



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr C Iwunze

v

Incentive Facilities Management

Limited (1)

Andy Carter (2)

Heard at: Watford

On: 27, 29, 30 & 31 July 2020

Before: Employment Judge Smail
Mr W Dykes
Mrs I Sood

Appearances

For the Claimant: In person

For the Respondents: Mr C Adjei, Counsel

Judgment to the effect that all claims of race discrimination were dismissed was delivered orally on 31 July 2020 and sent to the parties on 7 September 2020. The Claimant applied for a reconsideration on 1 August 2020. The Employment Judge ordered the typing of the reasons for the Judgment given on 31 July 2020 so that any application for reconsideration could have appropriate context. The Judgment on the reconsideration application is contained in a separate document.

REASONS

1. By a claim form presented on 11 July 2018 the claimant claims race discrimination. A claim of disability discrimination was not pursued following the preliminary hearing before Employment Judge Alliott on 11 July 2019. The claimant was employed as a security officer at the Royal Shakespeare Theatre in Stratford-upon-Avon. The security contract was contracted out by the RSC. The claimant was first employed from 12 June 2017. The contract was then held by his then employer Wilson James Ltd. The contract was TUPE'd over to the first respondent, Incentive Facilities Management Limited, on 1 April 2018. The claimant was dismissed ostensibly for gross misconduct on 30 May 2018 specifically for sleeping on duty. The claimant is a black man

of African origin with an African accent, that is how he wished to describe himself for these proceedings.

2. The second respondent, Andy Carter, was one of the claimant's shift supervisors.

The Issues

3. At the preliminary hearing before Employment Judge Alliott on 11 July 2019 the following issues were identified for determination in the present hearing:
 - 3.1 Was the claimant subject to harassment on the grounds of race by Andy Carter? This was subject to further particularisation, below.
 - 3.2 Did Nicky Smith, then the interim head of facilities, fail to deal with the claimant's grievance dated 8 April 2018 concerning racial harassment by Andy Carter?
 - 3.3 Did Andy Carter and/or parties unknown, photoshop a video clip showing the claimant with his eyes shut whilst at work on a night shift? This was the evidence leading the first respondent to conclude that the claimant was sleeping on duty.
 - 3.4 Did David Shakespeare make a false report that he had seen the claimant asleep on duty?
 - 3.5 Did the first respondent dismiss the claimant in a racially discriminatory fashion?
4. The claims are all put in the alternative as direct discrimination on the grounds of race and/or as harassment.

Particular allegations of harassment alleged against Andy Carter.

5. The claimant served further information as to the harassment alleged against Andy Carter pursuant to the order of Employment Judge Alliott. The order was dated 11 July 2019 and the further information we believe was served by the 22 August 2019. The allegations of harassment were as follows: First, relating to the nightshift on 5 November 2017 the claimant alleges and I quote:

“On my first nightshift training I was told by my manager, Peter Brown, to work with Andy Carter so that he can train me on what they do at nightshift. As the starting shift was 6 to 6 I arrived on time for the handover. Immediately Andy Carter saw me approaching the security post, he asked: “Where is he going?” I pretended as if I did not hear what he said. On my getting to the security post I informed Andy Carter that the manager, Peter Brown, told me to come for training with you on a night shift. Andy replied: “Go home there is nothing for me to teach you. Today is Sunday and everywhere is locked up.” He continued: “How can Peter Brown tell you to come and work with me?” he asked. “Hang on”, he said, “I’m going to call him to tell him that there’s nothing for

you to do.” He then called Peter Brown and told him that everywhere was locked up. There was nothing to show or teach Caj. Peter Brown replied: “Since everywhere is closed and locked up, it is the best time to train him. Unlock them and show him what you do at night”. Andy was not happy because the manager knew his psychological disposition.”

This is a reference to the claimant’s belief that Mr Carter had a psychological disposition to be racist.

6. Secondly, relating to the same shift:

“Andy Carter took me to the staff canteen and told me to stay there. As he was leaving the canteen, he turned off the light and closed the door behind him. I was left in complete darkness. I was scared. However, I consoled myself with the thought that it could be the way that they do things during the night shift. He went to the security cabin and called Peter Brown and told him that I was sleeping.”

7. Thirdly, there follow allegations relating to 13 December 2017. The claimant asserts, and again I quote:

“I was on RST shift [6-6] while Andy Carter was on night shift. Andy Carter came to me and shouted at me saying “Why did you tell the agency staff to go and sit down? “I don’t know what you are talking about. Please explain to me what you meant by that because I have not told anyone to go and sit down.” Andy Carter retorted: “You know what I am talking about. You are not stupid.” At that point when his voice was going up I pleaded with Andy Carter to call the agency staff in my presence for him to say: “Yes I did tell him to go and sit down”. Andy Carter replied: “No I don’t have to call him because he said you did and I believe that you did.” After my tea break I went to Andy Carter to plead with him to believe me that I didn’t tell the agency staff to go and sit down. I had not even finished what I was saying before he shouted at me saying “Come outside with me” and he dragged me outside and told me to go home.”

8. There is a reference here to a warning letter said to be written by Peter Brown following this matter. The claimant persists with the suggestion that he was sent home. The claimant said to Mr Carter to let go of him because the claimant was not his slave and he could not physically and verbally abuse him. This matter is the subject of a documentary complaint by the claimant and a response from Mr Brown.

9. Fourthly, it is alleged that Andy Carter was trying to isolate the claimant because he does not want a black person working beside him. For example, when it was the claimant’s turn to man the CCTV “he will send me on patrol and call an agency staff without CCTV licence to man the CCTV instead.” What this means is because the security guards work in pairs, one of them monitors the CCTV, the other is out on patrol. The claimant’s complaint here is that he was sent out on patrol rather than stay monitoring the screens because that would mean a black person was working inside with Andy Carter supervising.

10. Fifthly, the Claimant referenced a complaint letter to the line manager, Nicky Smith, and indeed we will examine his complaint letter closely. The claimant then states: “When Andy Carter told me not to use the staff toilet but the public toilet

when he was asking me if it was true that some black people still live in trees those acts caused the claimant to consider suicide.” So there is a serious complaint by the claimant that he had been banned from using the staff toilet because he was black and he was subject to the insulting question as to whether it was true that some black people still live in trees.

11. The sixth allegation relates to the first week of April 2018. The claimant alleges that Nicky Smith and Gemma had a meeting with the security team. The first respondent in fact took over the contract on 1 April 2018 so this relates to the first week of the claimant’s employment with the first respondent following the TUPE transfer. He alleges that immediately Andy Carter saw him approaching, he put his hands on his face to cover his mouth and nose as though to avoid a smell emanating from the claimant, a black man. The claimant states that he felt humiliated, unwanted and dirty. He says that because of this action he decided to isolate himself from the team after the meeting. He said that Nicky Smith came over to him and asked why he had isolated himself during the meeting. The claimant told her, he says: “That I don’t want trouble but you saw what Andy Carter did when I came closer to the team”. The claimant says that Nicky Smith told him not to worry, that she would see to it. The claimant comments that it seemed that nothing was done as a result and it emboldened Andy Carter to carry on with the racist behaviour.
12. The seventh allegation of harassment at the hands of Andy Carter relates to the claimant’s suggestion that Andy Carter and/or his team had fabricated a video of him sleeping which was then used to discipline him with. It was part of the claimant’s contention within the disciplinary proceedings, and we will come on to his position later, and it has been his contention before us today, that the video which we now know was taken by David Shakespeare was doctored by Mr Shakespeare and Andy Carter to reveal the claimant as sleeping on duty, when in fact he was not. It is an important allegation made by the claimant.
13. In the document which the claimant relies upon as listing his allegations of harassment against Andy Carter, he also suggests that the dismissal for sleeping was less favourable treatment, if he was sleeping, which he does not accept. The Claimant contends that when he did a nightshift on 9 May 2018 with David Shakespeare, David Shakespeare was asleep. He assisted Mr Shakespeare because Mr Shakespeare has a history of migraines and there was accordingly less favourable treatment of him for getting dismissed when David Shakespeare was not. The nightshift from which the claimant was dismissed was the following nightshift, on 10 May 2018 going into the 11 May 2018.

The Law

14. Direct discrimination is defined in s.13(1) of the Equality Act 2010: 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. The protected characteristic in this case, of course, is race.
15. Harassment is dealt with under s.26 of the 2010 Act. By sub-section (1): a person, A, harasses another, B, if 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.
16. By sub-section (4), in deciding whether conduct has the effect referred to in sub-section (1) 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.
17. The concept of the burden of proof is important in discrimination cases. This is provided for by s.136. By s.136(2) if there are facts from which the court could decide in the absence of any other explanation that a person, A, contravened the provision concerned, the court must hold that the contravention occurred; but by sub-section (3), sub-section (2) does not apply if A shows that A did not contravene the provision. What this means in practice, as confirmed by the Court of Appeal in the case of Igen v Wong [2005] ICR 931, is that if the claimant adduces evidence of a prima facie case of race discrimination then the burden transfers to the respondent to show that race played no role whatsoever in its decisions or omissions.

Findings of Fact

18. There are findings throughout the document but most are set out here.

Credibility

19. There is in this case a substantial conflict of evidence in respect of many of the claimant's allegations and we are compelled in this case to make findings about credibility. Allegations of race discrimination are serious. The allegations have to be cogent in themselves, supported by reliable evidence, so as to give rise to a prima facie case. The claimant was dismissed for sleeping on duty. Mr Shakespeare, a fellow security guard, had taken a video on his phone showing the claimant asleep in front of the CCTV screens and, in any event, not monitoring the screens and so not doing his job. Mr Shakespeare says, as it happens, that this was the second occasion on that night that he saw the claimant sleeping. On the second occasion he decided to video the matter, the video lasted some 20 seconds. It was taken on the night shift of 10-11 May. The claimant has asserted that this video was

fabricated. He has played to us videos of Boris Johnson and Jeremy Corbyn with a voice-over from a comic purporting to say things which Boris Johnson and Jeremy Corbyn obviously did not say. The claimant says: "There you are: it is easy to manipulate the videos and that is what happened here".

20. We accept, of course, that one can put a voice-over a video but this was not a matter of voice-over. The claimant was suggesting that whilst the person in the video was him, he had been made to sleep and he had been made to wear a security cap with which he had never been issued. We have come to the conclusion that the claimant's position that this video was manipulated in that way is wholly wrong. What the claimant has said about it is unsubstantiated and unreasonable. We reject it.

21. In the course of the disciplinary investigation the claimant was running in effect two cases. First of all, he was saying the video was a manipulation and he was not sleeping; alternatively and contradictory in nature, he was purporting to rely upon medication as an explanation for the sleeping, if he was sleeping. He handed in this document with this preliminary paragraph - he wrote:

"I must first and foremost apologise to you for letting myself down. I cannot apologise enough, especially to Fiona, Nicky, Gemma, Sam and Rose. These management team who have my welfare in their uppermost mind. I feel ashamed of myself and from the bottom of my heart I say sorry. It could have been as a result of my blood pressure dropping below normal. I am on a medication for it for life."

22. That passage is only consistent with an acceptance that he had fallen asleep and an attempt to mitigate the seriousness of the matter. That strategy may have been entirely fair enough but it does not sit with the claimant's alternative strategy of suggesting that the video had been manipulated. We heard evidence from Mr Shakespeare. He was an entirely straightforward person. He admitted to us that he struggles to read and write and we formed the conclusion that he would not have the capacity to manipulate the video. He did not manipulate the video. The video showed what it purported to show and the claimant's insistence maintained before us, that it was manipulated by Mr Shakespeare working with Mr Carter for discriminatory purposes, has simply lacked credibility and has undermined whatever else the claimant wants to say in this case. When we make findings of fact we have to do so on the basis of reliable evidence and regrettably the claimant's position in this was unreliable.

23. Further, the claimant makes very serious allegations that Mr Carter barred him from use of the staff toilet; that Mr Carter asked him whether black people still live on trees and that Mr Carter covered his nose and mouth when the claimant approached him at the first meeting following the TUPE takeover. Those are plainly serious allegations consistent with a racially discriminatory disposition on the part of Mr Carter, if true. The difficulty for the claimant is that he did not mention these matters in his grievance letter dated 8 April 2018. The introduction was a generalised complaint of bullying and harassment on racial grounds and two specific incidents were mentioned in it. First of all, an allegation that on 3 April 2018 on the two-way radio Mr

Carter ignored a call from the claimant; and secondly, that on 6 April 2018 Mr Carter had asked agency staff to monitor the CCTV screens rather than the claimant when the agency staff in question did not have a CCTV licence.

24. Similarly, there was a grievance hearing following the grievance letter on 23 April 2018. The claimant did not mention these three matters in that hearing despite being asked for all the details that he had in support of his suggestion that he was subject to a discriminatory treatment at the hands of Mr Carter. He expressly denied that Mr Carter had ever used racial words to him in that meeting. If it had been the case that he had been barred from the staff toilet because of his race or that he had been subject to the insulting question - do black people still live in trees - or that Mr Carter had clearly covered up his nose and mouth, the claimant would have raised those matters in the grievance letter and in the grievance hearing. The fact that he says this now significantly undermines the trustworthiness of his evidence.
25. The claimant called Elliot Williams, a supervisor, who had worked as a supervisor with Wilson James prior to the TUPE transfer. We were told by Mr Carter that he had a difficult relationship with Mr Williams. Mr Williams agreed. Mr Carter's suggestion as to why that was the case was that Mr Williams had a tendency to get drunk and obnoxious at press parties when a new play was being launched, for example, and on at least two occasions Mr Carter had to escort Mr Williams away from the party by force. We were concerned by Mr Williams' evidence. Mr Williams, on the face of it, gave evidence strongly supporting what the claimant wanted to say. Mr Williams told us this in his statement:

"I worked at RSC as a supervisor together with Andy Carter who was equally a supervisor. I left during the TUPE transfer from Wilson James to Incentive FM. One of the deciding factors for me was Andy's racial abuse of black people especially those with African accents. As a white person I thought it was disgraceful that in this 21st century that some people would engage in such appalling behaviours. For example Andy is fond of making monkey noises when he sees our black colleagues who have African accents. I was embarrassed the day Andy asked Cajetan if it were true that some people in certain part of Africa were still living in trees. I remember coming to work one day Andy was boasting of how he stopped Cajetan from using the staff toilet, which the security team also uses. Whenever Andy see any of our black colleagues coming towards us he will cover his nose not only to Cajetan but to other black Africans working with us at the time just to humiliate them. I attended the disciplinary meeting with Cajetan and during that meeting, [this is the disciplinary appeal meeting he is making reference to] when he started asking questions, Kaleigh Jones told him to leave the racial harassment aside because she was aware that it was going on; that she would like to concentrate on his sleeping on duty. She advised Cajetan to put in a fresh complaint and they would look at it again."

26. It is right that Mr Williams accompanied the claimant to the appeal meeting. He says he was just there in an observer capacity. Well, in whatever capacity he was there, Mr Williams had the opportunity to contribute information to the meeting which he did not do. It is a matter of dispute as to what Ms Jones said at the meeting. She says she did not say she accepted racial discrimination took place. The point she made was that the grievance was separate from the disciplinary hearing that she was conducting.

27. There is a correlation between what Mr Williams was saying here and what the claimant is also telling us. The problem for the claimant is that if these things had happened he would have raised them with the respondent. It seems to us if these things had happened, then Mr Williams would have escalated these internally. He says he mentioned them verbally to the then manager, Peter Brown, but Peter Brown was a manager who did not like conflict and did not act upon them. There is no written record of Mr Williams raising these matters. If they happened, they would have been so serious as to merit escalating in writing. The claimant made no reference to them at the time. Mr Williams made no reference to them at the time. We find that there is a striking similarity between the content of these allegations with those made by the claimant. The fact that the claimant did not raise them at the time, the fact that Mr Williams did not raise them at the time, leads us to regard this evidence as unreliable and we do not rely upon this evidence as evidence of fact. On the balance of probability, we reject the evidence because if these matters had taken place they would have been raised, there would have been an audit trail for them. We know that the claimant did not raise them when he did go into writing.
28. We are forced to conclude that wherever there is a significant conflict of fact between the claimant and the respondent's witnesses, unless what the claimant says is supported by trustworthy corroboration, it is unsafe to rely upon what he tells us. It seems to us that you cannot make allegations of fabricating a video, when you did not make them when you made a grievance and you were interviewed in a grievance meeting.
29. The tribunal finds that Mr Williams' cannot be trusted in support of the claimant's allegations, bearing in mind that he has not raised these matters previously. The quality of the evidence lacks the cogency that it ought to have had if it had been raised before in a recorded fashion.
30. So with those comments on credibility, we now turn to make our findings of fact on the disputed matters.
31. Alleged harassment by Andy Carter
- 31.1 The night shift of 5 November 2018. We accept the evidence of Mr Carter on this. Mr Carter did not know that the claimant was attending for night shift training. He rang Mr Brown to ask what was going on; in particular he was not expecting to train someone that night because the various buildings associated with the RSC that have to be locked up on a night shift had in fact been locked up already by the day shift because it was a Sunday. Mr Brown stated nonetheless there was some training that the claimant could be given on the night shift and some training was given. We accept from Mr Carter that he was not disinclined to work with the claimant because the claimant is a black person. He was concerned that the training conditions were not appropriate. We also accept from Mr Carter that he found the claimant

in the course of that night shift asleep in the river room on two occasions before midnight. The night shift is 6pm until 6am. On the second occasion, Mr Carter rang Mr Brown who said that the claimant could go early and would be fully paid for the shift. Mr Carter says, and we accept, that the claimant thanked him for leaving early and that there was no conflict between them on that occasion. We prefer Mr Carter's account. We reject the claimant's account for all the credibility reasons given above. Mr Carter did not switch off the light in the river room with the claimant awake and present. We accept from Mr Carter that to do so he would have had to walk past the seated claimant who would have objected if this had happened; that is to say, if Mr Carter had walked past him in the river room, gone to a switch to switch the lights off, when he was in there awake. We reject the claimant's evidence as factual.

- 31.2 As to 13 December 2017: the claimant wrote a letter of complaint about this incident. He wrote it to his then manager, Peter Brown. He wished to inform Mr Brown of the incident that took place that day and said he was having his evening tea break when Andy the supervisor came to him and said 'Caj, you told the support guard to go and sit down at the Scott bar. You do not have the right to tell him to sit down.' "I informed Andy" says the claimant "that I did not tell the support guard to go and sit down in the Scott bar" and a disagreement followed during which the claimant alleges that Andy shouted "Come outside come outside", an altercation took place and Mr Carter raised his voice and he informed the claimant to go home. The claimant protested at being treated as he put it "Like a slave".
- 31.3 Mr Carter accepts that there was a disagreement. The content of the disagreement is not agreed. Mr Carter says that he told the claimant not to raise his voice in front of the client and that they should discuss the matter elsewhere. Mr Carter accepts that voices were raised. He denies telling the claimant to go home but admits telling the claimant to go out on patrol. Whatever the rights and wrongs were of this, it is clear that Mr Brown brokered a reconciliation meeting. A reconciliation meeting took place and the claimant and Mr Carter shook hands. The matter was resolved in that way. Mr Brown did write a follow up email on 21 December. He informed the claimant that he had spoken to Mr Carter regarding the incident and explained that he found that the escalation of the incident was unacceptable. Mr Carter did not remember poking or prodding the claimant but did accept that he should not have behaved in this manner. In evidence before us Mr Carter accepted that he should not have shouted. The circumstances of the dispute are elucidated in Mr Brown's email. He says:

"It appeared that Mr Carter had received some feedback from the duty managers regarding officers taking breaks and had been told by the support officer that you had authorised him to sit in the Scott bar. I explained I had spoken to the officer and he denied the allegation and if Andy had received some feedback from the DM's he should have spoken to you at the time and not allow it to bottle up. I asked him to follow the file note process for all performance issues going

forward. This process is already in place at the RSC. I have also told him that he will no longer be able to ask an officer to leave site for performance issues without my authority first. With your agreement we met with Andy on an informal level on 20 December to put the incident behind us and enable us to work together going forward. I hope this has resolved the complaint and if any further incident arises please inform me to escalate straightaway.”

There is some support for the claimant’s position in Mr Brown’s email here. We asked the respondent to check the files as to whether there was any written warning given to Mr Carter. There was no such warning on record. It seems to us there was a disagreement about what had been said to the support officer. That disagreement had led to raised voices. There was a reconciliation meeting and the matter was resolved in that way. That concluded the matter. There was no prima facie case that Mr Carter had acted in a discriminatory fashion. There is clear evidence that he had acted in an unwise fashion.

- 31.4 The claimant contends in respect of this period that an unqualified agency staff was asked to man the CCTV when he was the qualified person. He should have monitored the CCTV. He should not have been sent out on patrol. The claimant also alleges around this allegation that he was told not to use the staff toilet; that Mr Carter asked him whether some black people still lived on trees and that Mr Carter covered his mouth and nose. The claimant says he shared this in a discussion with Nicky Smith at the time.
- 31.5 Nicky Smith denies that there was any such conversation. We reject the claimant’s evidence that he had been told by Mr Carter not to use the staff toilet as an example of racism. We reject the suggestion that Mr Carter had asked him whether some black people still live on trees and we reject the suggestion that Mr Carter had covered his mouth and nose. The reasons why we do reject these is because, whilst he had the opportunity of raising these matters in his grievance and in the grievance hearing, he made no reference to them. Accordingly, on the balance of probability we find that they did not happen.
- 31.6 The grievance letter, as we have already observed, raised (a) Mr Carter ignoring the claimant on a two-way radio and (b) asking a non-qualified CCTV operative to man the monitor. The matter of Mr Carter ignoring the claimant on the two-way radio has not made it to the list of issues but we note that Mr Carter explained that there was an occasion when he had to ask someone else to ascertain what the claimant was saying because Mr Carter’s radio was faulty. That is corroborated both by Mr Shakespeare and Mr Bristol in the comments made to Nicky Smith in the grievance investigation. There is no prima facie case of racial harassment established by the claimant in connection with the two-way radio matter.
- 31.7 As to the allegation that a non-qualified CCTV operative was asked to monitor the CCTV: whilst the claimant was asked to go out on patrol, we do not find that this amounts to a prima facie case of race

discrimination. The job involved either monitoring CCTV or going out on patrol or a mixture of those duties in the course of the shift. It seems to us that these duties are of equal importance and we see no basis for generating a prima facie case of race discrimination, even if it were the case that a non-qualified CCTV operative was asked to monitor the CCTV screens for a period. It may not be best practice but it does not generate a prima facie case of racial discrimination.

- 31.8 We repeat that Nicky Smith denies having a meeting with the claimant and asking him why he was isolating himself when he gave the explanation of Mr Carter and covering his nose. Had that happened, as we have now said quite often, the claimant would have raised it in his grievance letter or in his grievance hearing.
- 31.9 So our conclusion is that the claimant does not adduce reliable evidence of harassment at the hands of Mr Carter and we reject his assertions. His evidence cannot be accepted for reliability reasons and his claims in respect of having been harassed by Mr Carter are rejected.

32. Nicky Smith did not deal with the grievance

- 32.1 As we know, the claimant raised a grievance on 8 April 2018, seven days after Incentive took over the security contract. There was a generalised allegation of bullying and harassment with two specific examples. First, that Mr Carter allegedly ignored the claimant over the two-way radio on 3 April 2018. Secondly, he asked a non-CCTV qualified agency worker to man the CCTV and sending the claimant out on patrol instead. Nicky Smith did begin to investigate the grievance.
- 32.2 On 10 April 2019 Nicky Smith investigated security colleagues, Craig Laing and Ian Bristol. Craig Laing told her the following. This of course is hearsay as far as we are concerned but nonetheless we can see what is recorded as being told to her. He was asked: "Have you ever witnessed within the team any racist behaviours?" and he replied "Not that I know of, no not at all"; "Any racist language used?", "No"; "Any favouritism?", "No"; "Do you feel that there are any issues between team members?", "There is tension sometimes between Andy and Caj and myself. Before Incentive took over, 2-3 months ago maybe, Andy as superior had asked Caj to do something take his break or how long he'd been on a break and Caj blew up at him. Someone else was waiting to go on break, Caj hadn't returned, Andy only asked him what he would have asked any of us. They had a 'go'. I remember Caj saying to Linda on the stage door about how he was being spoken to. 'I said not to get Linda involved and he said to me that I was the same and that I spoke to him like a slave.' He was asked whether he had spoken to Andy after the accident. Mr Laing replied that he couldn't remember exactly but he did remember that

Caj called Andy a racist. He was asked "Have you ever witnessed Andy being a racist?" Mr Laing replied: "No, they had all nationalities there" He had never seen anyone let alone Andy being racist. He was asked whether he wanted to add anything else and he said just that Caj is really hard to manage and work with. He was asked how so and replied "He just disappears doesn't say where he's going, goes on break without checking-in, falls asleep on nights, just announces that he's going for something to eat, doesn't take his share of patrols, has more breaks than anyone else or is in the river room. Andy has told me he does not want to say anything because he is worried that Caj will play the race card again." He was asked just to confirm: "Do you have any worries about any kind of racist behaviour in our team?" to which he replied: "No".

32.3 Mr Bristol was then interviewed. He was asked: "Have you ever witnessed within the team any racist behaviours?" He replied: "Only once third hand before Incentive came in maybe two months ago" He heard that Caj had accused Andy of being racist. "In what respect?" "Andy had pulled him up on something. Caj wouldn't accept this and then accused him of being racist." "Have you ever heard any racist language being used?" "No we always speak to each other as we should speak to people." "Do you think there is any favouritism within the team?" "No we all like to work together as team members and friends. I always say to the superiors if I'm doing anything wrong or I could do it better just let me know. I always ask the supervisors if it's okay to take my break. I try to be polite at all times." "Do you feel there are any tensions within the team?" "There can be, usually tiredness and irritability or if someone isn't doing what the supervisor says that can be tension." "Is that everyone or anyone in particular?" "Well it's Caj. He is really rude and ignorant, pushes you out of the way to get to where he wants to go, just goes on his breaks whenever he likes, doesn't check if it's okay. I've had it once whereby a lady was waiting to get her pass, he just ignored her, got his dinner and I had to take over. He then came back after I had dealt with the situation still with his lunch." He was asked: "Have you ever witnessed Andy being racist towards Caj or any other team member?" He replied: "No."

32.4 He was asked about a matter about which he had been specifically named in the claimant's complaint. Mr Bristol responded: "I don't smoke. We were not outside having a cigarette. I remember the call, we were walking down the colonnade, we still had the old radios, Andy's was playing up, he couldn't hear very well and asked me to ask what Caj wanted." "By then we were by the stage door and Gemma came out to meet us. She started speaking to Andy and I carried on with my duties. Andy heard him but was having difficulty hearing. I have never known Andy to ignore anyone on the radio no matter where he is unless he's in a black spot or his radio had died. That is the only circumstances I can think of. Plus Caj is very hard to understand on the radio, especially the old ones. If you are in a busy area like the colonnade without an earpiece you could easily miss a

call. I always wear an earpiece so I do tend to hear. On several occasions not just Andy have told colleagues that there's a call for them." He was asked whether there was anything else he would like to add. He said: "I witnessed on a night shift Caj fast asleep. I took a photo of it. I dare not say anything for fear of being called a racist." Mr Bristol then showed Nicky Smith the photo showing Officer Caj Iwunze asleep in the stage door area on the CCTV between the stage door and the security desk. The photo was stamped 13 March 2018 at 01:36 in the morning. Mr Bristol said: "I didn't take any more photos that night but he slept a few more times." Mr Bristol then went on to explain why he suspected he might be called a racist if he were to challenge the claimant with the photo. We note in passing that the disciplinary proceedings have not relied upon that apparent photograph taken by Mr Bristol.

- 32.5 Having interviewed Mr Laing and Mr Bristol, Nicky Smith then interviewed the claimant on 23 April 2018. This was his opportunity to add to what he had put in writing. There had been a slight gap between 10 April 2019 when Nicky Smith had spoken with Craig Laing and Ian Bristol and 23 April when she spoke with the claimant. This was explained as being down to the fact that Nicky Smith had been ill. The claimant was asked what was the outcome he wanted from the grievance. He said that he did not have a specific but he would like Nicky Smith to talk to Mr Carter to tell him how to treat people. You don't have to like a person or spend time outside of work but not make that person's work miserable. He was asked for examples of bullying and harassment to which the claimant replied: "The way he speaks to me without respect and he tries to undermine me. If I am on the desk and another team member needs a break and I say for one to come off break and another may go on, he says: "I can't say that everyone has to go through him. It was not like this before." "So this is recent?" Nicky Smith asked. "Yes since Incentive took over." Well of course they had only taken over on 1 April 2018 and by saying that it was as though he had not had difficulties with Mr Carter prior to the TUPE transfer, which of course is not his case, although to be fair to the claimant he did say "He was physical with me once in the past which I reported to Peter. Peter asked if I wanted to take it forward. I said no. I didn't want him to lose his job but it seems we had come to a different company and he can go back to how it was before." Ms Smith sought to summarise: "You don't feel he speaks to you with respect?" The claimant replied: "You can't even speak to a child like that. Mr Carter has an aggressive bad tone. Why am I not allowed to tell someone to take a break?" "Do you feel it's just you?, asked Ms Smith. Does Elliot Chalmers do this?" Elliot Chalmers was cited by the claimant as a favourable comparator to Mr Carter. The claimant had no difficulty with Elliot Chalmers as a supervisor.
- 32.6 A particular problem raised by the claimant was someone else being on the desk, for example Ian, and leaving the claimant out there to do patrols. He said it felt very personal against him. Specifically, the

claimant was asked “Does [Mr Carter] ever use racist language towards you?” “No, but he uses insulting words.” “What sort of words?” “Stupid, hopeless, insulting definitely not racist.” There is reference to the night training incident when Mr Carter questioned why the claimant was there for the training. The claimant does not say in that passage that Mr Carter deliberately switched the lights off on that occasion to leave him in the dark. He does repeat his suggestion that Mr Carter tries to discredit him. Nicky Smith left it that she would continue with her investigations and arrange to meet again. She said that this would take some time depending on shifts and when she could schedule other meetings”. The claimant asked not to be on shift with Mr Carter and Ms Smith said she would try and accommodate that.

- 32.7 We have Nicky Smith’s analysis of where she thought she was at in the process at this time. She tells us in her witness statement at paragraph 14:

“There was not any evidence of racism or bullying and harassing behaviour from Mr Carter towards Mr Iwunze. To the contrary, the investigation suggested that there may have been conduct issues with Mr Iwunze. Mr Iwunze accepted that Mr Carter had never used racist language but he alleged that he used insulting words. When I asked him what sort of words he responded: “Stupid hopeless insulting definitely not racist.” As an informal resolution to his complaints I agreed with Mr Iwunze’s request for him not to be put on shift with Mr Carter and I asked him to inform me of any other instances that may occur. I resolved to monitor the situation with Mr Iwunze and Mr Carter. I did not put the allegations to Mr Carter because I wanted to monitor the situation to see if there was anything untoward taking place.”

- 32.8 The grievance did not reach a conclusion. It was left in limbo in that way and the claimant makes complaint of that in this case as a matter of race discrimination. He says: “I brought a complaint of race discrimination. It was not concluded. It was not put even to Mr Carter.” We also know that Nicky Smith did not think that there was substance in the grievance based upon what she had been told. There was no support for the grievance from the information provided by Mr Laing and Mr Bristol. It is perhaps true that she did not communicate clearly to the claimant that there was an interim position in respect of the grievance.

- 32.9 So what happened to the grievance? Well, the position is that events took over because on the evening of 11 May 2020 it was reported that the claimant had been videoed sleeping on duty. The matter was investigated by Ross Campbell, the contracts manager. He prepared an investigation report on 22 May 2018. His conclusion was that the evidence in the form of witness statements and video footage was compelling. The claimant was given an opportunity to explain why it was that he was sleeping on duty but instead he flatly denied it. Mr Campbell recommended that the allegation be upheld and that further disciplinary action was warranted.

- 32.10 Mr Carter was not the supervisor on the shift where this happened but Mr Carter came in as the supervisor of the following shift and he wrote an email to Nicky Smith on 11 May 2018 saying that he had been informed by David Shakespeare that morning that last night as he came into the office he had seen the claimant asleep on the desk. 'Caj did not wake up when Dave came into the stage door or when he came to the desk and it took for David to call his name aloud to wake him up. David informed him that Caj was falling asleep twice on shift and made no effort to keep awake ie patrolling or asking for a welfare break, etc. David also showed me a video of Caj asleep at the desk which I have seen this morning and clearly shows Caj asleep and snoring on camera whilst working at the control room desk.' Having been informed of the matter by David Shakespeare, Mr Carter thought he was duty bound to raise it. We make no criticism of him for that, nor do we make any criticism of Mr Shakespeare. So there was a prima facie disciplinary matter. The claimant had been found - and videoed - sleeping on duty.
- 32.11 The intention had been for Kayleigh Jones to hear the disciplinary. She could not make the meeting and so Nicky Smith held it. She found that there was very clear evidence of sleeping on duty and dismissed for gross misconduct. That decision was upheld on appeal by Kayleigh Jones who described sitting on a difficult appeal hearing with the claimant behaving in what she described as a rude and obstructive manner. We see from the official minutes of the meeting made by a note taker that the meeting had to be stopped on two occasions to allow the claimant to compose himself. Both Nicky Smith and Kayleigh Jones formed the view that the disciplinary and grievance processes were separate. In the disciplinary, Nicky Smith did address the claimant's defence that Andy Carter and David Shakespeare were out to get him and had fabricated the video. She rejected that position. Mr Shakespeare had videoed what he had found and Mr Carter reported what Mr Shakespeare reported to him. As we have already said, there can be no criticism of Mr Carter or Mr Shakespeare for that. There is no prima facie race discrimination in reporting what they have seen. Nicky Smith explained her decision in her witness statement in terms which were reasonable. In the course of the disciplinary she summarised his complaint. "Your defence is that Andy Carter is out to get you, that he has made David Shakespeare make this allegation and between them they have made a false allegation and a photoshop video of you." He responded: "Yes". I then said: "Are you denying that it was you in the video?" to which he responded: "No not denying that it is me." I asked him again if he was admitting that he was asleep on shift to which he responded: "Yes it looks like it and that's why I apologise." He then again alleged it was due to his medication that he was struggling for breath. His evidence was contradictory, confusing and not believable at all. That observation by Nicky Smith was an observation we share.
- 32.12 She explained her decision in the dismissal letter as follows:

- (a) She believed that the video was true and had not been tampered with, she believed that Mr Iwunze was asleep whilst on duty and on the date in question.
- (b) There was no evidence to corroborate the inference from Mr Iwunze that Mr Carter and Mr Shakespeare were out to get him.
- (c) Mr Iwunze alleged that Mr Carter had not reported him sleeping on shift previously when they worked at Wilson James because they had not worked together on night shifts. He provided rotas to evidence this. However, I found other rotas and notes evidencing that they had worked together on night shifts.
- (d) His statements were highly inconsistent. In particular he admitted to being asleep and apologised and put the blame on his medication for falling asleep. He also denied that he was asleep and quite astonishingly alleged that Mr Carter and Mr Shakespeare photoshopped the video to make him look asleep which was an entirely uncorroborated allegation.

32.13 So there, as before us, the claimant was running contradictory positions. We well understand why Nicky Smith rejected the claimant's position.

32.14 Before us the claimant has suggested that the way in which he dealt with David Shakespeare shows there was an inconsistency of treatment. He did not report Mr Shakespeare for sleeping on duty when having a migraine. This was put to Nicky Smith who said it had never been suggested to her that Mr Shakespeare had been sleeping on duty. She had been alerted to the fact, by Mr Shakespeare, that he was struggling with migraines. There was no comparison between the two cases. We also find there was no comparison between the two cases. Indeed, the claimant did not develop that argument in the course of the disciplinary or appeal process, that Mr Shakespeare was a direct comparator who had been treated more favourably than he had been treated.

32.15 On the balance of probability the claimant was sleeping on duty. That was reasonably concluded by Nicky Smith and Kayleigh Jones. Furthermore, it was reasonable to regard it as gross misconduct. It was made clear to us that monitoring the CCTV has multiple importances. Two relate to checking: first, that your colleague out on patrol is safe; and secondly and fundamentally, checking the fire panels to make sure there was no warning that any of the buildings might be on fire. The responsibility is not just for the RSC theatre but all RSC buildings in Stratford upon Avon and there are a number of those.

- 32.16 There is no prima facie case of racial discrimination in the decision to dismiss and again Mr Carter and Mr Shakespeare did not fabricate the video. The claimant's suggestion that they did is wholly unreasonable.
33. The one issue that has demanded the most analysis by the tribunal is whether there was a prima facie case that the respondent, in the form of Nicky Smith, had not dealt appropriately with the grievance in that it was not concluded.
34. The grievance certainly was not ignored. It was investigated. Nicky Smith had come to an interim position that whilst on the face of it there had been nothing established during the grievance process, she would nonetheless monitor the position to see if there were further incidents. To our mind that was a reasonable position. There was not a failure to resolve the grievance. As it happened, events took over and there was an incidence of potential gross misconduct. It was reasonable to believe, both by Nicky Smith and Kayleigh Jones, that the grievance was a separate process from the disciplinary. That said, Nicky Smith did expressly consider whether there was evidence that Mr Carter and Mr Shakespeare were out to get him. She rejected that. It was their duty to report what they had seen and it may well be that she, as a new manager, representing a new contractor had a different view of the seriousness of sleeping on duty than perhaps Mr Brown previously had. We do not know, we have not heard from Mr Brown but there had been several features of the evidence to lead us to believe - as we were told by several witnesses - that Mr Brown did not like conflict. Nicky Smith was entirely justified in adopting the position she did.
35. In conclusion, we do not find that there is a prima facie case of race discrimination that Nicky Smith failed to deal appropriately with the claimant's grievance. She investigated it, she heard the claimant, there was insufficient cogency to the allegations for her to find that there had been any discrimination. She left it that she would monitor the position. In the event, the disciplinary matter took over.
36. If we are wrong about that and there was a prima facie case of race discrimination and the burden transfers, then we find that the respondent shows that the decision not to conclude the grievance was not on the grounds of race in any way whatsoever. The Respondent shows the following: first of all there was inadequate cogency to the allegations in the first place; secondly a reasonable interim position had been arrived at whereby she would monitor the position; and thirdly events took over in that the disciplinary brought the employment relationship to an end.

Conclusion

37. In respect of all of his allegations of race discrimination, then, the claimant has been unsuccessful. His claims are dismissed.

Employment Judge Smail

Date:18 October 2020.....

Sent to the parties on: 6 November 20

For the Tribunal Office