did not add significantly to the history here.

13. There was a further board meeting on 27 September 2016, and Mr Robinson reported from the Finance Committee. He gave the financial context as follows. The Board were all in receipt of the Finance Committee Profit and Loss Reports and those were taken as read. Mr Robinson raised concerns that net profit was £7,000 behind budget and would possibly be £30,000 behind budget by the end of the financial year. If a significant loss was not to be made, more funds would need to be generated in the second half of the year. He raised concerns that the First Respondent's staff do not have the financial expertise to carry out forecast analysis and asked the board to consider either outsourcing expertise or recruiting a trustee with financial expertise. The Claimant has suggested that that last phrase, recruiting a trustee with financial expertise, has been added by the First

Respondent because she has no recollection of it going back to 27 September 2016. We regarded that as a loose piece of evidence from the Claimant. She was going on recollection only. We do not find that the First Respondent has added those words, as it were altering the minutes significantly after the event.

14. Mr Robinson went on to say that the First Respondent could not absorb costs that the initiatives in the new contract would bring, along with less funding and redundancy costs. Those could impact on reserves. The situation would be clear in a couple of weeks and then decisions regarding best, worst or in-between scenarios regarding funding services could be made. If a decision to outsource financial advice was taken, it wold not occur until the beginning of the financial year in April. The Claimant takes issue here with Mr Robinson's concern that there was not financial expertise to carry out forecast analysis. She claims that she had the ability and did forecast and that this observation by Mr Robinson was symptomatic of his subconscious prejudice against her as a black person and as a person of Nigerian origin that she was suited to minor financial roles only. There is some support in the evidence for the view that Mr Robinson did not regard the Claimant as a Senior Financial Manager. He has referred to her as, essentially, a bookkeeper. These facts are pointed to by the Claimant as confirming her belief that she was underestimated significantly by Mr Robinson and that was symptomatic of his unconscious bias.

15. At this board meeting on 27 September 2016, it was reported that the three Directors had been appointed. The Claimant alerts our attention to the fact that the Fundraising Director was offered paid training for a professional fundraising qualification. She observes that no such paid training was offered to her. But, fundamentally, as at Stage 1 of this redundancy process, we find that the Respondent was acting reasonably in restricting the recruitment to the three Director posts that it did and giving the manager job holders first bite at the cherry.

16. In a supervision on 31 October 2016 with the Chief Executive, Helen Elliott, the Claimant did express her concerns about reporting to Debbie Wood. Ms Elliott explained that part of the restructure process, at Phase 1, was to reduce the number of reports from eight to four to her. It was a consequence of those Stage 1 proposals that there would be a new reporting structure. It was not just Finance who would not be reporting directly to her, but IT and Marketing also.

17. The Tribunal finds that the First Respondent was entitled to rearrange the reporting lines in this way. It was not targeted against the Claimant. It was not a demotion. There is no question of a prima facie case here of race discrimination. We note that the IT Officer, Paul Girelli, and the Marketing Manager, Jenny Rawlings, who were both white, were moved in the reporting structure. This process was not targeted against the Claimant. We also observe that salary levels are not necessarily co-extensive with reporting lines.

18. At a board meeting on 8 December 216, it was recorded that the reduction in the First Respondent's funding was looking to be £700,000 for the next year which meant that different scenarios to cut costs and restructure were being considered. These included outsourcing the back office services. Reducing senior management was also being considered.

19. By email dated 25 January 2017, the entire workforce was alerted to the cuts in funding and the implications of them and redundancies were referred to as a possibility in the attachment to the email.

20. Helen Elliot, the Chief Executive, wrote a report to the board meeting on 1 February 2017 in which she made recommendations under three scenarios of different income levels. The income of £652,000 was called Armageddon, income of £800,000 was called Ground Zero and an income of £1,150,000 was called Lot 1. Proposed cuts were given in respect of each scenario. So, in respect of Armageddon, back office costs were described as follows: CEO on .4 of a contract, Business Director on .5 of a contract, Head of Fundraising on .8 of a contract, HR and Volunteer Management on .6 of a contract, No Operations Director would be TUPE'd out. No Marketing and Development Manager - that would be outsourced. From July, no Finance Manager - outsourced. No IT and Facilities Manager - outsourced and inhouse. Three-month transition costs for IT, Finance and the Crash Pad function.

21. The position for back office costs for Ground Zero was: Chief Executive on .5 of a contract, Business Director on 1.0 contract, Head of Fundraising .8. No Operations Director - TUPE. No Marketing and Development Manager - outsourced. HR and Volunteer Management .6. From July no Finance Manager - outsourced. No IT and Facilities manager - outsourced and in house. And three months transition costs for IT, Finance and Crash Pad.

22. In respect of Lot 1, the Chief Executive could go up to .8 of a contract, Business Director at 1.0, Head of Fundraising .8, Operations Director .5. No Marketing and Development Manager - outsourced. HR and Volunteer Management and three months transition costs for IT, Finance and Crash Pad.

23. So, all scenarios anticipated the outsourcing of the finance role. The decision of the board was to plan on the basis of somewhere between Ground Zero and Lot ,1 and not Armageddon.

24. The rationale behind these proposals was explained to us by Ms Elliott, which was to preserve the frontline service, that is to say, the service to the homeless youth or those at risk of homelessness, at the possible cost of the back-office overheads.

25. Whilst the Claimant's case has been to attribute the entire restructuring and funding strategy to Mr Robinson, it is not clear to us that Mr Robinson was the sole decision maker behind these proposals. On the contrary, it seems that Ms Elliott made proposals of her own and the board accepted them. The board was not content on any proposal whereby the Chief Executive

would be working less than full time, at least in the interim. In keeping with the three-month transition costs provision, the Claimant's fixed term contract was extended to 30 June 2017.

26. There was, what the Respondent describes as a consultation process, the Claimant was informed by letter dated 8 March 2017 that the First Respondent was proposing to outsource the finance functions, not to extend her fixed term contract and that therefore she was at risk of redundancy. She was also told that the IT Support Manager and the Crash Pad Manager were also being proposed to be made redundant.

27. There was a meeting with the Claimant on 27 March 2017. It was confirmed that the Part-Time Financial Officer role, which reported to the Claimant, was not proposed for redundancy. The Claimant expressed her satisfaction at that position. The Claimant has never suggested that she should have bumped out her assistant and for her to have that role at a reduced level of pay.

28. The Claimant's principal concern at this meeting was that she should be paid redundancy based on her full length of service including the period at which she had been treated as self-employed. The Claimant did ask about the identity of the outsource company and was told that it was yet to be decided. The Tribunal finds that the Claimant had the opportunity to say whatever she wanted.

29. There was a further meeting on 11 April 2017. Again, there was focus from the Claimant on the proper calculation of the redundancy pay based on nine years' service despite the period of self-employment. It seems that there was knowledge at the time within the charity that the self-employed status of her and others could be challenged, for example, for tax reasons. The Claimant did ask about the positions of others. She did point out that a role had been created for T J Nichols, the Crash Pad Manager, in a similar operations role. It seems to the Tribunal that it is correct that a role for T J Nichols was found but this was frontline provision for those who needed it. This was not a back-office role against which she could claim some meaningful comparison. The Claimant did repeat her concerns that the three operations Director roles had not been advertised but the Tribunal has already found that the Respondent's position on this was reasonable and in no way connected with race.

30. The Respondent was clear at this consultation meeting that it was still proposing to outsource the finance. There was talk of when it would be best for the Claimant to leave to secure alternative employment, including whether the Claimant could take time off to look for work and whether she could leave early. But, as to the central issue of the outsourcing of the function, the Claimant was not putting forward alternatives and the Respondent was sticking to its position.

31. The Claimant was given notice of dismissal on 19 April 2017.

32. On balance, the Tribunal is satisfied that there was a financial case for outsourcing the financial role and that there was accordingly a genuine redundancy situation. The cost of the Claimant's salary package to the Respondent was around £34,000 including employer's overheads. The cost of outsourcing was to be £700 a month. There was a financial saving of £25,000 per annum. It is never comfortable for the employee subject to redundancy consultation, of course, but there was a financial case being made by the Respondent against the background of extreme reduction to its funding. This was an unfortunate position but the redundancy situation was a genuine one.

33. It was not just the Claimant who was made redundant. Mr Gerilli's function was outsourced but he came back on two days a week rather than five days a week, working on database. The HR Officer was to be made redundant but she found another job before being made redundant; she was not replaced. The Floating Support Manager, Matt Cox, was made redundant. Jenny Rawlings, Alison W and Catherine Salmon all had their hours reduced by 12 per cent. The Claimant was, as we know, the only black employee. All others who lost their jobs or whose duties were significantly altered were white. So, the Claimant is not in the position to run a less favourable treatment argument by reference to an actual comparator.

<u>The 23 November 2016 allegation</u>

34. The Claimant makes an allegation that at the Finance and General Purposes Committee Meeting on 23 November 2016, Mr Robinson stated that the Claimant's written marketing report, prepared by her because the Marketing Manager was off sick, was not good enough. Debbie Wood, her new manager, is alleged to have said it does not make any sense, does it? The Claimant points to Debbie Wood as bullying but claims race discrimination against Mr Robinson.

35. The Tribunal finds that there is not enough detail in this allegation for the Tribunal to be able to find that there is a prima facie link to the Claimant's race. We have also been taken to emails which were put forward to support the allegation of lack of respect for the Claimant from Mr Robinson. But we have seen similar blunt emails from Mr Robinson to the Chief Executive, Ms Elliott, Monica Orsal and Leone Maddin.

36. We have seen an email chain dated 6 April 2017, upon which the Claimant has placed some reliance. Perhaps it is worth lingering on it. So, on 6 April 2017, the Claimant wrote to the Finance Team:

> "Good morning all,
>
> As concern regarding April's cash flow volatility was raised at the last F & G P meeting, I thought to update that cash flow for the next two months is sorted."

37. In response to that Mr Robinson emailed in the afternoon:

> "Dear Fola,
>
> Please clarify what sorted means"

38. The Claimant replied:

> "Dear John,
>
> Apologies for the ambiguity as we currently have uncertainties with cash receipts. My email was to reassure everyone ahead that we currently have enough cash in the bank and expect more to cover all outgoings in April. Notwithstanding the cashflow statement, we will be prepared and despatch the monthly accounts as normal".

39. So, perhaps it is right that the phrase "please clarify what sorted means" is direct. It is not unprofessional, however, and it does not in any way suggest that there was a lack of respect for the Claimant and we have seen, as we have said, similar sorts of email messages to others.

40. In respect, then, of the 23 November 2016 incident, we do not find that there was a prima facie of race discrimination. There is just not enough detail in the allegation, not enough cogency in it for us to make such a leap.

<u>The appeal against redundancy and the grievance.</u>

41. By letter dated 12 May 2017, the Claimant appealed the redundancy and raised the grievance. She made serious allegations. The essence of her allegation was in the concluding paragraph. She said: "My belief is that John finally found an opportunity in the restructure to get rid of me for my Nigerian heritage and he wasn't to let go". Before that the various matters that the Claimant has put before us were also referenced. So, the Nigerian banks comment, the criticism that the First Respondent did not have forecasting expertise, the 23 November 2016 allegation. Some of it was headed discrimination, other bits were headed bullying, other bits unfair treatment. Debbie Wood was criticised for bullying. It was suggested the Chief Executive was a nice person with good intentions but was overpowered and influenced by Debbie Wood and Mr Robinson. There was complaint made of the fact that the three heads of service roles were not advertised, that her reporting line was changed amounting to a demotion. It was floated that the fact that she was on a fixed term contract was determinative. There was a generalised challenge to the reasonableness of the outsourcing decision. So, serious matters were put to the appeal panel.

42. There was an appeal hearing on 10 July 2017. There was a full discussion. It is a fact that the Claimant's position was to seek a compromise agreement and compensation for the matters she had raised. The panel was Mr Humphries, who has, apparently, an HR background and fellow trustee Kate Belinis and the HR Advisor as notetaker was there Mr Plume, who had been in the background throughout the entire process. It is right also that the Claimant was given the bundle for the appeal at the beginning of the

hearing rather than some days in advance. That said, it seems that she was familiar with nearly all the documents anyway.

43. Following the meeting on 10 July 2017, she put in an email saying that the paperwork had failed to record that on 25 April she had put forward, she says, suggestions other than resourcing. So, firstly, that the Chief Executive hours might be cut to 30, that her own hours be reduced to 33 hours and cutting the £10,000 costs of the outsourcing bid writing. Whether or not these were raised by her on 25 April 2017, the Respondent says that the suggestions would not have been adopted. First, the board was against during this pivotal period, any reduction to the Chief Executive's hours and given that, there was now a need to secure funds from third parties, the writing of bids was a most important role and it would not have been a prudent cut to withdraw the funding for instructing professional bid writers. All of that seems reasonable to the Tribunal from the Respondent.

44. The outcome letter, dated 16 July 2017, was in these terms and we will quote it in full. The grievance outcome was:

> "The trustees of HYH will under no circumstances condone or tolerate bullying or discrimination. We will be investigating the matters that you have raised and taking any remedial action that is felt to be necessary. We will also be taking appropriate measures to ensure that all trustees, management and staff are fully aware of our stance on bullying and discrimination in the workplace.
>
> <u>Appeal against redundancy decision</u>
>
> We have given careful consideration to the decision to make your role redundant and find that there was a clear rationale that your role was redundant due to the restructure. We also believe that a fair procedure was followed which included consultation with you."

45. There is then a passage on the statutory redundancy pay to the effect that the self-employed period was a genuine period and that therefore the redundancy pay was not to be based on nine years. That position has subsequently been changed by the Respondent and the redundancy pay, as we understand it, was based on the basis of nine years.

46. The trustees simply did not address the allegation of race discrimination made by the Claimant in respect of the decision to outsource finance and dismiss her for redundancy. They did not interview Mr Robinson; they did not interview the Chief Executive. Their approach was wholly inadequate. We reject their explanation that because some of these allegations were earlier in time and because some of the colleagues had since moved on, that it was not appropriate to investigate the matter. The Claimant was putting forward a clear position which was that Mr Robinson had discriminated against her in the past and the proposal to restructure essentially came from him and he saw the opportunity to remove her from the business. It was an allegation that needed to be addressed head on and not fobbed off, as was the effect of this response. Further, they never did get back to the Claimant as to investigating the matters that she had

raised and taking any remedial action that was necessary. None of that happened as far as the Tribunal can tell.

Conclusions

47. There is an allegation of less favourable treatment on the grounds of fixed term contract. Whilst we see that remains in the issues and we see it remained in Counsel for the Claimant's skeleton argument by way of a bold assertion, there was no treatment of this orally in the submissions before us. Indeed, we were unclear as to whether the argument was in fact being pursued and as to whether the Tribunal had to adjudicate it or not. As it happens, the Claimant was not selected, on our findings, for redundancy because she was on a fixed term contract. She was selected for redundancy because there was a commercial decision to outsource the finance function which was supported financially. Further, a permanent member of staff, Matt Cox, was also dismissed for redundancy so this claim fails if it was pursued at all.

<u>Race discrimination</u>

48. It is put as both direct and harassment although some of the allegations are more sensibly regarded as harassment.

49. Dealing in chronological order. The first allegation, 4.2 of the issues, by the Second Respondent stating pointedly to the Claimant in open meetings on three occasions between 2010 and 2015 "whatever you do, do not deposit money in Nigerian banks". This does not work as an allegation of direct discrimination because we find, on balance, it was likely that Mr Robinson did make comments about, for example, Icelandic banks and therefore made a derogatory comment about banks likely to be run by white people, so there is no obvious less favourable treatment compared with any actual or hypothetical comparator. We understand the way in which the Claimant seeks to run this argument as essentially an allegation of harassment.

50. Section 26 of the Equality Act 2010 provides as follows in respect of harassment:

> "By sub section (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.
>
> By sub section (4) in deciding whether conduct has the effect referred to in sub section 1 (b) each of the following must be taken into account.
>
> (a) The perception of B

(b) The other circumstances of the case, and
(c) Whether it is reasonable for the conduct to have that effect.”

51. Mr Robinson has accepted that he made these comments on occasions and in respect of this allegation we have a majority decision. The majority, which is Judge Smail and Mrs Thompson, whilst acknowledging the negative comments about a Nigerian bank might engage the protected characteristic of race or nationality of the Claimant, and it was at least foreseeable that the Claimant was of Nigerian origin as Mr Robinson has travelled widely in Africa and that it might arise as having the effect of creating an offensive environment for her. It did not violate her dignity or create an intimidating, hostile, degrading or humiliating environment but it might have created an offensive environment given her perception. However, the majority finds that the other circumstances of the case namely, the context of these discussions being investment, mean that it was not reasonable for her to regard this as harassing behaviour.

52. The minority, Mr Bhatti, accepts the Claimant’s argument that there was simply no need to make reference to Nigerian banks at all and that there is a prima facie case that it would have a harassing effect and that the burden transferring over to the Respondent, or Mr Robinson, to show that the protected characteristic played no role whatsoever was not discharged by them or him. Reliance is placed in part by Mr Bhatti on paragraph 25 of Mr Robinson’s witness statement where he says, “Given the well-publicised scams and scandals involving Nigerian financial institutions and individuals - who hasn’t received and email from a Nigerian source telling them that there is a vast sum of money in an account waiting for you to claim it…”. Mr Bhatti suggests there is prima facie evidence, not rebutted, of an animus against Nigerian people and Mr Bhatti would uphold the allegation. The majority reject the allegation because they accept the context was a business context of talking about investments and it was not reasonable for the Claimant to regard it as directed at her or offensive. There we are: by majority, the Claimant does not win that argument.

53. In all other respects the Tribunal is unanimous. We accept that Mr Robinson did, as was minuted, question the experience of the First Respondent’s staff to perform forecasting. That was his view as a professional. We find that it was reasonable or open to him, to form that view. He had been at the Respondent for a considerable time. He will have known the strengths and weaknesses of members of staff. Whilst it is true that the Claimant had some experience in forecasting, given the dire financial situation the Respondent found itself in, it was open to him to form a view that different sort of forecasting experience was necessary.

54. So, we conclude, unanimously, on the balance of probabilities, that there was no prima facie case of race discrimination here. There was no prima facie racial discrimination in the restructuring of the reporting line. We have already dealt with that above. The Chief Executive and the First Respondent were dealing reasonably with the restructure at Phase 1. We have already dealt above with the allegation on 23 May relating to the comments on 23 November 2016 when Mr Robinson said the marketing

report was not good enough. He may have been blunt but he does not generate a prima facie case of race discrimination.

55. We conclude the decision to dismiss, effective on 4 June 2017, also does not involve prima facie less favourable treatment on the grounds of race or harassment. There was a financial justification for the proposal. There was a genuine redundancy situation. The charity was under great financial pressure. It was unfortunate that the Claimant, along with others, were proposed for outsourcing but there were white people also made redundant. White people working in departments that were also outsourced. The issue of race is not demonstrated on the balance of probability as even amounting to a prima facie case.

56. So, the allegations of direct discrimination and harassment fail.

57. There is then the allegation of victimisation relating essentially, to the appeal and its handling. Victimisation is dealt with under section 27 of the Equality Act 2010. By section 27 sub section (1):

> "A person A victimises another person B if A subjects B to a detriment because
> (a) B does a protected act.

58. The raising of the grievance clearly was a protected act. The detriments relied upon are set out in the list of issues as amended. We can dispose of three of these relatively swiftly. There was no genuine delay. There was a period we understand of without prejudice discussions taking place which contributed to the position but by the standards we typically see in the Tribunal, a delay, even of a few months, is not untypical and does not raise a prima facie case of detriment.

59. Secondly, whilst it was not ideal practice to provide a bundle only at the beginning of the hearing, the Claimant had seen the documents, or the vast majority of them, previously. She was not given the documents late because she had raised a grievance.

60. Thirdly, she says that there was no right of appeal against the grievance. The explanation for this, we find, is that an agreed joinder of the appeal against the dismissal with the hearing of the grievance because that was a sensible thing to do. There was no expectation thereafter that there be a further appeal limited to the grievance. Certainly, the final letter did say there was no further appeal and that was not challenged by the Claimant but she did legitimately ask for the outcome of the investigations which were contained in the outcome letter. That is not an appeal - that is further information based upon what they said they would do and, as far as we can tell, did not do.

61. The weight of the case here is in respect of the detriments submitted of failure to investigate the full grievance and failure to provide the Claimant with an outcome to her grievance of discrimination or copy of the investigation.

62. We applied the burden of proof provision as to this allegation. By section 136 sub section (2) of the Equality Act 2010:

> "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".

63. By sub section 3:

> "Sub section (2) does not apply if A shows that A did not contravene the provision."

64. There is clearly, in our judgment, a prima facie case here that the Claimant was subject to a detriment of a wholly inadequate investigation and response to her grievance because she had raised matters of race. Those matters simply were not addressed. The burden transfers to the Respondent to show that there was no discriminatory or victimising element to this and we find the Respondent does not show that there was no discriminatory or victimising element. A genuine attempt at dealing with her grievances would have involved them dealing with them head on. They did not and by reason of the provisions of burden of proof, we must find that there was victimisation of the Claimant because the Respondent subjected her to the detriment of not investigating her grievance and her appeal.

65. So that means she wins a claim of discrimination in the form of victimisation under the Equality Act 2010.

66. We note that direct discrimination was not claimed in respect of the manner in which this appeal was conducted. We do not have to decide it because it was not argued but there would have been a real argument for us to look at that the Claimant was treated less favourably than a hypothetical comparator because a hypothetical white person's complaint, we might have concluded, would not have been investigated in such an inadequate way. Be that as it may, the Claimant wins an argument of victimisation.

67. But that finding also has implications for the fairness of the dismissal. We have found that the appeal was wholly unsatisfactory and that it did not address the matters raised before it by the Claimant. That means that this dismissal was at least procedurally unfair because the appeal was, in our judgment, incompetent. The band of reasonable responses cannot rescue this outcome because no reasonable employer would have conducted this appeal by failing to address the matters raised before it.

68. The Respondent does show that the reason for dismissal was redundancy. They do show a fair consultation. They show that there was a genuine redundancy situation but the fairness of the dismissal is wholly undermined by their approach on appeal. What it meant was that the Claimant lost the opportunity of having the decision to dismiss her reversed. We have found that the decision to propose her dismissal and dismissal was not a matter of race discrimination. However, had there been a fair investigation of the Claimant's grounds of appeal, there is some prospect, more than simply a

theoretical prospect, of the appeal being successful. A fair figure to reflect that chance, in our judgment, is that there was a 25 per cent chance that a properly conducted appeal and investigation could have led to a decision other than to dismiss. There was a 75 per cent chance that the dismissal would have been confirmed but we are not able to say there was a 100 per cent chance because the appeal was so deficient it did not directly address the matters complained about. It would be wrong for there to be a Polkey reduction of 100 per cent. Similarly, it would be wrong to have a Polkey reduction of 0 per cent because we have to acknowledge that in all other respects the redundancy was fair. A fair figure, in our judgment, is a Polkey reduction of 75 per cent and that reduction is applied to the compensatory award only.

69. So, in summary, the Claimant succeeds in her victimisation claim. She succeeds in her unfair dismissal claim but there is a 75 per cent Polkey reduction reflecting the chance that she would have been fairly dismissed in any event.

70. We find that there was a breach of the Acas Code on Discipline and Grievances at Work not in respect of the appeal, which was against redundancy as Counsel for the Claimant rightly points out, but against the Code relating to grievances.

71. Paragraph 34 provides:

> "Employers, employees and their companions should make every effort to attend the meeting. Employees should be allowed to explain their grievance and how they think it should be resolved. Consideration should be given to adjourning the meeting for any investigation that may be necessary."

72. Well there was, of course, a hearing and the outcome said there would be a further investigation.

73. Paragraph 40 says:

> "Decide on appropriate action.
>
> Following the meeting decide on what action, if any, to take. Decisions should be communicated to the employee in writing without unreasonable delay and where appropriate should set out what action the employer intends to resolve the grievance. The employee should be informed that they can appeal if they are not content with the action taken"

74. Well, we are not taking the point on appeal for the reasons given, but the outcome of the grievance said that matters would be investigated. They were not investigated. To our mind the Code is not met by the Respondent saying it will investigate - that it is simply a communication requirement as submitted by Counsel for the Respondent. It is more substantive than that. If you say you are going to investigate, you have got to investigate.

75. Turning then to the question of injury to feelings. We have heard evidence from the Claimant. She has told us she was extremely disappointed that her points in her grievance were not investigated. She hoped that they would be. She tells us it was as though she did not have a voice and this contributed - it might not be the sole cause, it does not have to be - to difficulty in sleeping and a general sense of lack of self-worth. It does not have to be the sole cause, it has to be a material cause and it was a material clause. The Claimant took seven weeks to find new work. There was one visit to the doctor with stiffness in the neck. The fact that she found work promptly does not mean there is not a generalised sense of disappointment as to the fact that the Respondent where she worked for nine years did not look at the matters she raised. We are confident that she suffered substantial disappointment, substantial injury to feelings and the figure put forward by the Respondent of a mere £1,500 goes nowhere near meeting the severity of the impact on the Claimant. We award £5,000 by way of compensation for injury to feelings.

76. So, a point of law essentially has arisen as to whether the uplift can apply to the injury to feelings award. The considered position of the Tribunal is that if, as a matter of law it can, then the Tribunal will uplift the injury to feelings award by 15 per cent. It is consistent with the policy of the legislation to make a point about the grievance. If you have got one you have got to investigate it and that happened here. However, if Counsel for the Respondent can show an authority to Counsel for the Claimant within 48 hours, then we will review that position. But, in so far as there is a discretion, we exercise it in the Claimant's favour unless there is no discretion.

Employment Judge Smail

Date: ……5 June 2020………..

Sent to the parties on: ...3 August 2020..

....T Yeo..
For the Tribunal Office