



EMPLOYMENT TRIBUNALS

Claimant: Miss Melissa Powell
Respondent: Oxford university Hospitals NHS Foundation trust
Heard at: Reading **On: 1, 2, and 24 September 2020**
Before: Employment Judge Gumbiti-Zimuto
Miss D Ballard and Mr M Pilkington

Appearances

For the Claimant: In Person
For the Respondent: Mr S Keen, Counsel

RESERVED JUDGMENT

The claimant's claims are not well founded and are dismissed.

REASONS

1. In a claim form presented on the 4 December 2018 the claimant complained of direct race discrimination and harassment. The respondent defended and denied the claimant's claims.
2. The claims and issues to be decided in this case were discussed at a preliminary hearing on the 8 August 2019. The issues to be decided in the case were set out as follows:
 - (1) Did the respondent discriminate against the claimant by treating the claimant less favourably than others because of race by reason of the following:
 - (a) Being given tasks in her role in ENT which were downgraded compared to the job description for the role;
 - (b) The support/guidance, or lack of, provided by her managers;
 - (c) Not being given additional duties and the chance to learn new things within the department;
 - (d) Not being given the opportunity to be redeployed to another department;
 - (e) The lack of training;

- (f) Being told by her line manager in a meeting in July 2018 that she was not fitting in with the team.
- (2) By reason of the matters in paragraph (a) to (f) above, did the respondent harass the claimant by engaging in unwanted conduct related to race which had the purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading humiliating or offensive environment for the claimant (including consideration of the claimant's perception, the other circumstances and whether it is reasonable for the conduct to have that effect).
3. The claimant gave evidence in support of her own case. The claimant prepared a manuscript document which she presented as her witness statement. The document produced by the claimant did not fully comply with the directions on the preparation of witness statements set out in the case management orders, more significantly the witness statements did not set out a chronological narrative of the evidence relating to the issues in the case and the statutory provisions. This document and the claim form at section 8.2 were taken as the claimant's evidence in chief. The respondent relied on the evidence of Claire McCabe, Marinda Rye, Naomi Fitzgerald and Suzy Robertson, all of whom prepared written witness statements which were taken as their evidence in chief. The Tribunal was also provided with a Trial Bundle containing 371 pages of documents.
4. From these sources we made the following findings fact and set out those matters which we considered necessary to determine the issues in dispute.
5. The claimant is a black woman. She was employed by the respondent from 19 June 2017 to 8 November 2018: from 2 July 2018 she was employed as Assistant Pathway Administrator in the ENT department. The claimant's line manager was Marinda Rye.
6. The claimant's job description summarised the role as follows: *"to provide a professional, comprehensive and effective administration support service to the administration, nursing and wider medical teams."* The full job description was set out in the trail bundle (p74) and included among the principle reception duties and responsibilities *"to collect health records as required from the Medical Records Library or elsewhere in the hospital and to assist with the preparation and pulling of clinic notes."*
7. On her second day working in the department the claimant was asked to a meeting with Marinda Rye after she was found crying at her desk. The claimant would not say what was wrong and simply said she was fine. After consulting with her line manager, Claire McCabe, Marinda Rye approached the claimant again later in the day. During this exchange the claimant said to Marinda Rye, *"I am not good enough to do anything else, I am only good for pulling notes."* Marinda Rye then explained to the claimant that the department was behind in puling medical records which was vital part of the smooth running of the department and that once they had caught up on

pulling records the claimant would be focussed on learning other parts of the role.

8. A few days later Marinda Rye arranged for the claimant to be shown the coding shelf and explain how to identify different medical record codes, and how to do distribution on Dictate IT.
9. The claimant also learnt and carried out other tasks like opening post and collecting medical notes needed by the consultants, helping with the registrar clinic letter typing, helping secretaries with scan reports, looking at discharge notes and making sure patients were booked.
10. On about 9 July 2018 the claimant approached Marinda Rye and asked her about PA, a temp working in the department. The claimant asked what she was doing. The claimant did not know at the time that the PA was a temp. Marinda Rye explained that the PA was a temp and that she had been specifically brought into the department to catch up on Registrar typing which had a backlog of some weeks. Marinda Rye describes the claimant first approaching her with crossed arms. After Marinda Rye had explained the position of the PA she mentioned that another Assistant Pathway Administrator was to be recruited and that the appointment would mean that the claimant would have someone to share tasks such as pulling medical records. Marinda Rye then describes how the claimant "*stood and stared*" at her for about a minute before she "*stormed off*". It was put to the claimant during her evidence that she did she behaved in an aggressive manner, the claimant did not give an answer to this, we are satisfied that whether it was intended or not the claimant presented in an aggressive manner on this occasion.
11. Marinda Rye spoke to Claire McCabe about the claimant. Claire McCabe offered to speak to the claimant and met with her on the 30 July 2018.
12. Claire McCabe told the claimant that she wanted to help, and that the claimant could be open and honest with her. She asked why the claimant had been crying at work. The claimant explained that her role in the department was not what she thought it would be and she did not realise that it would involve so much note pulling. The claimant was told that she was still very new to the role and getting exposure to all the duties noted in the job description would take time. The claimant told Claire McCabe that some people in the team do not speak to her and that she did not want to speak to them either. Claire McCabe asked the claimant who she would speak to if she was ever unsure about a task she had been given. The claimant responded by saying that she "*wings it*." Claire McCabe discussed with the claimant how she could approach people in the department. The claimant explained that she had some health issues that had affected her and continued to affect her. Claire McCabe suggested a referral to occupational health and Marinda Rye subsequently made the referral.
13. Marinda Rye noted that by the end of July the claimant did not engage with other staff in the department. Marinda Rye told the claimant that some staff

felt reluctant to assist because of her attitude. The claimant complained that she was being treated differently because she was black, and excluded from the team. In this meeting Marinda Rye told the claimant that she should engage more with her colleagues and she would feel more like part of the team. The claimant's account of this meeting is similar but with some significant differences. The claimant says that Marinda Rye called her into the office and spoke about the claimant not fitting in with the team. The claimant says that Marinda Rye failed to offer her any support at this meeting or make any suggestions that took on board what the claimant had said to her. We conclude that it is likely that something was said to the claimant about her not fitting in but it was said in the context of discussion which involved how the claimant did not engage with her colleagues and would sometimes ignore them (something that the claimant accepts).

14. The claimant accepts that by this time (the end of July) she had come to the view that taking on the role in ENT department was a mistake. The job was not what she hoped, she was bored in the role and did not enjoy good relations with her immediate work colleagues. She was now actively seeking to move on after a very short time in the role.
15. Following this meeting the claimant says that things got worse. Marinda Rye says that the claimant stopped speaking to her. Claire McCabe gave evidence of the claimant pointedly ignoring Marinda Rye in reference to matters which should have been addressed to Marinda Rye in respect of day to day aspects of the work, such as a request for leave.
16. Marinda Rye thought it would be useful, possibly motivating, for the claimant to speak to Hollie Charlett who was a Senior Pathways Administrator but had commenced her employment in the same role as the claimant. Marinda Rye was covering the role for which Hollie Charlett was the substantive post holder during the latter's maternity leave. Hollie Charlett agreed to meet the claimant. Marinda Rye was present during the conversation, she describes the claimant's demeanour as not listening and says that at one point the claimant shouted at Marinda Rye, "*I know you do not like me and Rebecca is your favourite*".
17. Rebecca was a white English Assistant Pathways Administrator. She started working in the department after the claimant. The claimant stated that Rebecca was trained up while the claimant remained "*at the bottom of the food chain*". The respondent denied that there was any preferential treatment for Rebecca. The tasks that they did were the same, they would take it in turns to pull notes and the respondent pointed to the fact that the claimant having been taken through the list of duties on the job specification had to accepted that she had carried out all of them during her employment save for two or three which she would not have had an opportunity to carry out during that period because of the situation in the department. The same applied to Rebecca. The Tribunal concluded there was no practical difference between

the way the claimant was treated in allocation of work and the way that Rebecca was treated.

18. By August the claimant was looking for alternative employment and had attended interviews for other roles.

19. On 4 September 2018 the claimant wrote to Suzy Robertson:

"I currently work as assistant pathway administrator.

My first few weeks were rough as this job was a lot similar to my previous role, in which the main reasons for leaving was to further my learning and personal development.

Two months later I haven't learned anything new from when I first started, I just pull notes and distribute letters.

We have a new assistant who is learning and doing new things yet they still give me all the rubbish jobs.

I feel like they treat me differently and I'm starting to feel it's because of the colour of my skin.

As they know I am unhappy here and actively seeking new employment I feel they treat me worse to try and push me out.

One member of staff actually made a comment to me after giving me a double trolley of notes to track "well in October you will be getting all the notes" in which I replied who said I'm still going to be here?

Does this mean they have made a decision about who is moving on?"

20. At around this time there was a reorganisation within the Trust however this did not impact on the claimant or the claimant's role which were unaffected. The last sentence in the email extract above is a reference to that.

21. On 5 September 2018 the claimant spoke to Helen Williams, Craniofacial Service Manager, and said to her that Marinda Rye had been treating her unfairly by giving the claimant's fellow Assistant Pathway Administrator more opportunities than her. The claimant complained that this was due to race. Helen Williams spoke to Marinda Rye who denied what the claimant said and gave illustrations of the work that the claimant had been given showing that the claimant had carried out most of the activities in her job role save for two or three. The claimant accepted during her evidence that when she spoke to Helen Williams about her concerns, she did not make a formal complaint.

22. Marinda Rye received an occupational health report for the claimant on the 10 September 2018. The report stated that the claimant was fit for her role and did not give any advice but did state that the claimant, *"would like more support and the opportunity to do similar roles to the other Band 2 which Melissa does not feel she is doing at present. Clarification of her role may be beneficial."*

23. The claimant's colleagues made comments about the claimant's unwillingness to help or assist colleagues, these escalated to complaints about the claimant's attitude to work. After receiving email's on 12 and 14 September

2020 which contained complaints about the claimant including reference to the claimant saying *"in front of the whole office 'it's because I'm the only black person where I work'"* and that *"she has accused us of being racist"*, Marinda Rye made a grievance complaint against the claimant in which she complained of *"upward bullying"*. The grievance was dated 5 October 2018

24. At the start of October 2018 Hollie Charlett returned to her role as Patient Pathway Team Leader and Marinda Rye's period of acting up in this role came to an end.
25. On 4 October 2018 Sarah Viner reported an incident involving the claimant to Naomi Fitzgerald. Naomi Fitzgerald spoke to the claimant about the incident. In evidence during the hearing the claimant agreed that there had been an incident in the office on that day. The claimant took issue with the way that this meeting was put to her but did not give an alternative version of the meeting.
26. A further meeting took place later in the day following an incident when the claimant is alleged to have referred to a colleague as *"a fucking slag"*. The claimant's version of this meeting is also not clear. The claimant accepts that the meeting took place and that the allegation was made that she had used the said words. The claimant's position in evidence appeared to be that she got angry at this point *"because it was a lie"* and the claimant said *"possibly I said the things alleged in the meeting- I was getting upset – I was unwell"*.
27. The claimant was signed off work with *"stress at work"*. On the 8 October the claimant wrote a letter of resignation with effect from 5 November 2018. The claimant's letter of resignation read as follows: *Thank you for employing me but unfortunately due to not having the support or the opportunity to reach my full capacity. Therefore, I am handing in my notice and my last working day will be Monday 5th November."*
28. On 13 October 2018 the claimant made a formal grievance. In her grievance the claimant stated, among other matters *"treated differently from other members of staff...feels the need to beg for learning and further development... feeling discriminated health/race"*. The claimant also wrote in an email that she was *"being pushed out of my job and attacked the more I speak up"*.
29. On 19 October 2018 the claimant was informed that there was going to be a formal investigation to look into allegations against the claimant relating to her conduct. On 2 November 2020 the claimant attended a meeting with Holly Posselwhite to discuss the allegations of misconduct raised against her.
30. The claimant's last day of employment with the Trust was the 5 November 2018. The claimant's grievance was not investigated further.
31. An employer must not discriminate against an employee by dismissing her or subjecting her to any other detriment. An employer discriminates against an employee if because of her race they treat the employee less favourably than

they treat or would treat others. Race includes colour, nationality ethnic or national origins. Where the employee seeks to compare her treatment with that of another employee there must be no material difference between the circumstances relating to each case.

32. If there are facts from which the employment tribunal could decide, in the absence of any other explanation that the employer contravened the provision concerned the employment tribunal must hold that the contravention occurred. However, this does not apply if the employer shows that they did not contravene the provision.
33. A person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic, and 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. 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. The relevant protected characteristics include race.
34. It has long been recognised that claimants in discrimination cases are faced with difficulties in proving that they have been treated unlawfully on the grounds of race (or some other protected characteristic). Guidance has been given by the higher courts as to how to approach such cases. We set out below the guidance (with some deletions for relevance to this case) from the case of Igen -v- Wong [2005] EWCA Civ 412.

(1) ...It is for the claimant who complains of discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful...

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

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

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word "could"... [in s.136 Equality Act 2010]. At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking

at the primary facts before it to see what inferences of secondary fact could be drawn from them.

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

...

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

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

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of [race], since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.

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

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

35. The claimant in this case has been disadvantaged by the absence of a properly prepared witness statement in accordance with the directions from Judge Hawksworth. Had she complied with the direction she might have been better able to explain aspects of her case and put before us evidence from which we could arrive at conclusions supporting her position in this case. However, we have to decide the case on the evidence that was presented and not on matters we might suspect that the claimant might have been able to give. We came to the following conclusions:

Being given tasks in her role in ENT which were downgraded compared to the job description for the role;

36. In the short period of time that the claimant worked in the ENT department the claimant covered almost all aspects of her job role. There were a limited number of areas she did not cover because the work was not there to be done in her department at the relevant time. While the claimant asserted that she was not treated the same as her fellow APPA, Rebecca, in doing so the claimant relied on her observations but failed to give concrete examples of this actually occurring. At one point in her evidence the claimant states that in a conversation with Claire McCabe she said,

“yeah and they’ll probably put Becca on the phones before me” to which the reply came from Claire McCabe *“we may well do everyone’s needs are different.”*

37. The respondent’s evidence sought to refute the claimant’s allegation on this. There is no independent evidence on this. The claimant produced photographs which show a number of envelopes, we took this to be part of what the claimant relies on in support of her assertion that she was required to perform dull tasks and was not able to cover the full range of her job description. The photograph while a visual illustration of the claimant’s case does not evidence that proves her case. It is not disputed by the respondent that the claimant’s role involved these tasks. The claimant found the work a disappointment and the role in the ENT department was not what she hoped or imagined it would be, the claimant was bored in the role. The claimant had applied for the role in the ENT department because she wanted to *“get on and learn new things”* instead she found herself *“pulling files”* a task she had been undertaking in her previous role and spending a lot of time putting letters in envelopes.
38. We reject the suggestion that the role was downgraded what the claimant did was the role. We are unable to conclude that there was a difference in the way that the claimant was treated as opposed to her fellow APPA, Rebecca, was treated. We cannot reach a conclusion that the claimant’s role was downgraded. On balance of probabilities the claimant and her APPA colleague did the same tasks. They did not necessarily do them together so the claimant could well have mistakenly formed the view that she was being treated less favourably. The claimant has not proved on the balance of probabilities facts from which the Tribunal could conclude that the claimant’s role was downgraded.

The support/guidance, or lack of, provided by her managers

39. It is clear from the evidence of the claimant and the respondent that the claimant’s relationships with her colleagues deteriorated quickly. The colleagues considered that the claimant was unwilling to assist with tasks and the claimant considered that her colleagues did not support her but left her out of things. We concluded that a problem in the claimant’s relations with her colleagues arose from the claimant’s disappointment with the role which manifested itself in an attitude to the work which resulted in tensions between the claimant and her colleagues. The claimant’s own evidence suggested that her demeanour and attitude at work was at times truculent, and on occasion her behaviour offensive towards colleagues. In such an environment the claimant’s colleagues are unlikely to be forming a queue to assist the claimant with support and guidance.
40. The main thrust of the claimant’s claim was that on starting the role she was *“collecting notes and stuffing letters in envelopes”*. The claimant said

she expected things to change after a few weeks, she described how she asked Marinda Rye if she could learn something new and the response was “*like what?*” The claimant also spoke with Claire McCabe about the learning structures and reports that she was told that “*your personal development is down to yourself*”.

41. Marinda Rye did attempt to provide guidance and support to the Claimant. The claimant, after short while in the role, shunned Marinda Rye. An example of the effort made by Marinda Rye to support the claimant was arranging for the claimant to meet with Hollie Charlett. Claire McCabe in a meeting with the claimant counselled the claimant about her relationships with colleagues in an effort to show her how she might work towards repairing relations. We do not consider that the claimant has shown that there was a lack of support/guidance by a manager, the evidence shows the contrary.

Not being given additional duties and the chance to learn new things within the department

42. The claimant accepted in evidence that she carried out all but two of the tasks in her job role. The tasks she didn't perform were explained in a way that is unconnected with any discrimination. The claimant has failed to prove this part of her complaint.

Not being given the opportunity to be redeployed to another department

43. The claimant has not produced evidence to support this. The respondent at around the relevant time was carrying out a reorganisation which may have resulted in people in some roles being redeployed. This did not apply to the claimant's role in the ENT department, there was no question of redeployment arising in her case. The claimant applied for other roles in the Trust, she attended interviews and was unsuccessful in the applications she made. There was no influencing the process by anyone connected with the claimant in this case. This allegation is unproven.

The lack of training

44. The claimant has not shown that she was deprived of any training. The evidence was that the claimant was provided with on the role training by various colleagues. The claimant was in the role for such a short period of time that it is not possible to conclude that the fact that the claimant did not attend “training courses” outside ENT department is of any significance. This allegation is not proved.

Being told by her line manager in a meeting in July 2018 that she was not fitting in with the team

45. We are satisfied that the claimant may well have been told that she is not fitting in. In the circumstances it was a fair and permissible comment if it was made. We note that the statement is denied but we consider that

viewing all the evidence it more likely than not that something along lines the claimant suggests was said in the meeting on the 30 July 2018.

46. On the basis that the statement was made, we consider whether the claimant has proved on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful.
47. The claimant was truculent, at times abusive and uncooperative with colleagues, and clearly unhappy in her role. We accept the context provided by Marinda Rye for the occasion when the statement was made: at the time the claimant was being counselled about her attitudes to work and her colleagues. The discussion was about the claimant's relationship with colleagues and mention was made of how she might seek to repair or improve relations. In context the comment was appropriate and intended to be of assistance by asking the claimant to reflect on her relations with colleagues. There are no facts from which we conclude that the statement was made because of the claimant's race.

Harassment

48. The Tribunal have not found that the matters in set out in paragraphs (9) a-e of the case management summary proved. In regard to (9)f we do not consider that the alleged statement as reported by the claimant was made.
49. A person harasses another if they engage in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating the other's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the other. In this case the conduct that the claimant relies on is the claimant being told in the meeting on 30 July 2018 that she was not fitting in. The context in which the statement was made, on the basis of the claimant's version of events, did not have the purpose of violating the other's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.
50. In deciding whether that conduct, the claimant being told in the meeting on 30 July 2018 that she was not fitting in, has the effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment we must be take into account the perception of the claimant. At the meeting the claimant was seeking to put her position. She explained that she wanted to do more. She made clear that she wanted to advance her personal development. She does not say expressly or give evidence that suggests that at the time her dignity was violated by the statement, or that it created an intimidating, hostile, degrading, humiliating or offensive environment for her. The comment was made as a view expressed about the claimant's engagement with her colleagues, it is not clear to the Tribunal that the claimant, as a statement of fact, disagreed with it. We also have to take into account the other circumstances of the case. These show that the claimant was by her own

description or her behaviour at times truculent. The comment was made in the context of discussing the perception and effect of the claimant's behaviour. We also have to consider whether it is reasonable for the conduct to have that effect, namely violating the other's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment. Considered in its proper context, as described by the claimant, we do not consider that it is reasonable for the conduct to have that effect. Finally, in any event we are not satisfied that what was said was in any sense related to the claimant's race.

51. The claimant's claims are not well founded and are dismissed.

Employment Judge Gumbiti-Zimuto

Date: 16 October 2020

Sent to the parties on: 22 October 20

For the Tribunals Office

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