# EMPLOYMENT TRIBUNALS

**Claimant:** **Mr J Anthony (now known as Jamal Ud Din )**

**Respondent:** **H&M Security Services Limited**

**Heard at:** **East London Hearing Centre (by Cloud Video Platform)**

**On** **8th & 9th October 2020**

**Before:** **Employment Judge McLaren**
**Members:** **Mr. T Burrows**
**Ms R Hewitt**

**Representation**
**Claimant:** **In person**
**Respondent:** **Mr J Bryan (Counsel)**

# JUDGMENT

**The unanimous decision of the tribunal is that:-**

**(1) The claim for direct discrimination under section 13 of the Equality Act 2010 does not succeed and is dismissed.**

**(2) The claim for victimisation under s26 of the Equality Act 2020 does not succeed and is dismissed.**

# REASONS

Procedure and preliminary applications

1. This has been a remote hearing on the papers which was not objected to by the parties. The form of remote hearing was by CVP.A face to face hearing was not held because it was not practicable. Both parties were able to take an active part in the proceedings and had a full opportunity to put their case.

2. There had been two previous case management hearings, the latter of which had left some matters unresolved and the claimant raised four points at the outset of this hearing.

3. He made an application that the respondent's witness statements be struck out for late service, he made a request to amend his claim by adding two points, and he raises complaints about correspondence from the respondent's solicitor suggesting that the case be heard in person and not by CVP, and that an application to compel the attendance of one of the respondent's former employees evidence on behalf the respondent had not been granted.

4. After discussion I explained that it would have been a matter for the respondent if they wished to compel a witness to attend on their behalf. If the claimant felt that the absence of that witness meant various questions could not be properly answered that was a point he could make, and the tribunal would take that into account in reaching its decision. I also explained that any party making a request that a hearing be held in person rather than CVP was something they were entitled to do.

5. We considered the claimant's submissions on his application to strike out the respondent's witness statements and to amend his claim form. The first application arose because the respondent had served their witness statements one day after the deadline for exchange that had been set by the tribunal and had done so some hours after the claimant had sent his witness statement. The claimant considered that an unfair advantage had been taken and that the respondent's witnesses had an opportunity to amend their statement in the light of his and that, as a professional organisation, the respondent should have complied with the employment tribunal order and its failure should be penalised.

6. We heard submissions from the respondent's counsel and took evidence from Mr Barton, the solicitor with conduct of this matter for the respondent. We were satisfied from his evidence and from the papers that the employment tribunal had ordered mutual exchange of witness statements on a particular day. The respondent had asked the claimant if he was ready to exchange on that day and had been told that he was not. The claimant then sent his statement after business hours and it was not therefore received or viewed by the respondent until the following day. Having noted that the claimant had sent a statement, Mr Barton then made arrangements with his secretary to send an email to the claimant attaching the respondent's statements. He confirmed that the respondent's statements had already been finalised and signed by all the witnesses prior to receipt of the claimant statement and the claimant statement had not been sent on to any other witnesses before their statements were sent to the claimant. Accordingly, we dismissed the claimant's application and allowed the respondent's witness statements to stand.

7. The claimant's application to amend the claim to include an act of post-employment victimisation, namely that he says he was approached in the park and threatened by an individual but the significant consequences did not drop the case, was not opposed by the respondent. They would be able to address this point in their evidence as their position is that, if this occurred, it was not at their request or instigation and they had no part in any such incident.

8. The second application to amend was to include a complaint of direct discrimination for the claimant says was failure to pay double time for working the holiday period when he had been told that that was the appropriate rate. He considered it likely that he was the only one who had not been paid double time, the respondent's other staff all being Asian. He had included this in his ET1, but this had been cut off and this incident had not appeared on the tribunal's version of the claim form. He had not raised this at the first preliminary hearing as he was too unwell. He had no explanation why he had not raised this second preliminary hearing. The respondent objected to this amendment.

9. After a short adjournment, the claimant's application to amend to add a complaint about pay rates was refused. The application to add post-employment victimisation was allowed. In reaching our conclusions the panel considered the principles set out in Selkent and the presidential guidance on amendments. We considered that both were substantive amendments and the application to amend was made at a very late stage in the proceedings. The balance of prejudice in relation to the claimant's application about pay rates would be against the respondent who are not in a position to deal with that allegation at this stage in the proceedings.

10. Accordingly, we refused this amendment application. Similar considerations arose in relation to the post employment victimisation, however on the balance of prejudice, as the respondent did not object, we allowed this amendment.

Adjustments

11. The claimant had put the employment tribunal on notice that he would need some adjustments to the procedure. He suffers from a variety of conditions, including dyslexia. He requested that he be given more time to answer questions and breaks as necessary.

12. The claimant was visibly distressed at a number of points during the hearing. He explained that the stress of the hearing had the potential to make his physical condition worse. He was on his own in the house but had his phone with him and was able to dial for emergency medical assistance should he require it.

13. Whenever he became distressed, he was asked if he wished for a break. On each occasion that he wished to get on with the case so that he could start to put it behind him. We were satisfied that despite the symptoms from which he was suffering, the claimant continued to be able to answer the questions articulately and was able to give full answers. We are satisfied that he was able to take a full and active part in the proceedings and his conditions did not prevent him from giving the evidence he wanted and making points to the tribunal as he wished.

14. The claimant also put the employment tribunal on notice that he had denounced his Christian faith and white heritage as a result of his experiences and wished to be addressed as Jamal Ud Din.

Evidence

15. We heard evidence from the claimant on his own account and from four witnesses on behalf of the respondent. These were Mr Kwasi Gyarteng-Gyafimi, Mr Danny McNally,Mr Paul Spencer and Mr Brian Tuite. We were provided with an agreed bundle of 444 pages.

16. In reaching our decision we have considered all the evidence we heard and those parts of the documents in the bundle to which we were directed. We were assisted by helpful submissions from both parties.

Issues

17. The issues were accordingly confirmed as follows, with the addition of an act of post -employment victimisation.

*Direct discrimination because of race (s.13 EqA)*

18. The less favourable treatment alleged by him is as follows.

a. Mr Razza Gulzar, his line manager, instructed/authorised the control room to cancel the Claimant's shift at 6 p.m. on 21 December 2019, when he was due to start working the next morning at 6 a.m. The decision was later reversed and the Claimant worked the shift.

b. Between around 24 December and around 27 December 2019 (i.e. over the Christmas holiday), Mr Gulzar organized/authorised free transport to and from work for security officers working on the same site as the Claimant (10, South Colonnade in Canary Wharf), but did not arrange/authorise such transport for the Claimant. Of those officers, the Claimant was the only white officer; the others were all Asian.

c. The Respondent dismissed him.

19. For the avoidance of doubt, the Claimant clarified that, in relation to 16.1 and 16.2, the alleged discriminator was Mr Gulzar. He contends that no decision would have been taken without Mr Gulzar's approval.

20. The issues for determination are as follows.

a. Did the alleged acts occur?

b. Did the Respondent thereby treat the Claimant less favourably than it treated, or would treat, others who are not white British/who are Asian?

c. Did the Respondent treat the Claimant in this way because of his race.

d. In so doing, did it subject the Claimant to a detriment?

*Direct discrimination because of religion (s.13 EqA)*

21. The Claimant is a Protestant Christian. The less favourable treatment alleged by the Claimant is as set out above under the direct race discrimination claims.

22. The issues for determination are as follows.

a. Did the alleged acts occur?

b. Did the Respondent thereby treat the Claimant less favourably than it treated, or would treat, others of a different religious group?

c. Did the Respondent treat the Claimant in this way because of his Christian religion.

d. In so doing, did it subject the Claimant to a detriment?

*Victimisation (s.27 EqA)*

23. Did the Claimant do a protected act? The acts relied on by him are:

a. the Claimant asked for reimbursement of his transport costs by email on 31 December 2019 at 11:10 to the Respondent's payroll and, in that email, referred to Tribunal proceedings and discrimination;

b. the Claimant's email to Ms Virginia Griffis on 2 January 2020.

24. Was the protected act done in good faith?

25. Did the Respondent treat the Claimant unfavourably because it believed he had done, or may do, a protected act? The unfavourable treatment relied on is:

a. failing to deal with the Claimant's complaints;

b. dismissing him.

<u>Finding of facts</u>

26. The claimant is an experienced security professional. He was engaged by the respondent as a security guard and began his shifts for them on 6 December 2019. He worked exclusively on the HM government site, 10 South. Colonnade, Canary Wharf.

27. The claimant was interviewed by Mr Gulzar and the pack of documents relating to the interview were in the bundle. They had not been signed in the appropriate place by Mr Gulzar. The claimant also gave evidence that during his interview he was asked about his religion and he informed Mr Gulzar that he was Christian. It was the claimant's belief that Mr Gulzar was prejudiced against Christians, but nonetheless hired him because it was difficult to find staff with appropriate skills for the contract.

28. The claimant also took issue with the document at page 74B. This had circled "yes" in answer to the question" do you have your own transport?". The claimant now considers that this was a deliberate error by Mr Gulzar who had determined from this point to discriminate against the claimant in not offering him transport over the Christmas period as he was fully aware the claimant did not have a car and yet had led the respondent to believe that he did.

29. Mr Spencer was asked about the failure to sign documentation. He was not surprised that the documentation had a missing signature. In his experience there were occasions when companies' paperwork was not completed to the standard that he would like to see on all occasions. We accept that in organisations errors such as this can be made.

30. The claimant confirmed that during his employment with the respondent he had worked the shifts set out at page 36 of the bundle. His first shift was 6 December 2019 and the last one 19 January 2020.

Cancellation of a shift

31. We heard from Mr Gyarteng-Gyamfi, formerly employed by the respondent as a controller, that the control room is the nerve centre for controlling all sites on a daily basis. It is the controllers who set the rotas for security officers and send out duty sheets notifying security officers of their weekly rotas. He agreed with the claimant that Mr Gulzar as a manager and client liaison could also influence the shift rotas. He also agreed that all management had access to the system remotely and this included Mr Gulzar.

32. He told us that in December 2019 there were two controllers, himself and Mr Danny McNally. In addition, Mr Nawaz was a designated controller/mobile driver, and he covered the control room when either of the two controllers were absent. It was Mr McNally who was on duty on 21 December.

33. It was Mr Gyarteng-Gyamfi's evidence that it was standard procedure for the controllers to send out duty sheets over Friday night, Saturday and Sunday, updating or informing security officers of their rota for the following week. There is no common practice on how these documents were dated. Mr Gyarteng-Gyamfi told us that it was his practice to send out a duty sheet that started on the day he was sending it out. Other controllers, however, sent out duty sheets starting on the Monday of the following week.

34. It was agreed that on Friday, 13 December 2019, the claimant was sent the document at page 162. This set out the shifts that he was due to work from 22 December until 31 December. That duty sheet is headed from 13 December 2019 to 01 January 2020.

35. On Saturday, 21 December the claimant was working for another organisation and received a text to his mobile phone from the respondent. This is at page 168-169 of the bundle. It attached a duty sheet headed from 23 December -29 December and showed the shifts from the 23rd onwards. It did not show the shift of 22 December which had been on the previous worksheet.

36. The claimant explained that he was very concerned about this. He understood from this document that he had been cancelled from 22 December shift at very short notice, that is the afternoon of the day before the shift. He texted his manager, Raza Gulzar, to ask him why his rota had been changed at the last moment. From the summary of the text exchanges at page 189 it appears that Mr Gulzar tried to call the claimant a couple of times and then sent a text saying that he thought the claimant was working that morning and asked him to check with control. The claimant was able to confirm that the rota had been be re sent and that it now showed that he was working on the 22nd.

37. We heard evidence from Mr McNally who was on shift in the control room on 21 December. He was comparatively new at that point and was learning the ropes and who people were. As part of his duties he was asked to email out duty sheets for the week commencing Monday, 23 December 29th of December 2019. It was his practice at that time to send sheets for the week ahead, although he acknowledged that was made aware subsequently that this could cause confusion and that should not be done.

38. He emailed the claimant his duty sheet and was clear in his own mind that he was only showing shifts from 23 December, as the document states in its heading. By sending out the rota for the week ahead he had not intended to, nor did he believed he was, cancelling the shift of 22 December.

39. At 17.32 on 21 December (page 175) he received an email from the claimant asking why control was messing about with his rota. He asked who was doing this and said that he had been told it was Kwasi. The Claimant told us in his evidence that he had in fact telephoned the control room just before this and spoke to Danny McNally on the telephone. Danny told him that the shift had been cancelled and this had been done by Kwasi.

40. The claimant suggested in his questions that Danny had told him this was authorised by Mr Gulzar. In his witness statement the claimant had said that when he asked Danny who would authorise this, Danny had put the phone down. The claimant's speculation was that Danny was worried about getting into trouble. Mr McNally had no recollection of this conversation and did not believe it had occurred; however, he was very new at that point and would not have known or recognised the claimant's voice or name. He would not necessarily remember who had called. He could not remember the conversation happening, but equally could not remember that it did not happen. He was adamant, however, that he would not have told the claimant that "Kwasi" was responsible. While Mr Gyarteng-Gyamfi had told him to send the rotas out, this was his action. On the balance of probabilities, we accept that a conversation did take place and that

Mr McNally may have told the claimant that he had been instructed to send out the rotas by Mr Gyarteng-Gyamfi. We conclude that he would not have said that a shift was cancelled and that this had been authorised by his colleague as there was no cancellation.

41. It is agreed that some four minutes after he sent this email, the claimant received a further duty sheet, this time headed from 21 December 29 December. The claimant then did work on 22 December.

42. During a break from his duties on that day claimant sent a text to Paul Spencer and his manager, Mr Gulzar. These are at pages180-183. They reiterate the view that the shift was cancelled, asked who authorised this to be done, explained the stress he was under and ended with "a request that you fuck around with someone else's rota in future!". The expletive was capitalised. The claimant accepted that this was a rude text to send but did not consider that it had caused offence because it was never raised with him formally or informally.

43. We heard from both Mr McNally and from Mr Gyarteng-Gyamfi that they had both been present in the control room when this email was received and that Mr Gyarteng-Gyamfi had been very upset by the email and the language used.

44. Mr Tuite was in the office that morning and Mr Gyarteng-Gyamfi showed him the email. Mr Tuite confirmed this. He was made aware by Mr McNally that Mr Gyarteng-Gyamfi was unhappy about the email. He did not take any action because it was a busy period and because no formal complaint was made to him. Mr Gyarteng-Gyamfi told us today that he had raised a complaint about this to Mr Gulzar but had asked him not to progress it.

45. The Claimant believed that his shift had been cancelled. This was not a misunderstanding but a deliberate act because he's the only white Christian. He also believed that the cancellation had been done by Mr Gulzar.

46. While Mr Gulzar did not attend to give evidence, we accept the evidence of the respondent's witnesses as to the process for sending out duty sheets. It was confirmed that Mr Gulzar was able to influence rotas and would have had access to the system to make changes, but that they were largely determined by the control room.

47. While Mr Gulzar could therefore have cancelled the claimant's shift, we find that the claimant's shift had not been cancelled. We also accept that it appeared to the claimant that this had occurred, because of Mr McNally's then practice of showing shifts for the week ahead, which therefore excluded the shift for the next day which was part of the prior week's shift pattern. This was corrected very shortly once the claimant raised the question and concern. We accept that nobody had instructed the control room to cancel the shift which had not been cancelled. We find that this was a misunderstanding caused by an admin process.

Transport on Christmas Day

48. Mr Gyarteng-Gyamfi explained that he generally organised the pickup and drop-off of security officers who work on Christmas day and he could not get to site or could not get home. He had done this for nearly 10 years. The respondent has a number of personnel working both on the night of Christmas

Eve and Christmas Day during the day and all night. While the numbers varied, there were around 40 to 50 officers working at various sites on these days and nights.

49. He described the process. When duty sheets are sent out, if a security officer contacts the control room and said they cannot get to the site they will be asked to see if they can get a lift from a work colleague. If he/she is unable to do so, then the name is taken and Mr Gyarteng-Gyamfi tries to organise the pickup and drop-off. If that is not practicable then the shift is cancelled and an alternative security officer who can get to the site is rostered on. The organisation of these pickups and drop-offs is entirely his initiative and responsibility, Mr Gulzar has no involvement in its organisation.

50. Christmas Day is the only day of the year there is no public transport and accordingly Mr Gyarteng-Gyamfi will organise pickups and drop-offs on that day only. He does not do this for Boxing Day. We accept that the company did not have a practice of offering this service on Boxing Day and that no other staff received that service on Boxing Day. There would be no need for a pickup service other than on Christmas day as that is the only day when public transport stops.

51. The sheets that Mr Gyarteng-Gyamfi said that he prepared identifying who was to be collected were at pages 303 -306. The claimant suggested that they had been made up after the event and that they were not signed or dated. Mr Gyarteng-Gyamfi did not accept this. They were documents prepared on 24th December and were used by mobile drivers to direct their pickup and connections. There was no need to sign or date internal memos made for his own use. We accept that these were contemporaneous documents. The basis for the claimant's suspicion, that they were not signed or dated, is not one we share, we accept that such a document would not be signed or dated.

52. The bundle contained at page 302 a written note from Mr Gulzar which .explained that he was on shift that day from 4.30 in the morning and he drove around London to pick and drop-off based on the list that Mr Gyarteng-Gyamfi had prepared. He had no hand in organising this list and merely picked up those as he was directed. He did not personally organise the pickup and drop-off. We accept that it was Mr Gyarteng-Gyamfi who organised the service and not Mr Gulzar. It was not put to him that he had been told to leave the claimant out by Mr Gulzar and we find that was not the case.

53. The claimant maintained that all the other staff at his site were collected and that they were all Asian. In looking at the list of names Mr Gyarteng-Gyamfi identified that it was not only those of Asian origin who were provided with lifts. He identified that the security guards on the list included those from a variety of backgrounds and heritage, this included Eastern European, Nigerian and Jamaican.

54. We accept Mr Gyarteng-Gyamfi's evidence that he provided this service for those who had asked. The claimant accepted he had not asked for this. While he had initially suggested he may have problems attending shifts over Christmas for transport reasons( page 138) he had not pursued this and had subsequently accepted all shifts( page 165) .There is no reason for the respondent to be aware that the claimant needed this service.

55. We also find that the service was extended to officers from a variety of backgrounds and heritage. It may be the case that other officers who were on shift with the claimant at his site were of Asian background and received lifts, however we find that, if that were the case, that was a function of them having asked. The respondent did not have a practice of offering lifts only to those from certain ethnic backgrounds.

56. The claimant also says that when Mr Gulzar collected the other Asian members of staff at the site, they all laughed at him. This was raised by the claimant in his evidence to the tribunal but did not form part of his original letter of complaint after the termination of employment.

Pursuing reimbursement of expenses

57. The claimant was very unhappy about having to pay taxi expenses for Christmas Day and Boxing Day. He therefore sought to recover these from the company. He sent an email at 11.10 on 31 December to the payroll service. This is addressed to whom it may concern and asked for reimbursement for travel expenses in the Christmas period. In addition to setting out the details of the claim, the email concluded the paragraph by stating that if the company was not dealing with such a loyal, honest and upright man like himself, employment tribunal claims can definitely follow regarding discriminative behaviour to members of staff from management. The paragraph above asks senior management to have a word with Razza regarding his behaviour. It referred to the fact that all staff members should be treated the same and equally and not given preference.

58. A response was sent at 12.48 on the same day from the office manager saying that they would get back to him and asking for any queries to be addressed to her rather than to payroll. Shortly afterwards, the same individual asked the claimant if he had receipts for these journeys which the claimant then forwarded to her.

59. The claimant had copied his email to the managing director of the company but had inadvertently sent it to his son who also worked for the company and who has an all but identical name. He forwarded the email to Paul Spencer with the comment that he was not sure about this officer's comments and it reminded him a lot of "Cosmin". The claimant identified this as a reference to another white Christian individual who had been employed by the respondent. The email concluded, I thought I would pass it on to you instead of razz, that being a reference to Mr Gulzar, due to the comments he's put in the email.

60. The claimant considered that this meant that Mr Henderson(the son) had understood his email to raise complaints of discrimination against Mr Gulzar.

61. On 2 January the office manager sent the claimant an email asking him if he had made anybody at the respondent aware that he did not have transport to enable him to get to the site. The claimant replied by email of 2 January at 11.23 replying that he had not done so. This email talked about "razza taking the piss" and abusing his position as a manager of the company." It also states that the claimant was not very happy about being treated in such a way and discriminated against by his manager. The claimant refers to the first incident, that is when his rota was changed, and says that he knows that some managers like to give their

friends extra shifts but that Razza should have done this before the first rota was sent. He refers to the second incident, that of the lack of transport and says that it would be nice to get home fast after his shift but that was not taken into consideration because "Razza couldn't care less about him". The claimant is troubled that Mr Gulzar has still not apologised to him for the inconvenience that he had caused.

62. The office manager replied on the same date saying that she forwarded the email to Mr Spencer who has said that he would get back to the claimant. It was the claimant's understanding that his two complaints were therefore being investigated by Mr Spencer. The claimant considered that he had made a protected disclosure in each of these emails by referring in general terms to discrimination. He accepted that he had not referred to discrimination on grounds of race or religion but did not consider that he needed to do so, he had mentioned discrimination and identified the individual.

Mr Spencer's interaction with the claimant

63. Mr Spencer had originally had dealings with the claimant when he came to collect the suit that he had to wear at the site to which he was assigned. The claimant attended the office dressed for a formal dinner and in conversation the claimant explained that he had been working in VIP protection.

64. Mr Spencer thought that might be interesting to the managing director as the respondent was considering providing VIP security services involving chauffeured close protection.

65. A meeting between the claimant and the managing director was scheduled for 17 December 2019. However, on the day managing director was unable to make the meeting and therefore Mr Spencer met the claimant again. He closed the meeting after some 30 minutes. He formed the impression that the claimant was not what they were looking for. He recollected that he felt the examples the claimant gave of his experience were fanciful. He was clear in his evidence that interviews are matters of assessment and that he formed the impression that the claimant was not a credible candidate. Mr Spencer's evidence was that was the end of the matter and no job was offered in business development.

66. Once Mr Spencer gave evidence that he had thought some of the claimant's examples were fanciful, the claimant asked for permission to produce documents proving the incidents on his CV were true. He was keen to show the tribunal that he could evidence all his CV achievements, in particular commendations/awards for saving a life. We refused permission to introduce additional documents late in the hearing because they were not relevant to the issues.

67. The claimant's account of this meeting was different in that he told us this was a formal meeting, and he was offered a commercial manager job role which he turned down because the salary was inadequate. He asked for a second meeting with the chief executive to talk about a more appropriate salary package

68. We conclude that it is more likely that no role was offered. There would have been some paperwork generated about this. We also note that the claimant

makes no reference to having a job offer made to him in his email of 22 January which he sent after his dismissal and which set out his history with the company and the complaints that he had. We also consider that in the absence of the managing director being able to take the meeting it was unlikely that Mr Spencer would have felt able to offer the claimant a role in business development. For these reasons we prefer the respondent's account and find that a job offer was not made.

69. Mr Spencer confirmed that he saw the emails of 31 December 2019 and 2 January 2020. He took these as being requests for reimbursement of Christmas travel to which the claimant was not entitled. The Christmas period is a very busy one and while he would have received these e-mails, they did not get his attention until after the New Year. He did not take them as complaints of discrimination against Mr Gulzar and for that reason, they were not investigated as such.

Relationship with Mr Tuite

70. Mr Tuite explained that as one of the two company directors he likes to keep in touch with the staff and show that they are appreciated and he has the habit of popping into the control room most weekends to say hello to the staff. One such routine visit occurred on 22 December when, as referred to above, he was made aware of the contents of the claimant's email. Mr Tuite was very clear that he found this email offensive and aggressive and that he would not tolerate his control staff being addressed in this way. He did not, however, deal with the matter straightaway because it was the Christmas season.

71. The claimant came to his attention again in early January. Mr Tuite explained that as a small office they all help each other out. He was aware that the company was falling behind with its legal requirement to carry out vetting checks on its staff. He therefore came into the office one Sunday, 5 January and sent emails to staff with outstanding employment checks. He sent the claimant an email, at page 232, from his email address but unsigned with the signatory designated as the HR Department. He explained that he did so because he did not want the replies to come back to him but to the HR email address as he did not have time to carry out this task.

72. On receipt of this email the claimant emailed back on the following day to say he was very puzzled by having received this email as Mr Tuite was the company's finance director and did not work in the HR Department. He questioned whether he was receiving special treatment been contacted at the weekend by a company director. He also questioned whether not the process was necessary, as the company could simply Google his history. He also took the opportunity to raise his request for a refund of the taxi fares he had spent over the Christmas period. He considered that this did not really need looking into, the company could just press a few buttons and transfer the money in 2 minutes. The claimant also forwarded with the email an attachment, the company structure chart, to show that Mr Tuite was not HR

Dismissal

73. Mr Tuite told us that he was offended by this email. While he accepted in answer to the claimant's question that it was not rude, he nonetheless found it

offensive. He took exception to the claimant's suggestion that he was pretending to be HR. He was not pretending to be anything but helping a colleague with a backlog of tasks. He had never received an email like this and is also offended by the attachment of the chart trying to evidence his own role. He considered this to be extraordinary behaviour.

74. Mr Tuite was very clear that based on this email, together with the email 22 December, he considered that the claimant was not somebody that he wanted working for the company. The email of 22nd December was unacceptable, and he characterised it as aggressive, which he would not accept in any circumstances.

75. As he was now concerned about the claimant's conduct and behaviour, he asked to see Paul Spencer. This was an informal meeting between the director and a manager, it was not one that required noting, and no written record was made. Going into this meeting Mr Tuite had already decided that the claimant's employment should not continue. He was clear that he had the right to make this decision without going through any formal process because the claimant had been employed for only one month. He had no knowledge of the claimant's discrimination complaints when he made the decision. He only became aware of these via the court proceedings once employment had ended.

76. While he discussed the matter with Mr Spencer he did so only because Mr Spencer was in charge of the operational arrangements and so Mr Tuite wanted to check with him what operational impact ending the claimant's employment would have. Any consultation with Mr Spencer was therefore limited to how the claimant's exit would be timed. It was at Mr Spencer's request that the claimant was allowed to work out the shifts he had already been rostered to do to give him some time to find somebody to replace the claimant at the particular site on which he worked.

77. Mr Tuite was clear that he was the sole decision maker and he considered that the reason for dismissal was the claimant's performance. As far as he was concerned performance encapsulated the 2 emails. He instructed Mr Spencer to arrange for the claimant's employment be ended. Mr Spencer delegated that to Mr Gulzar who asked the office manager/PA to prepare the standard letter.

78. Page 248 of the bundle contained the email from Mr Gulzar to the PA asking her to "please poor performance this officer due to being aggressive and using foul language towards the control room". The letter was prepared and a copy of it is at page 250 of the bundle. It simply said that the company decided to terminate employment as the standard of performance had failed to reach that required by the employer. The letter was copied to Mr Gulzar. The claimant found this hurtful and questioned why that had to be done. Mr Spencer gave evidence that it would have been copied to him so that he was aware that his instructions had been carried out, but acknowledged that could have been done in such a way that the claimant was not made aware of that.

79. The claimant also considered that there was a conspiracy between Mr Gulzar and Mr Spencer around his dismissal. He referred to pages 244 - 245. This is correspondence between Mr Gulzar, Mr Spencer, Margaret and Virginia in which Mr Gulzar says that he has forgotten to take the claimant off the roster for the week of 14th of January. The email indicates that Mr Spencer agreed,

because the claimant had previously made a complaint about his shifts being changed, that they would let him work those shifts as had been sent the roster and the termination date would be 20 January instead. We accept the respondent's evidence on this point that a mistake was made and there was therefore delay in carrying out Mr Tuite's instructions.

80. We accept Mr Tuite's evidence that he was the sole decision maker. The respondent's witnesses were consistent on this point and Mr Tuite gave a clear account as to his reasoning. We also accept that he had not been made aware of the claimant's complaint of discrimination and therefore the emails of 31.12 19 at page 197 and the email of .02.01.2020 at page 224 played no part in the decision-making. The decision was based entirely on the two emails that he had seen and that he reached a conclusion that did not wish the claimant to continue as part of respondent organisation.

81. The reason for dismissal being given as standard of performance was meant by the respondent to describe the email correspondence. We accept that because the claimant did not have qualifying service, no formal procedure was required to end his employment.

Post-employment victimisation

82. The claimant gave evidence that on 22 August 2020 he was approached in the park in which he took his daily exercise at the same time every day, by a gentleman in a blue tracksuit. This gentleman told him that he should drop the litigation against this respondent or there would be bad consequences. The claimant was terrified by this threat and, despite his weak physical condition, ran away. The claimant contacted the police and was given a police number for this incident. He believed that the respondent had authorised the making of this threat.

83. This was put to Mr Tuite who said that the respondent had nothing to do with anything like this and that nobody at the respondent organisation had been contacted by the police about this incident. We accept this evidence on this point and find that if the police had concerns that the respondent organisation had been responsible for such threats, they would have been in contact.

Relevant Law

84. The claim is one of direct discrimination on grounds of race and religion. The claimant describes himself as a white Christian. S13 of the Equality Act provides "*A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."*

85. S.13 EqA focuses on whether an individual has been treated 'less favourably' because of a protected characteristic, the question that follows is, treated less favourably than whom? The words 'would treat others' makes it clear that it is possible to construct a purely hypothetical comparison.

86. Whether the comparator is actual or hypothetical, the comparison must help to shed light on the reason for the treatment. For this purpose, S.23(1) stipulates that there must be 'no material difference between the circumstances

relating to each case' when determining whether the claimant has been treated less favourably than a comparator.

87. The unfavourable treatment must be "because of " the protected characteristic. It is now well established that direct discrimination can arise in one of two ways.Where a decision is taken on a ground that is inherently discriminatory, or where a decision is taken for a reason that is subjectively discriminatory.That is, where the act complained of is not in itself discriminatory but is rendered so by a discriminatory motivation; i.e. by the 'mental processes' (whether conscious or unconscious) which led the putative discriminator to do the act

88. In some cases, there is no dispute at all about the factual criterion applied by the respondent, it will be obvious why the complainant received the less favourable treatment. If the criterion, or reason, is based on a prohibited ground, direct discrimination will be made out.

89. In other cases where the reason for the less favourable treatment is not immediately apparent, it is necessary to explore the mental processes, conscious or subconscious, of the alleged discriminator to discover what facts operated on his or her mind.' Accordingly, the subjective test, is only necessary where there is doubt as to the factual criteria that have caused the discriminator to discriminate'.

90. The protected characteristic needs to be a cause of the less favourable treatment, but does not need to be the only or even the main cause.

Victimisation

91. The claimant brings a separate claim for victimisation .Victimisation is defined as follows

> *(1)A person (A) victimises another person (B) if A subjects B to a detriment because—*
> *(a)B does a protected act, or*
> *(b)A believes that B has done, or may do, a protected act.*
> *(2)Each of the following is a protected act—*
> *(a)bringing proceedings under this Act;*
> *(b)giving evidence or information in connection with proceedings under this Act*
> *(c)doing any other thing for the purposes of or in connection with this Act;*
> *(d)making an allegation (whether or not express) that A or another person has contravened this Act.*
> *(3)Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.*

92. Subsection (d) covers allegations, whether or not express, made by the claimant that the employer or another person has contravened the Equality Act. A reference to the possibility of unlawfulness in general will not be sufficient for the purposes of S.27(2)(d)

Burden of proof

93. Igen v Wong ltd [2005] EWCA Civ 142, [2005] ICR 931, CA. remains the leading case in this area. There, the Court of Appeal established that the correct approach for an employment tribunal to take to the burden of proof entails a two-stage analysis. At the first stage the claimant has to prove facts from which the tribunal could infer that discrimination has taken place. Only if such facts have been made out to the tribunal's satisfaction (i.e. on the balance of probabilities) is the second stage engaged, whereby the burden then 'shifts' to the respondent to prove — again on the balance of probabilities — that the treatment in question was 'in no sense whatsoever' on the protected ground.

94. The Court of Appeal explicitly endorsed guidelines previously set down by the EAT in Barton v Investec Henderson Crosthwaite Securities Ltd 2003 ICR 1205, EAT, albeit with some adjustments, and confirmed that they apply across all strands of discrimination.

95. We reminded ourselves that the Court of Appeal confirmed in Madarassy v Nomura International plc [2007] EWCA Civ 33, [2007] ICR 867, [2007] IRLR 246, that a claimant must establish more than a difference in status and a difference in treatment before a tribunal will be in a position where it 'could conclude' that an act of discrimination had been committed.

Submissions

96. The claimant referred us to an employment tribunal decsion of Ms Anne Giwa Amu v Department for Work and Pensions 1600465/2017 because it had many factual similarities.We note this involves different parties and it is for each tribunal to make its own findings of fact.

Conclusion

97. Having made the findings of fact set out above, we have then considered the relevant law and applied that to those findings.Using the issues list as our guide we conclude as follows.

98. The first incident of less favourable treatment about which the claimant complains is Mr Gulzar cancelling his shift on 21 December 2019. We have found that the shift was not cancelled and Mr Gulzar had no part in the actions which led up to the confusion.There was a simple misunderstanding on the claimant's part.

99. The document that he received, which he took to be cancelling his shift ,was clearly identified to be setting out shifts from 23 December onwards. This misunderstanding was quickly addressed by the respondent. There was no less favourable treatment and the fact that the claimant was sent a roster for the week ahead which did not confirm a shift which was to take place the next day and so was part of the current week, does not amount to a detriment.

100. The second incident of less favourable treatment that is raised is that the claimant was the only white officer for whom Mr Gulzar did not organise /authorise free transport to South Colonnade in Canary Wharf. We have found that the organisation of travel was limited to Christmas Day only. It was not organised by Mr Gulzar but by Mr Gyarteng-Gyamfi. The offer of travel was not limited to those of Asian background only, but was made to all those who asked for it to be put in place.

101. We accept that it was the case that the claimant was the only individual on his site who was not provided with a lift. We find that this was not a deliberate act on the part of the respondent. The claimant was not treated differently because of his race or religion. No lift was organised for him as he had not requested it and, having originally raised a question about transport, he then accepted his shifts without reservation. There was no reason for the respondent to consider that he might require transport assistance. We find that no discriminatory act occurred.

102. We also find that the claimant has not shifted the burden of proof in relation to either allegation. He raises an number of matters that could amount to the "something more". These were identified to us by Mr Bryan in his submissions. He contends that Mr Gulzar was aware he was a Christian from the interview and was therefore prejudiced from the outset. Mr Gulzar did, however, hire the claimant and we have found that he had no part to play in any of the acts about which the claimant complains.

103. The claimant believes that he was offered a job by Mr Spencer and that the company's attitude to him therefore changed once he raised complaints of discrimination. We have found that no job offer was made. Mr Bryan referred us to claimant's evidence that other staff laughed at him when he was not given a lift. We accept that this on its own, even had it occurred, could have had many explanations other than discrimination and we give it little weight.

104. The claimant was concerned that Mr Henderson compares him to another white Christian security guard. We are satisfied that this individual had no part in any of events about which the claimant complains. The claimant also raises as a concern that no procedures were followed prior to his dismissal. We are aware that there is no requirement for such procedures to be followed. We accept Mr Bryan's submission on these points that these do not amount to the required something more that could shift the burden of proof.

105. We have found that the events complained of did not occur. Even if the claiamnt had shifted the burden of proof in relation to these allegations there was a wholly non discriminatory explanation for what had occurred.

106. The claimant also complains that he was victimised as a result of doing protected acts on 31 December 2019 and in a second email 2 January 2020. He considers that the respondent's failure to investigate his complaints, his dismissal and the subsequent making of threats after his employment ended were result of either, the respondent believing that these were protected acts ,or saw his emails as a red flag that he might raise a protected act in future.

107. The first email at page 197 is addressed to payroll initially and is asking for reimbursement of travel expenses. It mentions discriminatory behaviour and refers to an employment tribunal claim. It does not expressly reference discrimination on grounds of race or religion. While there is no requirement that an individual does expressly state which protected characteristics he intends to rely on, the email does need to be clear on its face that it is raising a complaint under the Equality Act, although that language does not need to be used.

108. Looking at it in the round, we conclude that the final paragraph when read with the one before would reasonably be seen as a complaint that a

manager is giving different treatment to his friends.We conclude that discriminatory behaviour was reasonably understood in that light and not as a claim of discrimination under the Equality Act.

109. We conclude that the email of 2nd January is even less clear. That refers to Mr Gulzar showing his true colours, abusing his position as a manager and being careless about the claimant. None of these suggest an allegation of discrimination.

110. We conclude that the claimant had not done a protected act as he has not raised concerns as requirted by s27 Equality Act. We accept that the respondent was unaware that there were any discrimination allegations to investigate and also that it was reasonable for them not to understand that those were the claimant's points. The first time the respondent was aware there was anything to investigate was after the claimant's employment was terminated and he identified his concerns as discrimination on grounds of race and/or religion.

111. The claimant also suggests that his dismissal was a result of these protected acts. While we have found that there were no protected acts, we've also found that the dismissal was carried out by MrTuite . We have found that it was his sole decision and responsibility and have accepted that he was not aware of the two emails in question. Even if these emails had amounted to protected acts, which we have found they did not, they played no part in the claimant's dismissal.

112. We conclude that the respondent was not involved in the making of any threat to the claimant in August this year. We have found that where that thought to be the case, the police would have been in touch, which they have not.

113. As with the claim for direct discrimination we have found that the claimant has not shifted the burden of proof, however, even if he had done so we have found that there were non-discriminatory reasons for the treatment that he received.

Employment Judge **McLaren**
**Date: 13 October 2020**