EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr K **v Secretary of State for Justice**

Heard at: Watford **On**: 3 & 4 August and 5 August 2020 in chambers and by CVP

Before: Employment Judge R Lewis
Members: Mr D Bean
Mr I Bone

Appearances

For the Claimant: In person (no participation on 5 August)
For the Respondent: Mr J Duffy, Counsel

JUDGMENT

1. The claimant's claim of direct race discrimination fails and is dismissed.

2. The claimant's claim of harassment in relation to race is upheld.

3. The respondent is ordered to pay to the claimant as compensation for injury to feelings the sum of £10,436.06, including £1,436.06 interest.

REASONS

Introduction

1. These reasons were requested by Mr Duffy after judgment had been given.

2. In these reasons we use the following acronyms or abbreviations:-

   - CRC Community Rehabilitation Company
   - EQA Equality Act 2010
   - FGM Female genital mutilation
   - HCS Hertfordshire Children's Services
   - MASH Multi Agency Safeguarding Hub

- NPS National Probation Service
- RAG Red amber green
- YOT Youth Offending Team

3. This was the hearing of a claim presented to the tribunal on 19 December 2018. Day A was 11 October and Day B was 23 November. The claim was of race discrimination only.

4. When, in accordance with usual practice, the file was considered under Rule 26, the present Judge made an order in accordance with Rule 50 which was sent to the parties on 8 May 2019. The order was made by consent and, in accordance with Rules 50(1) and 50(3)(b), it was an order for permanent anonymity relating to the claimant and his daughter. It remained in force, and at conclusion of this hearing the respondent applied for it to continue to do so. (The claimant was not then taking part in the hearing).

5. In agreeing to continue the anonymity order, the tribunal had regard to the balance between the fact that this was a public hearing, and the commitment of the tribunal to open and public justice; when weighed in the balance with the privacy rights of the claimant and his former partner, and their two young children. We noted in particular that the last three were referred to extensively at this hearing (not by name) and that evidence touched on potentially intimate family matters. It seemed to us that the privacy rights of non-parties, notably of children, particularly where the Family Court has been engaged, outweigh the interest in public justice. In so saying, we attach weight to the significant extension in practice of public access which follows from HMCTS' practice of posting reasons on line.

6. The claim was the subject of a case management hearing before Employment Judge Bloch QC on 24 July 2019. The claimant was then represented by Counsel and the respondent by Mr Duffy, who also appeared before us. The agreed list of issues was set out in the order of the tribunal and a case management timetable was set.

7. On 8 December 2019 the claimant informed the tribunal that he henceforward acted in person.

8. At this hearing there was an agreed bundle in excess of 450 pages. We noted that it contained very few items in the crucial period in summer 2018; a few pages were added. The parties had exchanged witness statements. The claimant was the only witness on his own behalf, and had submitted a lengthy statement.

9. The respondent had submitted four statements, but in the event called only two witnesses. They were Ms Denise Everitt-Story, Senior Probation Officer, who had been the claimant's line manager at all relevant times; and her line manager, Ms Clare Ansdell, Head of Service Delivery.

10. All three witnesses adopted their statements and were questioned. There were closing submissions on the afternoon of the second day. The tribunal

took a break of over 30 minutes after Mr Duffy's submissions so that the claimant would have time to finalise his reply.

11. The parties had in addition prepared skeleton arguments, which were both opening and closing summaries.

12. The tribunal met in the absence of the parties on the morning of the third listed day and gave judgment by CVP at 2pm that day. The CVP hearing started late, so that tribunal staff could attempt to contact the claimant. The claimant did not participate. After giving judgment, the judge asked the respondent to inform the claimant by email of the outcome of the case promptly after the hearing, given the likely delay in providing these reasons.

13. The issues were narrowly defined. The factual basis was a single event, namely that on 8 August 2018 Ms Everitt-Story, on behalf of the respondent, made a report about the claimant to Hertfordshire Children's Services. By the list of issues, the claimant asserted that that was an act of direct discrimination on grounds of his Nigerian national origin or an act of harassment related to his Nigerian national origin (although the list did not say so, the same event could not be both in accordance with s.212(1) Equality Act 2010). As it was common ground that Ms Everitt-Story had made the report, and a copy of it was in the bundle (86), evidence focussed on the circumstances and interpretation of her actions.

14. The claimant's witness statement introduced a wide range of other matters, and the bundle contained what he called his "schedule of discrimination" (54). The schedule contained a range of issues which had never been pleaded and were not the subject of any application to amend. They were simply not matters before the tribunal, and we declined to include them in this case. Where they were covered in the claimant's witness evidence, the tribunal told Mr Duffy that he did not need to cross examine on them, and would not be taken to have agreed any matter on which he did not cross examine, rather to have exercised professional judgment about relevance and the effective use of time.

General approach

15. We preface our findings with a number of general points concerning our approach.

16. In this case, as in many others, evidence referred to a number of matters, some of them in depth. Where we make no finding about a matter of which we heard; or where we do make a finding without going to the detail which the parties did, that is not oversight or omission. Rather it reflects the extent to which the point was truly of assistance to the tribunal.

17. While the above is true of many of our cases, it was a particular issue in this case, where the claimant was acting in person, and the case touched on emotive questions.

18. We understand that the claimant wanted in these proceedings to convince the respondent and the tribunal that there was no evidence whatsoever to suggest that he was ever at risk of submitting his daughter to FGM. While we understand his emotional drive to prove that point, and while we agree that there was no such evidence, it was nevertheless not the task of this tribunal to make any finding about the claimant's family or about any issue of child welfare.

19. Both parties approached this case with binarism. We mean by that that both took the approach that this was a case where there was right only on their side. At the end of the evidence of the two main witnesses the Judge put to each a parallel question to the effect that while the claimant alleged that his treatment was entirely on grounds of race, did he accept the possibility that it might be also, in part at least, on grounds of child protection. He said that it was not. Ms Everitt-Story was asked the parallel question (ie did she accept that her treatment of the claimant might at least in part have been tainted by race) and gave the same answer.

20. What we call binarism rarely reflects the complexity and muddle of human interaction or decision making in the workplace. Certainly, we find that it did not reflect the fact finding in this case.

21. We also in this case faced a familiar problem of time and perspective. The sole act of discrimination about which we had to decide took place on 8 August 2018. We were concerned to examine Ms Everitt-Story's reasons for that action. It seemed to us a matter of plain logic that information which she did not have at that time could not be relevant to that question, no matter how helpful to either party. A prime example was that the claimant put to Ms Everitt-Story that he could not have had a plan to take his children to Nigeria in late July or early August 2018, because he had agreed with their mother the previous May that they would go elsewhere on holiday at that time. The claimant relied on text traffic of 7 May with his children's mother (176) evidencing that agreement. The tribunal explained to the claimant that the text traffic did not in fact take his point any further for two reasons. The first was that it was not within Ms Everitt-Story's knowledge on 8 August 2018; and the second was that his agreement with the children's mother on 7 May was not in fact proof that the agreement was carried out the following July.

22. As is not unusual in our work, questions sometimes appeared to suggest an unrealistic standard of the witness or party. We approach the case on what we hope is a realistic basis. That includes accepting that human beings at work make mistakes, or may express themselves poorly, or may make a decision and change their minds. None of those everyday events is necessarily evidence of wrong doing.

23. Similarly, while the tribunal places a high value on written record keeping, it does not expect, nor is it realistic to expect, that on a daily basis at work colleagues make notes of their routine interactions. That said, we were indeed surprised by the paucity of paper trail in the crucial period between mid July and 8 August 2018.

The legal framework

24. This claim was brought only under the provisions of the Equality Act 2010 and only under the provisions of s.13 or s.23.

25. The claim presented in the first instance as a claim of direct discrimination on grounds of race (ie Nigerian national origins). It was therefore brought under the provisions of s.13 and s.39 EQA. S.13 provides that,

> "A person discriminates against another if because of a protected characteristic, A treats B less favourably than A treats or would treat others."
>
> The protected characteristic of race is (s.9) defined to include colour; nationality; and ethnic or national origins.
>
> The potential acts of discrimination are set out so far as material at s.39, of which the material portion was s.39(2)(d) which provides so far as material:
>
> "An employer must not discriminate against an employee … by subjecting B to any other detriment."

26. Section 23 provides that when comparing a claimant with an actual or hypothetical comparator,

> "There must be no material difference between the circumstances relating to each case."

27. S.136(2) provides,

> "If there are facts from which the court could decide, in the absence of any other explanation, that A contravened the provision concerned, the court must hold tat the contravention occurred.'

28. We understand that we need not consider whether the protected characteristic was the only or even the main reason for the treatment in question. We need only ask whether it was a material factor. In a case where the burden of proof shifts, we ask whether it has been shown that the protected characteristic played no part whatsoever in the material event or decision.

29. We were not referred to authority, or invited to address the point of whether this was a case in which we might find it useful to approach the question of the reason why the claimant was treated as he was. As we set out in our discussion below, we have found that the 'reason why' question has a complex entangled answer, and that we are, on these facts, more assisted by identifying the characteristics of the comparator.

30. Section 212(1) provides that the same event cannot be found to be both a detriment in direct discrimination and an act of harassment. This claim was brought as a claim for harassment in the alternative. Section 26 of the Equality Act 2010 provides so far as material:

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

31. We take care to approach our analysis by taking each step in the definition as a separate step.

Findings of fact

32. This case had its origins in the practice of FGM. Neither side led any evidence on FGM. We need find only that which we understood to be common ground or a matter of judicial notice.

33. FGM is lawful and practised in a number of countries, predominantly in Africa and Asia. Its prevalence is higher in some countries than others, and among some traditions than others: the traditions may be religious, cultural or national. Nigeria is a country where FGM is lawful and practised, and we noted that HCS wrote that FGM prevalence in Nigeria "is less than 29% of the population" (90). In English law the practice of FGM, and acts preparatory to facilitating FGM abroad, are criminal offences.

34. The bundle contained some 250 pages (198-451) of general materials and policies, including materials about safeguarding and FGM. We accept that there was no specific policy, or contractual procedure, which engaged any issue which might arise between the respondent and the children of one of its employees. We do not think that that absence was important, because we accept the existence of a societal obligation not to turn away from an issue, or suspicions of an issue, which might engage the welfare of a child.

35. The claimant became an employee of the respondent within NPS on 1 January 2015. He was then aged about 40. He is of Nigerian origin, and wrote in the ET1 that, "He is a member of the Igbo Tribe and practises the Jewish faith." He holds a Masters Degree from London University. He qualified as a Probation Officer in June 2016.

36. The claimant has two children, a daughter born in 2007 and a son born in 2008. He identifies the mother of the children as "Caucasian English." He and the children's mother separated in about 2013.

37. There was reference in evidence to child arrangements. The bundle contained no record or document setting out any order or agreement. At the material times with which we were concerned, we understood the Family Court to have formalised an arrangement which was that the children spent 144 nights per year (40% of 365) with the claimant, and that there were arrangements about meeting and collection on particular days in particular weeks. Although these arrangements were on occasion the source of tension (see below) we were referred to text traffic in May 2018 (176) which

showed the claimant and his former partner in co-operative correspondence about the arrangements.

38. In January 2017, Ms Everitt-Story became the claimant's line manager and Ms Ansdell took up her present post. They were both highly experienced professionals. Ms Ansdell has served in the Probation Service since 2002, and Ms Everitt-Story since 1999.

39. Ms Everitt-Story had regular supervision meetings with the claimant. The bundle contained records of ten supervisions between 7 February 2017 and 15 May 2018. We accept that Ms Everitt-Story's working method was to follow the template for staff supervision records (eg 63) by typing on screen during the meeting. At the end of the meeting, she emailed the completed record to the claimant, with a general invitation to comment. She did not require him to sign a hard or electronic copy. We find that the claimant had the opportunity to challenge any material inaccuracy in the record which was sent to him. Nothing turns on whether any copy in our bundle was signed or not. We accept the notes as a generally accurate summary of what was said at each meeting.

40. The template record contained six topic headings for discussion, one of which was "Staff well-being." The ten records in the bundle show that the claimant, on seven occasions, mentioned personal welfare issues, including issues relating to his children or child care at six meetings.

41. We find that this record indicates a number of relevant points. Both the claimant and Ms Everitt-Story were aware that the claimant's childcare commitments required him to work flexibly, and were capable of impacting on his work. While we accept that consciousness of his commitments to work and childcare was a source of stress on the claimant, neither he, nor Ms Everitt-Story gave any evidence that there were in fact any workplace difficulties as a result. Secondly, it stands to reason that the issue was a dynamic one, capable of change and development. Thirdly, the record suggests that the claimant felt able to speak to Ms Everitt-Story about personal issues involving his children.

42. At the first supervision, on 7 February 2017, the claimant gave Ms Everitt-Story introductory information about his family arrangements. He told her then that, "The [family] Court process is still ongoing and this may impact on working hours" (63).

43. A crucial event took place in or about late March 2017. It is set out here to make the chronology clear, but neither party was at the time aware of the content of this record. The HCS record states (emphasis added, 91):

> "MASH Worker's Summary of Circumstances … Information received from School on 29-3-2017, reporting that Mother of the children has stated she has concerns for the children in Father's care, especially [daughter] as she is fearful that she will be a victim of FGM, as the Father is allegedly part of this culture. Mother does not have any communication with Father, but voiced to the School that she is concerned that this is a possibility. All agency checks have been RAG rated Green."

44. We repeat and stress that this specific document was not seen by any party at the time in question. We note that the record is third hand (mother to school to HCS). HCS discussed it with the claimant, and it therefore reached Ms Everitt-Story (see below) at fifth hand. We have added the emphasis to show the obvious evidential problem in the record: if the mother had no communication with the claimant, (and as the claimant has always been part of the same culture), there is no indication of an evidential basis for the mother's concern.

45. The same record goes on to record the claimant's response. HCS contacted him, and the record continues:

> "He is adamant that his daughter is not at risk of harm of FGM and appeared offended that his ex-partner (Mother) could suggest this. Father explained that he is Jewish from the Igbo Tribe – This has been researched and there is no indication of this Tribe being associated with FGM. Father explained that although FGM is practised in some parts of Nigeria, it is not in his region or religion and that in his view it is morally wrong, and acknowledges that it is against the law in the United Kingdom."

46. After capturing further responses from the claimant in the same vein, HCS recorded the following (emphases added):

> "Therefore case to close as there is <u>no evidence</u> at this time to substantiate Mother's allegation she had made to the School. There are <u>no concerns</u> relating to FGM from agency checks carried out and Father has explained in depth his views on FGM, stating both that he is aware it is against the law, and that he does not morally agree with it and that he would not allow this to happen to his daughter. Mother has not provided evidence as to why she has these concerns, other than stating the children's father is from Nigeria and it would appear that she did not have an understanding of the children's Father attitudes towards FGM, before suggesting this concern to the School."

47. On 6 April 2017, a few days later, the claimant had a supervision with Ms Everitt-Story. The HCS referral was fresh in the claimant's mind. The Staff well-being section of the supervision record reads in full the following (66),

> "Okay with child arrangements up until now. Received a call from Herts area re his children. Sensitive information was referred by K's ex partner regarding FGM. K explained that this is not a practice he endorsed and he had to explain himself to the Social Worker. His view is that his ex partner is being "vindictive". Troubling for K that he had to be interviewed by the Social Worker but this appears to be resolved now, case to be closed with no further action."

48. It was common ground at this hearing that the information about the HCS approach to the claimant, and that it concerned FGM, was volunteered by the claimant to Ms Everitt-Story. She had no other means of knowing about it.

49. At this hearing the claimant was at pains to deny having used the word "vindictive". We accept Ms Everitt-Story's evidence, which was that her practice in note making was to use inverted commas only where she was

actually quoting: this one word was the only use of inverted commas in all the supervision reports which we saw. We find that the claimant did use the word at the time. We noted that in this tribunal, over three years later, it was not a word that he wished to adopt.

50. Ms Everitt-Story's evidence was that she spoke briefly about the conversation to Ms Ansdell and they agreed that no further steps were required on their part. That was the end of the matter. The final sentence of the supervision record could not be more clear.

51. The claimant mentioned family issues at supervisions on each of the following dates: on 27 June 2017 the record indicates, "Some issues at home but these are manageable at present" (68); on 1 August, "Personal issues appear to be better than they have been in the past. Childcare remains the same and K wants to take some leave dates" (71); on 1 February 2018 the claimant mentioned, "some issues still ongoing with childcare" and Ms Everitt-Story suggested a stress risk assessment (78); and on 28 March 2018 there was a longer record which appeared more significant. It reads in full (80),

> "Children have spoken to him about the confusion they feel about the current arrangements. K has spoken to legal adviser and mediation. Trying to resolve it through mediation rather than a formal process. Ms Everitt-Story suggested speaking to NAPO about support with the legal process if it is needed. K has considered the conflict between the children and his work, hopefully a resolution may be reached without having to compromise either. Ms Everitt-Story also mentioned compassionate transfer but K didn't think this would help as traveling to the school and leaving earlier would still be an issue."

52. That record may be significant as it indicates that the process was a dynamic one, the position not being as harmonious as had been reported the previous summer; secondly, that it was approached by both the claimant and Ms Everitt-Story through a prism of problem solving; and thirdly, the claimant identified the risk of conflict between his commitments to his children and his work.

53. What proved to be the final supervision took place on 15 May 2018 in which the claimant is recorded as saying (82),

> "Situation still ongoing in terms of child care. At present there is no progress going forward. K has decided that the best option may be not to continue with the current arrangements."

54. We record briefly that in the course of 2017 and continuing into 2018 two further work issues arose in the relationship between the claimant and his managers. The first was that the claimant challenged the rating given by Ms Everitt-Story in his staff development review in summer 2017, and followed the appeal procedures. Our only relevant finding on that matter is that it was an indication of some disaffection at work. There was reference in evidence to an issue relating to the claimant's pay being calculated correctly. We heard no detailed evidence and make no finding other than

the generalisation that pay issues are of themselves a source of disaffection.

55. On about 7 May 2018, the claimant and his ex-partner engaged in an exchange of texts in which they agreed that the children would travel outside the UK on holiday with the ex-partner between 26 July and 11 August 2018. As stated above, there was no other documentary evidence that this arrangement was carried out, although the claimant confirmed at the hearing that it was. Neither the arrangement, nor its implementation, was within the knowledge of the respondent.

56. On about 20 June the claimant registered with a job agency (83). He was told that there were many vacancies, including CRC and YOT vacancies, with the possibility of increased pay (83). Again, this was not within the knowledge of the respondent.

57. At about the same time, the claimant was involved in a road accident, leading to having to take time off work, and a proposed Occupational Health referral (180, 456).

58. The position therefore at the end of June 2018 was that the claimant had a good working relationship with Ms Everitt-Story, and clearly felt able to speak to her about his family circumstances. He had had concerns about his pay and about his review and was looking for other employment. He had been able to make harmonious arrangements with his ex-partner for the children's summer holiday, and they were to travel with the ex-partner on the dates stated above.

59. The crucial events in this case took place in the summer of 2018. Making the allowances and following the approach referred to at #22-23 above, there was a troubling lack of documentation.

60. The claimant and Ms Everitt-Story both gave oral evidence to the effect that he indicated to her on Friday 29 June that he was planning to resign; and that he confirmed the same to her by email on Monday 2 July. That email was not in the bundle. We appreciate that if it was sent from the claimant's work account, he could not have had access to it for disclosure purposes. Their evidence was that they agreed on about 9 July to extend the claimant's employment to 10 August. That agreement was also not in the bundle

61. Additional documents added late to the bundle included an email from the claimant sent on Monday 16 July 2018 (454): we accept that the last sentence was written sincerely, and represented the claimant's honest opinion at the time.

> "Hi Denise,
>
> Further to my discussion with you on Friday last week, it is with sadness that I write to officially hand in my notice as I have really learned a lot within my time here ... As I am required to give four weeks notice period, I will work the next two weeks and take the last two weeks from Mon 30/07 – Mon 06/08 as annual

> leave. Also, I just want to use this opportunity to thank for all your assistance and support, especially, with my child care needs which without your unwavering support would have been impossible."

62. Ms Everitt-Story replied an hour later (456):

> "Hi,
>
> Sorry to hear that you have decided to leave the service. I have had a chat with [Ms Ansdell] and we are hoping you may agree to stay 4 weeks and take your leave thereafter so effectively a 6 week period? If you are able to be at all flexible please let me know. Best wishes and thanks for your comments."

63. At this hearing, the claimant denied the authenticity of 454. Although he did not quite say so in terms, the implication of his evidence was that the document was cut and pasted to a different date, presumably by the respondent, and presumably for some litigation advantage, the nature of which was not made clear to us.

64. We find that the email of 16 July was sent by the claimant on that date and constituted his resignation. We find that the parties are both mistaken in attributing this exchange to 29 June and 2 July. We do not accept that there were two resignations; or two occasions two weeks apart when the claimant and Ms Everitt-Story spoke on a Friday and confirmed their conversation the following Monday. We note the absence from the 16 July exchange of any reference to what would have been the same exchange two weeks earlier. Our finding is also in accordance with Ms Everitt-Story's email of 8 August (below) in which she refers to resignation three weeks previously. We add further that not a great deal turns on the timing point, save that our finding reduces the period of time available to Ms Everitt-Story and Ms Ansdell to reflect on the implications of the claimant's resignation.

65. We now come to the crux of the case. Ms Everitt-Story informed Ms Ansdell of the claimant's resignation. We accept their evidence that they were both taken by surprise. Ms Everitt-Story said that the resignation came "out of the blue." While we accept that they were surprised, resignation of a member of staff, particularly one who has had some cause for disaffection from work, is, of course, an every day event for a manager.

66. The claimant gave no indication of having a next job to go to. Although he was interviewed two days after he resigned (84), the respondent did not know about it and in the event, he was not offered that job. Ms Everitt-Story knew that with two young children the claimant had financial responsibilities, and one element in her surprise was that the claimant did not have a secure income so far as she knew.

67. We accept that there was some fairly loose conversation between the claimant and Ms Everitt-Story about the claimant's intentions, that he mentioned the possibilities of working within CRC or YOT, and that among the possibilities he mentioned was that of 'return' to Nigeria.

68. During the period up to about 7 August 2018, Ms Everitt-Story from time to time reflected further on the claimant's position and resignation, and spoke about it to Ms Ansdell. There was almost no oral evidence about this, and nothing was documented. It is therefore difficult for the tribunal to make findings. What happened was a process in Ms Everitt-Story's mind, which may have operated in the manner of any mental process: not always sequentially, not always logically, sometimes at random and so on. That is not a criticism of Ms Everitt-Story but a description of a human process.

69. Ms Everitt-Story was surprised by the claimant's resignation. As she saw it, the resignation came during an unresolved process of negotiating child arrangements. On the most recent occasion when she had spoken to the claimant in supervision, he had indeed described the arrangements as unresolved (15 May, 82); on the occasion before that he had spoken about the conflict between his commitments to his children and to work. Ms Everitt-Story knew that the claimant could give up a job but would retain his childcare responsibilities and she noticed also that the combined effect of his resignation and annual leave dates were that he was not at work for a large part of the school holidays. (She did not know that the children were due to be travelling with their mother until 11 August).

70. We accept, although it is not documented, that the claimant had spoken at one point about returning to Nigeria, and Ms Everitt-Story had understood that he meant a long-term if not permanent return. That gave rise in her mind to a puzzle about what would happen to the children; she wondered did the claimant really intend to give up his childcare so that they remained with their mother, or did he intend that they should travel to Nigeria with him.

71. Into this matrix were added three other factors. The first was what Ms Everitt-Story mentioned, but did not really analyse in evidence, as her professional mindset. Her professional mindset has been risk assessment. She applied to this situation the mindset of probation, which in turn led her to think in terms of secretive and dishonest behaviour, absconsion or flight risk. While we understand that that was Ms Everitt-Story's mindset, we do not agree that there was any logical basis to apply to the claimant the analysis or vocabulary of an absconder from criminal justice.

72. Secondly, Ms Everitt-Story of course knew that the claimant is Nigerian and that the country to which he would return is Nigeria.

73. Thirdly, at some point in her thinking Ms Everitt-Story, possibly in discussion with Ms Ansdell, was reminded of the FGM conversation 16 months previously. As a result, it occurred to Ms Everitt-Story to wonder whether there was a possibility that having resigned, the claimant would return to Nigeria with his daughter, and there arrange for her to be subjected to FGM. Ms Ansdell's evidence was that when Ms Everitt-Story spoke to her about these issues, her (Ms Ansdell's) first concern was that the children were the subject of a child arrangements order, and that if the claimant were returning to Nigeria without the consent of the children's mother (which she assumed to be possible or the case) there would be a breach of the mother's rights and possibly of an order of the Family Court. Expressed like

that (as Ms Ansdell did in evidence), her concern seemed to us to go beyond the boundaries of the employment relationship.

74. The claimant repeatedly put to Ms Everitt-Story and Ms Ansdell the most obvious question: given their concerns, and in light of their history of a harmonious working relationship, why did they not ask him. Ms Everitt-Story's answer was drawn from her probation experience: she was afraid that to do so would increase what she called the flight risk. We repeat the final sentence of #71 above.

75. Ms Everitt-Story and Ms Ansdell both had long experience in a specific form of social service. They were well aware of the body of events and opinion to the effect that any member of the public, let alone one in a caring service, should come forward with concerns about the safety of a child. The claimant's questioning on whether the respondent's policies ran so far as a policy relating to the welfare of the children of employees seemed to us slightly beside the point: this part of their evidence was humane societal evidence, not based on a contract of employment.

76. Drawing all this together, Ms Everitt-Story and Ms Ansdell agreed that there was a sufficient concern about the claimant's daughter to lead them to take matters further. Ms Everitt-Story spoke to a representative of the respondent's HR Department. There is no record of the questions she put or what answer she got, but it seems to us unlikely that HR could offer fruitful advice on the management of a perceived risk to an employee's child. Ms Everitt-Story however gave a compelling answer on the position in which she found herself. In weighing up her position, she felt that she would rather be held accountable for taking an unnecessary step to protect a child, than be criticised for having done nothing if the child came to harm. We have sympathy with that reasoning, particularly where as a manager Ms Everitt-Story felt in the position of damned if she did and damned if she did not.

77. On the morning of 8 August 2018, Ms Everitt-Story telephoned HCS and spoke to a duty officer. She explained the background to her call, but kept no note of what she said. She was advised to put her concern in writing, which she did at 12:20 the same afternoon in full as follows (86):

> "Dear Hertfordshire Social Care
>
> I called this morning and spoke to your duty Manager and was advised to email you, marked as urgent.
>
> I line manage a Probation Officer, Mr K [name, address and date of birth given]. Forgive me for the long email but I will need to provide you with a context of my concern.
>
> Since I have managed K for nearly two years I am aware of an acrimonious separation between him and his partner. They have two children; a girl and boy but I am afraid I don't know their details or DOBs. I believe his son may be called X. K has disclosed to me a bitter separation whereby the family Court have been involved and accusations made by his ex partner regarding the

> children. Approximately a year ago (it may have been 9 months or so) he informed me that his ex partner had made an allegation that he was planning to facilitate FGM on their daughter. He stated that Hertfordshire social care had discussed this issue with him and that they were satisfied that the risk was managed. I discussed this with my line Manager [copied into the email] and we agreed that as an employer we did not feel any further action was required. In fairness he had been transparent and kept us informed. He stated that he did not, believe in the practice and would not do this.
>
> Three weeks ago, K handed in his notice. He explained to me that he had given up hope of an amicable arrangement with his ex partner and that he wished to return to Nigeria. This was in conflict with an earlier discussion he had with me whereby he stated that he may have to choose between employment and his children in order to spend more time with them. He is now saying he has resigned himself to not seeing them and he is considering his future plans. This coincides with the summer break when the children are out of school.
>
> I have discussed this issue with my line Manager and we both of a "nagging" doubt about his intentions. I may be completely wrong but as this allegation has been made before and he says he plans to go to Nigeria I can't help but be concerned that he may take his daughter with him and his son.
>
> I get the impression that K is not giving me the full picture and he has no obligation to do so. Please feel free to call me on my direct dial or work mobile to discuss further."

78. There are obvious inaccuracies of detail: the line management period was 18 months; the FGM matter was 16 months before; the phrase "risk was managed" may have been probation vocabulary but by implying the balanced assessment of risk read quite differently from Ms Everitt-Story's April 2017 supervision report which spoke of resolved, closed and no further action.

79. The email referred to the separation as bitter or acrimonious. The claimant challenged this, and we have some sympathy with the challenge. Ms Everitt-Story recorded no information about the separation in 2013. Certainly, there were difficulties in child arrangements, but there was no evidence that they were bitter, and it is not clear whether that was Ms Everitt-Story's perception or her report of what she thought the claimant had said. Certainly, in May 2018, as commented, there was evidence of co-operation of which Ms Everitt-Story was unaware.

80. The most striking part of the email was the third paragraph (Three weeks..') The claimant's evidence, according to his witness statement, was that,

> "On 29 June 2018 I advised Ms Everitt-Story I would hand in my notice… I told her that I would like to go back to Nigeria, work for YOT or CRC ... On 9 August 2018 I advised Ms Everitt-Story I will not be going back to Nigeria and if I travel it will be for a short while."

81. Although we do not accept the evidence of either party about the dates of these conversations, we accept the claimant's evidence that at some point before 8 August 2018 he had told Ms Everitt-Story that one of the options in

his mind was return to Nigeria. We accept that while the claimant spoke of staying in Nigeria for a period which was beyond a casual trip or visit, he said that this was one of the options open to him. We find that the claimant did not say or suggest that his daughter would travel with him.

82. We accept that on 9 August, ie the day after the referral, and at a time when the claimant did not know about the referral to HCS, the claimant told Ms Everitt-Story that if he made a visit to Nigeria it would be for a short period of time, not a long visit, and that the reason was that his daughter had said that she would be upset if he went away and 'wouldn't be seeing them' (90). We accept that that was some evidence that he had spoken of the trip to Nigeria without taking his daughter with him.

83. The record from HCS shows that the assessment of Ms Everitt-Story's email by MASH was,

> "Remain in contact stage as there is no current evidence that father intends to take the children to Nigeria and have FGM performed on them" (*sic*).

MASH spoke to Ms Everitt-Story on 10 August and asked her to inform the claimant that the referral had been made. The MASH summary was also that the children's mother should be contacted, but the tribunal's bundle does not contain a record of that contact.

84. MASH spoke again to Ms Everitt-Story a number of times on 10 August, during which she explained that she had been unable to see the claimant that day, particularly as in the circumstances she wished to see him in the company of Ms Ansdell. That day, 10 August, was in fact the claimant's last day of service and it appears that he was unable to get to work because his car broke down.

85. It appears that MASH made contact with the children's mother and then made contact with the claimant on 14 or 15 August. The final MASH record reads (92, emphasis added):

> "There is <u>no evidence</u> to substantiate the referrers concerns raised that father is taking daughter out of the Country for FGM. Referrer has stated that they have <u>no evidence</u> of this, but they were concerned as to father's conflicting information about him returning to Nigeria and his sudden departure from work.
>
> Father has been spoken to and explained his reason for leaving work that this was causing stress to him in relation to the Child Arrangement Order in place that he states mother is alleging he is continually breaching. Father has no intention of taking either of the children to Nigeria and reiterated his dismay and worries that the children's mother could have previously accused him of looking to have FGM performed on his daughter. Letters of support and closure have been sent to both parents reminding them of their duty to safeguard from adult conflict. No role for MASH…. Previous MASH episode assessed the FGM concerns – which was low risk."

86. It was common ground that the claimant was first told of the referral to HCS when MASH succeeded in contacting him by phone, and that in the same conversation MASH told him that the matter was to be taken no further.

87. We add for the sake of completeness that the claimant subsequently sought to present a grievance about this issue which was dealt with under the respondent's complaints procedure. Ms Jarrett rejected the grievance by letter of 14 December 2018 (142). The claimant appealed further. His appeal was rejected by Ms Spring by letter of 6 February 2019 (165). Although witness statements had been served from Ms Jarrett and Ms Spring, neither was called. The tribunal suggested at the start of the hearing that while their enquiries might shed light on Ms Everitt-Story's actions, their finding that there had not been unlawful discrimination was not a matter which assisted us.

88. Ms Everitt-Story was taken to one of Ms Jarrett's findings, and in her evidence expressed her disagreement with it (145):

> "Ms Everitt-Story was clear that the decision to make a referral to HCS was based solely on concerns about risk to your children. The fact of your ethnicity was relevant only in so much that FGM is practised in Nigeria."

89. Ms Everitt-Story did not accept that ethnicity was a relevant consideration.

Discussion

Direct discrimination

90. We now turn to our discussion of the claim of direct discrimination. We first ask whether because of the protected characteristic of Nigerian national origin the respondent treated the claimant less favourably than it would treat others who do not share the protected characteristic of Nigerian national origin. When we consider a comparison under s.13 with a hypothetical comparator, we must bear in mind that there must be "no material difference between the circumstances" of the claimant and of the hypothetical comparator.

91. The treatment complained of was the report to HCS. We have found it useful to start our discussion by asking the question, was the report made to HCS because of the protected characteristic. It is not necessary for the protected characteristic to have been the only reason for the treatment or even the main reason, so long as it was a material or significant reason.

92. This was a point on which the binary approach was particularly unhelpful. We find that the report was made not only on the grounds of the claimant's national origins as he submitted; and we do not accept that the imperative of child protection was the only reason why the referral was made. The referral was the outcome of a process involving many factors, over a period of time. We find that the referral was made because of a combination of four groups of factors.

93. The first group was the resignation. We accept that it came as a surprise. We accept that Ms Everitt-Story understood that the claimant had given different reasons, which at times appeared irreconcilable: looking for a job with YOT was not necessarily reconcilable with returning to Nigeria; she could see that at some point he would have to make a choice. There is always a puzzle for an employer when an employee resigns, who has normal financial needs, but has no job to go to. The second group was the history of family events. Ms Everitt-Story knew from what the claimant had told her in supervisions that there was a continuing issue about child arrangements. She knew that the claimant had responsibilities towards his children, and that it was school holiday time. He had in broad terms spoken in the March 2018 supervision about the conflict between his family duties and his employment, and his desire not to compromise either of them. She characterised the separation as acrimonious, although it might be fairer to say that the child arrangements (not the separation as such) were a source of conflict and tension, and the word acrimonious appears to have been her word, not the claimant's.

94. These two groups formed a matrix which is not unusual in family life and therefore in employment. The third group was the range of issues to do with Nigeria and Ms Everitt-Story's perceptions of Nigeria. The considerations were that the claimant is of Nigerian national origin; that he had spoken of returning to Nigeria, which Ms Everitt-Story understood in terms of a possibly lengthy stay in a country with which he identified; and these two factors created the puzzle about how the claimant might reconcile the conflict between return to Nigeria and his responsibilities towards the children and their mother. This led to speculation (wholly unsupported by evidence) that the claimant might be planning to take the children, or at least his daughter, with him. In turn, these considerations brought to mind the old FGM conversation, and the understanding that Nigeria is a country in which FGM is not unlawful and is practised.

95. We add to these three groups a fourth point: the approach of Ms Everitt-Story and Ms Ansdell arising out of their probation experience. Their work accustomed them to manage secretive behaviour, absconsion, and the need to avoid what they thought of as flight risk. Their working background also gave them a serious understanding of their responsibilities to a child who might be at risk. In this last factor is to be included Ms Everitt-Story's view that she would rather be at fault for having done something to safeguard a child than for having done nothing if the child came to harm.

96. We find that the referral was made because of the combination of the four groups described in the above paragraphs: the resignation circumstance; the family circumstance; the Nigeria circumstance; and the probation factors.

97. Can it be said that in that factual matrix the referral was made because of the protected characteristic of national origin? We answer that question in the affirmative. The claimant's national origin was a material factor. We must flesh out that bare sentence by adding another layer: the material

consideration was not that the claimant is Nigerian as such, but that his Nigerian national origins lie in a country where FGM is lawful and practised.

98. However, the s.13 claim does not end there because we must then construct the question of comparison. We do so with caution, because this is a case in which characterisation of the comparator is potentially determinative. The reason is that we must include in the hypothetical comparison the material factors that the claimant's national origins lay in a country where FGM is not unlawful and is available, and that the fact of those origins had led in part to a previous allegation having been made.

99. In our judgment the comparator is a father in the same resignation and family circumstances; who is not a person of Nigerian national origin; but whose national origins lie in a country where FGM is not unlawful and is practised; and who has lived in that country in the past; who has spoken about a return to that country as one of a number of possible choices; who has a daughter aged 11 at the material time; and against whom an FGM allegation (no matter how threadbare evidentially) has previously been made.

100. We have no hesitation whatsoever in finding that that comparator, who might for example be Kenyan or Egyptian, would have been treated identically by the respondent, and that the same would have happened. A comparison with, for example, a Spanish employee expressing a possible wish to return to Spain (where FGM is unlawful) therefore cannot be apt. It follows therefore that a s.13 claim cannot succeed because the claimant cannot demonstrate that he has been treated less favourably than the respondent would treat others not of his national origins in comparable circumstances.

101. We add the comment that this conclusion must follow from circumstances which are inherently linked to national origins in countries where FGM is not unlawful and is practised. It was not put to us that we should interpret the words 'national origins' narrowly, so as not to include a tradition of the country of national origin. Although we were initially concerned to consider whether an issue of stereotyping arose in this case, we did not in deliberation consider it necessary to pursue that point. We were also concerned about the possible relevance of Amnesty International v Ahmed UK EAT/0447/08. That case, decided under the Race Relations Act 1976, was of less assistance than we anticipated. As Mr Duffy quickly pointed out, a major distinction was that Amnesty readily conceded that the treatment in question had been on grounds of national origin, but for benign motive. In this case, the respondent's position was that the treatment was for a benign motive only, unrelated to national origin.

Harassment

102. When we turn to the alternative pleaded case of harassment, we ask first whether the respondent engaged in unwanted conduct. We find that it plainly did, as the referral to HCS was unwanted conduct.

103. We ask secondly whether the unwanted conduct related to the claimant's national origin. The words "related to" do not imply a relationship of causation of the type required by s.13, but some broad factual connection. For the reasons set out above, we find that the referral to HCS was in material part related to the claimant's Nigerian national origins (as well as to the other factors which we have identified)

104. We consider at the third step whether the referral had the purpose or effect of either of the statutory effects. We find that it had the effect; there was no suggestion of purpose in this case.

105. When we consider the alternative formulations under s.26(1)(b) we ask first whether the referral had the effect of violating the claimant's dignity. In order to decide that we must take account of the three matters set out in s.26(4).

The claimant's perception

106. The first is the claimant's perception. His perception, with which we have considerable sympathy, was that the only FGM allegation had been made 16 months previously and closed down by HCS almost immediately. In other words, he saw that the expert agency had swiftly concluded, after one phone call to him, that there was nothing which warranted any further action. While we accept Ms Everitt-Story's evidence that she did not know that the claimant is Jewish, she did know in April 2017 that he identifies as a member of a community which does not practise FGM, and that he expressed hostility to FGM. As Ms Everitt-Story knew, it was not just that the claimant had been transparent, he had volunteered to the respondent the information about the FGM issue, when he was under no obligation to do so. The respondent had taken his word for it then, and had not asked for any other information.

107. At this hearing the claimant sought repeatedly to put to the witnesses and to the tribunal three overarching points. They were (1) that there was no extrinsic evidence whatsoever that he was planning to facilitate FGM; (2) that there was circumstantial evidence to show that he was not; and (3) that the respondent never put its concerns to him before contacting HCS. We find that each of those points was well made. We add nothing more on the first and third. On the second, we note that not all of the circumstantial evidence was available to Ms Everitt-Story at the time in question.

108. Drawing all of these matters together, we take account of the claimant's perception as informed by the above.

Other circumstances

109. We must then take account of the other circumstances, and we repeat what we have said at #93-95 above about the totality of the circumstances, and in particular about the claimant's observations and concerns about what was not done before the referral.

Reasonable to have the effect

110. The final matter is whether it is reasonable, in the objective assessment of the tribunal, for the referral to social services to have had the effect of violating the claimant's dignity. That question in our judgment requires us to weigh the circumstances and considerations described above with the imperative of child protection. In more plain language: even allowing for the hurt which the claimant has described to us, is that hurt reasonable, in a situation where there was an approach to child welfare which sought to eliminate risk; at a time in society when we are aware of the harm suffered by children in part as a result of the inaction of those around them. We ask the question more bluntly: should the claimant not have seen that however hurtful he found the referral, it was genuinely meant in the best interests of his child, and that the need to safeguard his child was or should have been a trump card over all other factors?

111. The question was not put to the tribunal by either side in quite those terms, although it was perhaps implicit in the evidence of Ms Everitt-Story and Ms Ansdell. It is a truly difficult question. The question is not whether Ms Everitt-Story was right to make the referral, in the circumstances, when she made it, and using the language which she used. The question is whether in the objective judgment of this tribunal it was reasonable that the referral, which related in part to the claimant's national origins, had the effect of harassing him by violating his dignity.

112. We ask whether it was reasonable to have had that effect at the time in question, in August 2018; but we must consider it through the evidence given at this hearing two years later. We must be aware of the risk of hindsight: it seems to us that we may attach weight to events at the time in question of which the claimant was unaware; but we are cautious of attaching weight to any event after about 15 August 2018 (the last date when the claimant was first told about the referral).

113. At the time the claimant knew: that his origins lay in one of the many communities in Nigeria which do not practise FGM; that he personally opposed the practice; that he had never had any intention of arranging FGM; that the one shred of evidence to the contrary was a remark made by his ex partner in March 2017 which HCS had discounted after one phone call to him; that he had volunteered information about this to his line manager, who had no other means of knowing about it; that there was no evidence or reason to believe that his opinions or plans had changed; that in the summer of 2018 he had had in mind a number of possibilities; that while one of these was a possible return to Nigeria, he had never spoken of taking his daughter with him; that he had had at least one job interview in London; that he had on 9 August (ie after the referral but before he knew about it) told his line manager that any trip to Nigeria would be short because his daughter would otherwise be upset by separation from her father; and that at the specific time of the referral his children were on an agreed holiday with their mother.

114. The claimant did not know anything of the thought process of either manager; he did not know the nature or extent of their concerns for the welfare of his daughter; and he did not know that in the referral Ms Everitt-Story had expressed herself in tentative language. He knew that no one at work had ever broached the issue of FGM with him, and that the only time when FGM had been spoken about was when he mentioned it in supervision 16 months before the referral. He knew that the respondent did not and could not know about all the factors set out in the previous paragraph, eg that he had been interviewed for other jobs. He knew that he would have had the opportunity to tell them, if asked.

115. We have balanced these matters. What has weighed heavily with us has been that the mistaken approach of both managers (ie their 'probation mindset') led them not to take the one simple step which would have avoided all of these events, ie not to put their concerns to the claimant before approaching HCS. In our judgment, in light of all of the above, it was, in our objective assessment, reasonable that the referral had the effect of violating the claimant's dignity.

116. We find that the referral violated the claimant's dignity in two broad respects. One was that it associated him with a form of Nigerian behaviour which he sincerely opposed; and perhaps more cogently, because of a factor which he summarised in a few words which capture the emotional core of this case (WS26). The claimant wrote that he was "falsely accused of violent child abuse against my only beloved daughter". We find that in that short sentence the claimant identified the three factors which most hurt him: that the allegation was untrue; that it was an allegation of violent abusive behaviour; and that it went to the heart of his relationship with his child. We add a fourth factor which is implicit: that the allegation was made by colleagues with whom the claimant had had a good working relationship for over 18 months, without evidence, and without first having spoken to him.

Remedy

117. We turn finally to the question of remedy. Judge Bloch QC recorded that Counsel for the claimant said at the preliminary hearing that remedy was a claim for injury to feelings only, and that the figure stated was £15,000. While we did not consider ourselves bound by that figure, we noted that as the claimant had suffered discrimination after he had resigned, it seemed to us to stand to reason that there was no claim for financial loss, and the claimant had given no evidence of financial loss.

118. At the end of closing submissions, the judge briefly explained the principles which apply to discrimination awards, including financial loss and injury to feeling awards, and asked the claimant what he wanted to say on remedy. It seemed to us that the claimant was emotionally unable to answer, and after a pause he said that he had nothing to say and left the question of remedy in the hands of the tribunal. Mr Duffy made the point that there was no claim for financial loss and submitted that any claim for injury to feelings should in the circumstances be in the lower band. He reminded us of Ms

Everitt-Story's benign motive in making the report, and he noted that there was a single act complained of, of which the claimant was told some days later, in the same call in which he was told that HCS would not take the matter any further.

119. There was no evidence of a claim for financial loss and we make no award. When we consider injury to feelings, we did not consider ourselves bound by the figure put by Ms Joffe on the claimant's behalf. It seemed to us that this award should not be in the lowest band, and should reflect the hurt felt by the claimant in the circumstances described above, and powerfully captured by him in the single sentence quoted at #116 above. It seemed to us that the appropriate figure was at the bottom of the middle band, and the award is therefore £9,000.00.

120. We have made the interest calculation as follows. Between date of infringement (8 August 2018) and date of this award has been a period of two years minus two days. We calculate one year's interest at 8% as £720.00; and a daily rate of £1.97. The calculation of the interest figure is therefore the following:

    2 x £720 = £1440 - (2 x £1.97) = £1436.06.

_____
Employment Judge R Lewis

Date: …27 August 20……..

Sent to the parties on: ..9 September 20

For the Tribunal Office