EMPLOYMENT TRIBUNALS

Claimant: Mr D Hill

Respondent: (1) The Berkeley Group PLC (2) Berkeley Homes (Southall) Limited

Heard at: London South **On: 3 (reading day), 4, 5 and 10 (in chambers) November 2020**

Before: Employment Judge Khalil sitting with members
Ms J Jerram
Mr S Goodden

Appearances

For the claimant: in person
For the respondent: Mr Palmer, Counsel

RESERVED JUDGMENT

Unanimous decision:

- The claims of direct race and marriage discrimination under S.13 Equality Act 2010 are not well founded and are dismissed.
- The claims of harassment (race and disability) under S. 26 Equality Act 2010 are not well founded and are dismissed.
- The claim of indirect discrimination (race) under S.19 Equality Act 2010 is not well founded and is dismissed.
- The claim of victimisation (race) under S.27 Equality Act 2010 is not well founded and is dismissed.
- The claim for discrimination arising from disability under S.15 Equality Act 2010 is not well founded and is dismissed.

Reasons

The claims, appearances and documents

1. The claimant brought claims of direct race discrimination, harassment (race), victimisation and indirect race discrimination. He also brought claims of disability discrimination (discrimination arising from disability and harassment).

2. The Tribunal heard from the claimant who had prepared a witness statement, and from three witnesses for the respondent – Mr Abdul Bada, Security Manager, Ms Wendy Pritchard, In house Group Solicitor for the first respondent (who gave her evidence by CVP) and Mr Richard Dow, Senior Construction Manager.

3. The Tribunal had an agreed bundle of documents.

4. There had been three previous case management preliminary hearings. At the Hearing on 26 February 2019 before EJ Bryant QC, the list of 10 issues were agreed as set out in that Order at pages 37-40.

5. The claimant relied on anxiety as his qualifying disability under the Equality Act 2010 'EqA'). This was conceded by the respondent. At the outset of the hearing, the claimant said depression was relied upon as having been caused by the alleged discrimination and was thus part of his personal injury claim.

6. The Tribunal noted from the claim form that the claimant also referred to his autism. The Tribunal asked the claimant if he required any accommodation in relation to that with regard to the hearing process and procedure or indeed his anxiety, for example, in relation to the need for breaks or the manner of being questioned or giving answers. The claimant confirmed that he was only inviting the Tribunal to have regard to how he may come cross expressively or through the use of his hands when assessing his evidence.

7. The claimant was challenged if indeed he was asserting that he was bringing an indirect race discrimination claim. This was not clear from his claim form. In addition, it had been positioned as a 'possibility' only in the agreed list of issues. The Tribunal announced following deliberation, that the claim would be permitted as it appeared to be pleaded. The Tribunal understood the alleged provision, criterion or practice (PCP) to be the respondent's policy of requiring all employees and contractors on site to produce *prescribed* right to work documentation as set out in the Home Office lists/annex A and B.

8. The Tribunal also raised with the parties the applicability of S.41 EqA in the light of S. 41 (5) EqA and the Court of Appeal's observation in ***Muschett V HM Prison Service 2010 EWCA Civ 25*** (paragraph 24). Following discussion, the Tribunal determined not to deal with the matter as a preliminary issue but as part of the totality of the case.

9. The Tribunal also observed that Mr Bada, an alleged discriminator, was not employed by either respondent at the time of the alleged discrimination. He was employed by a third-party security company. That company was not a named respondent in these proceedings; neither was Mr Bada a named respondent.

10. Due to judicial capacity, the Tribunal could not commence the hearing on first day. The first day had been pre-agreed as a reading day. Instead, the second day became the reading day and evidence and submissions were heard on the third and fourth day. Judgment was reserved. Had the Hearing proceeded over 4 days, it is possible that Judgment may have been delivered on the fourth day. That was the only consequence to the parties. Having regard to the overriding objective and proportionality in particular, the Tribunal case managed the Hearing to ensure the evidence and submissions were completed within 2 days. The claimant cross examined Mr Bada for approximately 2 hours and 30 minutes, Ms Pritchard for approximately 2 hours and 15 minutes and Mr Dow for approximately 1 hour and 30 minutes. The respondent's counsel cross examined the claimant for approximately 1 hour. This was a case where the main alleged discriminatory conduct took place on 1 day with a subsequent investigation. With that in mind it was a proportionate use of the Tribunal's time.

11. At the conclusion of the evidence, both parties were given time to close their cases orally and did do so. The respondent had technical difficulties in emailing its written closing submissions. Accordingly, as judgment was reserved both parties were given the opportunity to send in written submissions to supplement their oral submissions. In the claimant's case as he was a litigant in person, to ensure his submissions were focused on the issues, the Tribunal limited his written submission to 5 pages of single sided A4, normal font (font 12 was suggested). The deadline imposed was 4.00pm on Monday 9 November 2020. Written submissions were received from both parties.

Relevant Findings of Fact

12. The following findings of fact were reached by the Tribunal, on a balance of probabilities, having considered all of the evidence given by witnesses during the hearing, including the documents referred to by them, and taking into account the Tribunal's assessment of the witness evidence and having regard to the above findings on credibility and elsewhere in the judgment.

13. Only relevant findings of fact relevant to the issues, and those necessary for the Tribunal to determine, have been referred to in this judgment. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute. The Tribunal has not referred to every document it read and/or was taken to in the findings below but that does not mean it was not considered if it was referenced to in the witness statements/evidence and considered relevant.

14. The claimant was a self-employed contractor. He provided his services to Commodore Kitchens who contracted with the second respondent to provide services. The respondents are engaged in the construction industry and Commodore Kitchens were one of a number of third-party companies used for the supply and installation of products and services. In the case of Commodore Kitchens it was, as the name suggests, kitchen fitting.

15. The claimant did not offer any evidence about his working relationship with Commodore Kitchens beyond what he said in paragraph 1 of his witness statement – namely that he worked for Mark Allsopp Smith of Commodore Kitchens for 4 years.

There was no evidence provided about pay, hours, declining work, holiday pay, sickness absence etc. Mr Allsopp Smith was not called to give evidence.

16. This was important and relevant especially as, at the outset of the Hearing, the Tribunal had identified a jurisdiction concern about whether the claimant was 'employed by another' within the meaning of the contract worker provisions (S. 41 (5) EqA).

17. The claimant was however cross examined on his relationship with Commodore Kitchens. Under cross examination the claimant stated as follows:

    a) 'everyone' in the industry was self employed
    b) He did not get holiday or bank holiday pay
    c) There was no set salary
    d) There were no set hours
    e) He was paid for the days worked
    f) He was paid on invoice on a 'kitchen by kitchen basis'
    g) A 'standard' tax was levied by Commodore Kitchens; the claimant would 'claim back' taxes

18. The Tribunal also noted that he supplied his own tools.

19. The claimant is a South African national. He is married to a polish national.

20. The claimant's main contact point at Commodore kitchens was Mark Allsopp Smith. Mr Smith is a New Zealand national, married to an EEA national.

21. The claimant was engaged by Commodore Kitchens to work at the second respondent's site in Southall. He arrived on 23 April 2019 and was subjected to induction checks by security. This was a process followed for all inductees.

22. In paragraph 4 of his witness statement, the claimant said that Commodore Kitchens had checked his right of *residence.* In paragraph 6, he referred to a declaration form from Commodore Kitchens about the validity of the claimant's right to work documents but the Tribunal was not taken to any such document.

23. The first respondent had a policy of carrying out right to work checks on all of its employees *and contractors* and require documents from list/annex A or B of the Home Office guidance in all cases. The Tribunal heard from Ms Pritchard, Group Solicitor, that there were multiple reasons for his. First, to remain compliant with their statutory duties and responsibilities under the Modern Slavery provisions. Second, because it would/could be reputationally damaging if any of the respondent's sites were found to have illegal workers. (Ms Pritchard stated that the first respondent engaged approximately 13,000 to 15,000 workers at all of its 60 associated sites). Third, having a policy about this could prevent Home office/Immigration enforcement presence on site. Fourth, there would be an economic impact on their operations if illegal workers were prevented from working. These reasons were stated under cross examination. The Tribunal also had regard to paragraph 5 of Ms Pritchard's witness statement.

24. The claimant arrived on site on 23 April 2018. His passport was checked for authenticity via the respondent's PpAC checking service. Mr Bada confirmed that this was solely for authentication of the validity of the passport. Mr Bada explained in his witness statement that he noticed that the claimant had a Non -EEA passport. Mr Bada said he would normally expect to receive an endorsed passport or a Biometric card. He said that there several non-EEA nationalities on the site ('"in excess of 35") and from 'plenty' of countries. The claimant told Mr Bada that he did not need to provide further documents. The Tribunal found that at this stage this would have been based on the claimant's assertion that his marriage with an EEA national was enough. Mr Bada committed to checking the Home Office guidance document. In a subsequent discussion with the claimant, he explained to the claimant he would need to see further documentation from the claimant. The Tribunal found that this conversation was by telephone and the same day. Whilst the claimant agreed he had a telephone conversation in this regard, his evidence was this was on 25 April 2018. The Tribunal preferred the date given by Mr Bada as it was a natural follow through of his conversation earlier that day. The Tribunal finds there was no resistance to provide further documents at this point, though the description/identity of those documents was not specifically discussed.

25. The Home Office guidance was in the bundle at pages 227-252. Mr Bada said he had read the guidance, but he did not read the other documents referred to therein including the codes off practice. His evidence was accepted about this.

26. The claimant returned to the site on 26 April 2018 to drop off his tools (not on 25 April 2018 as believed by the claimant). The Tribunal noted Mr Bada had checked with the 'Datascope' records which would establish when the claimant was next on site which was 26 April 2018 (pages 124-125). On this date, the claimant was permitted to drive on site by Mr Bada (although he would normally first be required to undertake a Haul Road Induction to drive in a 4 x 4 vehicle with a beacon). The Tribunal also accepted Mr Bada's evidence that he enquired about the claimant's further right to work documentation and was told by the claimant that he would bring it when he was next on site.

27. Mr Bada explained that on occasions inductees did forget their passports or Right to Work documents and he would normally allow them to bring it on site on the next occasion they were there. The Tribunal found this to be pragmatic rather than any suggestion that Mr Bada was prepared to tolerate or accept illegal working.

28. On the following day (27 April 2018), the claimant arrived on site and was asked about his additional right to work documentation. He did not produce anything to Mr Bada. There followed a heated discussion between Mr Bada and the claimant – at the instigation of the claimant. The Tribunal found that Mr Bada was trying to discharge his obligation to be satisfied of the requisite documentation in accordance with the home office guidance and the respondent's policy. The Tribunal found that the reference to the claimant's nationality was, *in context,* to the claimant being a non-EEA national. The Tribunal found the claimant did make a racial allegation against Mr Bada. The claimant, in evidence and questioning, drew a distinction between alleging the actions of Mr Bada were racist rather than calling him a racist. The distinction, in the Tribunal's view, was one without substance. It amounted to the same thing. The Tribunal did not

find that the claimant was alleging to Mr Bada that the respondent's policy was discriminatory.

29. Mr Bada called his line manager Mr Dow, who was the Site Manager, in an attempt to defuse the situation as the claimant was shouting and was becoming aggressive. In addition, Mr Dow had other inductions to attend to. Mr Dow was not a technical expert in relation to right to work checks; he explained in evidence that Mr Bada was responsible to attend to the security requirements as a subject matter expert. He also referred to a health and safety manager who reported to him who similarly had subject matter responsibility. The Tribunal accepted his evidence that his primary purpose was to calm the matter down.

30. When Mr Dow arrived, Mr Bada explained what had happened. The conversation moved to the induction room at Mr Dow's request which was a more private area.

31. The claimant alleges he presented his marriage certificate and wife's passport to Mr Dow. Mr Dow stated he received no documentation from the claimant. The Tribunal had regard to Mr Dow's role as described above and was thus satisfied that Mr Dow would not himself be asking to see what documentation the claimant had. There was also no reason for Mr Dow to deny that he was presented with such documentation. It was not a case where, for example, it was being said that acceptable documents had been presented which Mr Dow was denying having received. On the respondent's case, nothing turned on the production of such documents. The Tribunal found that no such documents were presented to Mr Dow. In addition, the claimant's allegations regarding Mr Dow shouting and talking over the claimant because of the claimant's race were never put to Mr Dow.

32. Mr Dow was unable to defuse the situation and called Mr Mark Wilkinson, the Senior Health and Safety Manager. Mr Dow said Mr Wilkinson was known to be someone with a calm 'head'. Mr Wilkinson did not give evidence but there was no reason for the Tribunal to doubt Mr Dow's impression of Mr Wilkinson's personality trait in this regard.

33. Mr Bada stated in his witness statement that at some point he was shown, by the claimant, his children's passports (paragraph 15). He had mentioned this in the statement he provided in November 2018 too (as part of the subsequent internal investigation, it appeared to the Tribunal, following receipt of the claim). In his oral testimony, he stated he had seen them whilst the claimant was in the induction room with Mr Wilkinson. Mr Bada said he was not present for the entire duration of the claimant's meeting with Mr Wilkinson. The Tribunal accepted Mr Bada's evidence in this regard. The Tribunal was not taken to a site plan or photographs but with Mr Bada's responsibilities on the day, the Tribunal found that he would not have been at the smoking shelter at this point. The Tribunal accepted the claimant's evidence that he did have a conversation with Mr Wilkinson at the smoking shelter; as noted above, Mr Wilkinson did not provide testimony to rebut this assertion.

34. As stated above Mr Wilkinson did not give evidence. Having regard to the evidence of Mr Bada and Mr Dow (and indeed that of Ms Pritchard), the Tribunal was left in no doubt that the claimant remained agitated and raised his voice or was otherwise abusive to Mr Wilkinson. There was a witness statement for Mr Wilkinson taken as part of the internal investigation. Mr Wilkinson's statement was at page 175-176 which

supported this view. This was dated 4 September 2018. The Tribunal was not given a reason about why this statement was taken then but found that this was likely to have been brought on by the instigation of early conciliation which concluded without resolution on 30 August 2018. The statement did not address specific allegations about comments said which were set out in the issues. The Tribunal accepted the oral testimony of the claimant that the comments attributed to Mr Wilkinson were said. There was no rebuttal testimony. However, in relation to the comment "not for much longer" (6 (d)), the Tribunal did not find this to be related to the claimant's race or indeed to be related to the protected characteristic of race in general. It was a comment about the outcome of the UK referendum on EU membership and was not, without more, a comment which related to race. With regard to the comment about immigration checks 'especially in this area', the Tribunal was not satisfied that this was a comment related to the claimant's race, or indeed to be related to the protected characteristic of race in general or to a specific identified ethnicity. Mr Wilkinson's statement of 4 September 2018 had referred to instances of illegal working which had been intercepted *at the Southall site.* The Tribunal had been told that there were 7 instances uncovered of illegal working at the site. The Tribunal found that, in context, it was a comment about the geographical site.

35. The Tribunal found that the claimant may have been mistaken about his recollection about to whom he showed his marriage certificate and his wife's passport. There was reference to both these documents in Ben Brown's statement (of PpAC) at page 174, taken on 3 September 2018. The conversation was stated to have been between Mr Brown and Mr Wilkinson and thus although not alleged by the claimant, the documents could have been shown to Mr Wilkinson. Mr Bada's evidence, accepted by the Tribunal, was that he had seen the claimant's children's passports whilst the claimant was with Mr Wilkinson.

36. There was no resolution through the involvement of Mr Wilkinson; the claimant was asked to leave the site. He submitted a written complaint about the incident to Ms Pritchard on 28 April 2018. His email was at page 126. It was a broad complaint about discrimination and a general allegation about breaches of the Equality Act. He asked expressly for his anonymity to be preserved.

37. Mr Bada also confirmed that Mr Allsop Smith's status was such that he too had been required to produce a visa or a biometric card as he was a non-EEA national (New Zealand) although married to an EA national (Czech Republic). This however had been missed. Although a PpAC check had been carried out (page 89), the further documentation had not been seen. This was subsequently done. The document at page 91 was the further documentation which Mr Bada confirmed under reexamination was a biometric card. In response to Tribunal questions, Mr Bada explained that this was only one of two occasions he could remember when there had been an oversight. He was otherwise used to checking for the need for further documentation based on several non-EEA nationals (from plenty of nationalities).

38. A response was received from Ms Prichard the next day (30 April 2018) advising the claimant that complaints of discrimination were taken seriously, enclosing a copy of the whistleblowing policy. Ms Pritchard also advised the claimant that keeping his identity anonymous might affect her ability to carry out a proper investigation. Nevertheless,

she offered to have an initial discussion and to receive information about the site he had been working at and the examples of discrimination.

39. There followed an exchange of emails between the claimant and Ms Pritchard between 30 April 2018 and 10 June 2018 (pages 132-156). The Tribunal summarises its finding of that exchange as follows:

    a) The claimant did not provide examples of the alleged discrimination or the site where it was alleged to have taken place

    b) The claimant asked Ms Pritchard, twice, not to continue with any investigation of his complaint (pages 142 and 155)

    c) Ms Pritchard did commit to carrying out a group wide check of right to work protocols without reference to the claimant or his specific complaint (page 143)

    d) Ms Prichard did act on that commitment (pages 146-149)

    e) Ms Prichard's investigation was still on going as at 29 May 2018 (page 154)

    f) In one email, there was an expression of appreciation of Ms Prichard's efforts by the claimant (page 150)

40. The Tribunal also found Ms Pritchard's summary of her conversation with the claimant on 30 April 2018 (page 131), to be a fair and accurate summary of that conversation. This was a conversation during which the claimant had deliberately hung up on Ms Prichard, twice. Ms Pritchard's email following was contemporaneous, written about 90 minutes after her conversation. The Tribunal also took into account that the author was a Solicitor who would be used to making attendance notes or summarising discussions on a regular basis. The allegation by the claimant when he cross examined Ms Pritchard that this email was full of untruths and lies, was flatly rejected. When challenged by the Tribunal if it was his intention to make a serious allegation of this kind, he struggled to withdraw it and did not withdraw it.

Applicable Law

41. This claim includes direct race and marriage discrimination under S.13 EqA. Both are protected characteristics.

42. S.13 states that 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.

43. The claim also includes a claim of indirect race discrimination under S.19 EqA. This says:

    S.19: Indirect discrimination

    (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

44. The claim also includes a claim for harassment (race and disability) under S.26 EqA. This says:

S. 26: Harassment

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B…

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account:

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect

46. The claim also includes a claim of victimisation (race) under S.27 EqA. This says:

S.27: Victimisation

(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.

47. The claim also includes a claim for discrimination arising from disability under S.15 EqA. This says:

S.15 Discrimination arising from disability:

(1) A person (A) discriminates against a disabled person (B) if—
(a) A treats B unfavourably because of something arising in consequence of B's disability, and
(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) *Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability*.

48. The general burden of proof is set out in S.136 EqA. This provides:

"*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."*

49. S 136 (3) provides that S. 136 (2) does not apply if A shows that A did not contravene the provision.

50. The guidance in ***Igen Ltd v Wong 2005 ICR 931 and Barton v Investec Henderson Crosthwaite Securities Ltd 2003 ICR 1205 EAT*** provides guidance on a 2-stage approach for the Tribunal to adopt. The Tribunal does not consider it necessary to set out the full guidance. However, in summary, at stage one the claimant is required to prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, (now any other explanation) that the respondent has committed an act of discrimination. The focus at stage one is on the facts, the employer's explanation is a matter for stage two which explanation must be in no sense whatsoever on the protected ground and the evidence for which is required to be cogent. The Tribunal notes the guidance is no more than that and not a substitute for the Statutory language in S.136.

51. In ***Laing v Manchester City Council 2006 ICR 1519 EAT***, the EAT stated that its interpretation of ***Igen*** was that a Tribunal can at stage one have regard to facts adduced by the employer.

52. In ***Madarassy v Nomura International PLC 2007 ICR 867 CA***, the Court of Appeal stated: "*The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal "could conclude" that, on a balance of probabilities, the respondent had committed an unlawful act of discrimination"*

53. It was also said in ***Madarassy*** that under the first stage (under the previous incarnation in S.63A (2) of the Sex Discrimination act 1975):

    "*The Tribunal is not prevented at the first stage from hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the complainant's evidence of discrimination. The respondent may adduce evidence at the first stage to show that the acts which are alleged to be discriminatory never happened, or that if they did, they were not less favourable treatment of the complainant; or that the comparators chosen by the complainant or the situations with which comparisons are made are not truly like the complainant or the situation of the complainant; or that even if there has been less favourable treatment of the complainant, it was no the ground of [her sex or pregnancy]."*

54. In ***Raj v Capita Business Services and Another UKEAT/0074/19/LA*** it was confirmed that the correct stage one question was whether there were facts from which a Tribunal could conclude that the unwanted conduct related to [the protected characteristic].

55. In Indirect Discrimination claims, the burden of proof only shifts to the respondent where a claimant has established that there was a provision, criterion or practice (PCP) that puts or would put the claimant as well as those who share the protected characteristics at a particular disadvantage. This was made clear by Justice Langstaff in ***Dziedziak v Future Electronics Ltd EAT 0270/11.***

56. With regard to victimisation, a claimant would need to establish that he did a protected act and that there followed detriment; however, in accordance with ***Madarassy***, something more would be require to indicate a prima facie case of discrimination to shift the burden of proof.

57. In relation to discrimination arising from disability, once a claimant has established he is a disabled person, he must show that 'something' arose in consequence of his disability and that there are facts from which the Tribunal could conclude that this something was the reason for the unfavourable treatment. The burden then shifts to the employer to show it did not discriminate. Under S.15 (2) EqA, lack of knowledge of the disability is a defence but it does not matter whether the employer knew the 'something' arose in consequence of the disability. Further an employer may show that the reason for the unfavourable treatment was not the 'something' alleged by the claimant. Finally, an employer may show the treatment was a proportionate means of achieving a legitimate aim

Conclusions and analysis

58. The following conclusions and analysis are based on the findings which have been reached above by the Tribunal and the application of the law to those findings. Those findings will not in every conclusion below be cross-referenced unless the Tribunal considered it necessary to do so for emphasis or otherwise.

59. The Tribunal was not satisfied that the claimant was a contract worker for the purposes of S.41 Equality Act 2010, as the Tribunal concluded that the claimant was not employed by another person pursuant to S.41 (5) of the EqA. The Tribunal had regard to paragraph 24 of the Court of Appeal's observation in ***Muschett:***

    "*Finally, Judge Ansell agreed with the employment Judge that Mr Muschett's claim to be a contract worker (section 7 of the race Relations Act 1976 and the like provisions in other discrimination legislation), was also unfounded: that was because of the Judge's finding that he had no employment contract with brook Street"*

60. The claimant's evidence to establish that he was employed under a contract of employment (with Commodore Kitchens) was virtually non-existent. No evidence was provided, for example on control, mutuality of obligation or personal service. This was despite a prompt and invitation from the Tribunal at the outset that this would be a consideration.

61. Based on the findings above and cross examination of the claimant in particular on this point, the Tribunal was not satisfied that the claimant was employed under a contract of employment 'by another'. The Tribunal refers to paragraph 15, 17 and 18 above. On the contrary, the Tribunal concluded it was more likely than not that the claimant was a self-employed contractor.

62. The claimant was not and did assert a claim based on the prospect of being directly employed by the first or second respondent. Neither was it asserted that he was 'employed' under some other contract.

63. If the Tribunal was wrong in its conclusion above, it went on to determine the issues in the case on the basis that he was a contract worker.

Issues 1-3 Right to work documents

64. The Tribunal concluded that the date references in these issues were in fact 23 April and 27 April 2018 respectively. The Tribunal concluded that the claimant's South African race was not the reason why the claimant was subjected to right to works. It was because the respondent had a policy of requiring to see prescribed documentation evidencing an employee's or contractors right to work legally at any of its sites in the UK. That this required specific documentation of the claimant as a non-EEA national (married to an EEA national) was simply a furtherance of this policy.

65. The Tribunal was satisfied that the claimant's discussions with Mr Bada were initially in the foyer area and that the discussions with Mr Wilkinson during which

documentation was shown, was in the induction room. That is where Mr Bada had seen the claimant with Mr Wilkinson when he produced his children's passport and that is where Mr Dow spoke with the claimant too after the conversation moved there away from the foyer.

66. The Tribunal had regard to Mr Allsop Smith being permitted to work on site without evidence produced to satisfy the respondent's policy. Mr Allsop Smith was from New Zealand, married to a person from the Czech Republic. Mr Bada explained this was an oversight picked up via an audit. He subsequently provided his biometric card. This was 1 of only 2 examples of 'slippage' on site. Mr Bada's unchallenged evidence was that there were at least 35 other non-EEA nationals on that site from various nationalities. The explanation was entirely credible and innocuous.

67. The claim for direct discrimination fails. It did not pass first stage of the burden of proof as the claimant had not established facts from which the Tribunal could conclude that discrimination had occurred. Even if the Tribunal was wrong in its conclusion in this regard, the respondent's explanation (both the policy and the reason for Mr Allsop Smith's difference in treatment) was cogent and in no sense whatsoever discriminatory. The harassment claim fails too. The unfavourable treatment was not related to race.

Issue 4- Mr Dow

68. The Tribunal had regard in particular to Mr Dow's role 'in the incident' – that he was not there to be a document checker or arbiter, but to calm the situation down only. The statement at page 174 referred to a conversation between Ben Brown and Mr Wilkinson (not Mr Dow). Mr Bada's evidence was he had seen the claimant's children's passport during his meeting *with* Mr Wilkinson. The Tribunal was not satisfied that any documentation had been shown to Mr Dow.

69. In relation to the behavioural allegations against Mr Dow (4 (a) & (c)), the Tribunal concluded that these were not well founded. Having regard to the collective evidence of Mr Bada, Mr Dow and Ms Pritchard, the Tribunal concluded that the shouting and interrupting was being carried out or instigated by the claimant. The claimant did not directly challenge this alleged treatment by Mr Dow by reason of his race in cross examination. The Tribunal concluded that Mr Dow did not walk out but he escalated the matter to Mr Wilkinson.

70. The claim for direct discrimination (race or marriage) fails. It did not pass first stage of the burden of proof as the claimant had not established facts from which the Tribunal could conclude that discrimination had occurred. The harassment claim fails too. There was no unfavourable treatment related to race.

Issue 5 – Not allowing the claimant to call Mr Allsop Smith

71. The claimant did not make it clear who this allegation was alleged against. None of the respondent's witnesses were questioned on the alleged refusal either. There was no reason advanced why the claimant could not himself have called Mr Allsop Smith. Indeed, Mr Allsopp Smith did arrive on site and on the claimant's case spoke

to Mr Wilkinson (paragraph 62 of the claimant's witness statement). There was no detriment or unfavourable treatment established. Even if the Tribunal was wrong about that it was not because of the claimant's race. The claim for direct discrimination (race) fails. It did not pass first stage of the burden of proof as the claimant had not established facts from which the Tribunal could conclude that discrimination had occurred. The harassment claim fails too. There was no unfavourable treatment related to race.

Issue 6 – Mr Wilkinson

72. In relation to the behavioural allegations against Mr Wilkinson, (6 (a), (b), (f), (g) and (h), the Tribunal concluded, having regard to the collective evidence of Mr Bada, Mr Dow and Ms Pritchard, that the allegations were not well founded. Alternatively, they were not because of the claimant's race or related to race.

73. Regarding 6 (d), as already found above, this was not, in the Tribunal's conclusion a comment because of nor related to the claimant's race or race generally. It was a comment about the UK referendum outcome on EU membership.

74. In relation to 6 (e), as already found above, this was not, in the Tribunal's conclusion, a comment because of or related to the claimant's race or race generally. The Tribunal had regard to Mr Wilkinson's statement at page 175 which, in the Tribunal's conclusion, provided the context for the comment – because of the occurrence of illegal working and interception of that *at* the Southall site. This was expressly referred to in paragraph 9 of the grounds of resistance too and the issue (and frequency was also set out in an email from Mr Wilkinson to Ms Joanna McClelland (page 169) who the Tribunal understood to be a Manager at the Southall site (page 156).

75. In relation to the disability harassment claim, the Tribunal concluded that Mr Wilkinson's comment was not, in context, related to the claimant's disability. It was a comment expressing general awareness of mental health to lend weight to his ability to handle a situation where the claimant was becoming more agitated, angry and emotional. The Tribunal concluded it was not said in an open forum. The burden did not thus shift. Alternatively, the Tribunal concluded Mr Wilkinson did not have actual or constructive knowledge of the claimant's anxiety and it was not *reasonable* for the claimant to feel his dignity had been violated or that this created an intimidating, hostile, degrading, humiliating or offensive environment pursuant to S. 26 (4), having regard to all the circumstances of the case. The claimant's perception about his treatment at the time was exclusively about his assertion that he did not need to establish any documentary right to work. Mr Wilkinson was the third person in a chain attempting to pacify the claimant. It was not reasonable for the claimant to feel harassed (disability).

76. The Tribunal were not clear about the discrimination arising from disability claim. It was not advanced beyond the assertion in the list of issues. The claimant did not say what the unfavourable treatment was or identify the 'something' because of which he said he alleged he had been treated unfavourably. No witness was questioned on it. Further, Mr Wilkinson did not have actual or constructive knowledge of the claimant's disability. The Tribunal had regard to paragraph 40 of

the claimant's witness statement. The Tribunal also rejected the assertion that Mr Wilkinson had discretely obtained access to the claimant's medical records. The claim thus failed.

Issue 7 – Refusal to allow the claimant on site/Indirect Discrimination

77. The Tribunal repeats its findings and conclusions above regarding why the Tribunal concluded this did not amount to direct discrimination or harassment.

78. With regard to the indirect discrimination claim, the Tribunal had regard to ***Badara v Pulse Healthcare ltd UKEAT/0210/18/BA*** and ***Okuoimose v City Facilties Management (UK) Limited UKEAT/0192/11/DA*** which were relied upon by the claimant. ***Badara*** concerned, inter alia, a case of unauthorised deductions (based on the interpretation of a contractual clause) and direct and indirect discrimination which had been dismissed by the Tribunal. The central question on appeal, in each of the claims was whether, notwithstanding that the claimant had a right to work in the UK as a family member i.e. spouse of an EEA national resident in the UK, the respondent reasonably required him to produce evidence of his right to work in the form of positive ECS (Employer Checking services) checks from the Home office.

79. The EAT said the Tribunal at first instance had improperly distinguished the earlier case of ***Okuoimose***, (which was specifically about the defence of illegality) in particular because account ought to have been taken of the Home office guidance 'Additional Information' (on page 288 in *this* case).

80. The EAT in allowing the appeal, did not substitute a decision. Both the unauthorised deductions claim and the indirect discrimination claim were remitted to determine a proper construction of the contractual clause relied upon by the respondent and to determine both parts of the indirect discrimination test – the legitimate aim and the proportionality of the means to achieve that commenting

"*I am again not persuaded that the question necessarily admits only one answer."*

81. Before applying this in the current case, the Tribunal first looked at whether the respondent's policy did cause the claimant a substantial disadvantage (to Non-EEA nationals). In this regard the Tribunal noted he previously held a residence card (page 114) which had expired. In addition, there were workers from several non-EEA nationalities working for the respondents who were able to comply (approximately 35 in number). Further, there was no barrier preventing the claimant from applying for a biometric card. It was an election not to do so. Notwithstanding these observations, the Tribunal concluded that there was some disadvantage to the claimant and other non-EEA nationals married to EEA nationals, as they would need to go through the process of applying for a biometric card and not rely not pre-existing documentation.

82. The Tribunal thus moved on to look at the respondent's aim. This was broadly asserted as being the assurance that all workers on the first respondent's sites were working legally. In analysing the legitimacy of that broad aim, the Tribunal noted the respondent's aim, on the evidence, went a lot further than its objective to be satisfied that all employees and contractors on site were able to produce

prescribed right to work documentation as set out in the Home Office lists/annex A and B. In fact , in relation to this 'Home Office factor' itself, the respondents were expressly cognisant of the additional information section (Mr Bada had read it and Ms Prichard gave specific evidence about the group policy too); reliance on other documentation of a non-EEA spouse of an EEA national would not provide a statutory excuse if a worker turned out to be illegal as set out in the section. In addition, with regard to the legitimacy of the respondent's aim, Ms Pritchard stated this was to avoid reputational damage and also the economic impact of anyone found to have been working illegally (as they could not work). Ms Prichard also referred to responsibilities under the Modern Slavery legislation, which the Tribunal accepted would potentially have an overlap with right to work checks. i.e. stricter right to work checks are more likely to avoid issues of slavery and trafficking in the respondents supply chain as Ms Pritchard specifically referred in her evidence to the respondents' legal duty and the avoidance of exploitation by its contractors. This reason was also referred to my Mr Wilkinson in his email to Ms McClelland at page 169.

83. With regard to proportionality in particular, the Tribunal was taken to no evidence about any specific or broader concern of Non-EEA nationals struggling to provide the additional documentation from List A or B. Indeed, Mr Allsopp Smith, the claimant's comparator who was from New Zealand (non-EEA) whose spouse was from the Czech Republic), did provide his biometric card when his status was discovered. The Tribunal also noted that there had been at least 7 instances of illegal working uncovered at the second respondent's site (Southall). Further, having regard to the volume of contractors working on its sites and the number of sites (60), it was, in the Tribunal's conclusion, reasonable and proportionate to have a universal rather than site specific approach in order to maintain consistency of approach.

84. There was, thus reliance on the home office additional information section and several other factors in support of the respondent's aim and means of achieving it. The Tribunal concluded the aim (s) were legitimate and proportionate.

Issue 8 – failure to investigate the complaint properly

85. The Tribunal concluded that the claim for direct discrimination (race) fails. It did not pass first stage of the burden of proof as the claimant had not established facts from which the Tribunal could conclude that discrimination had occurred. The harassment claim fails too. There was no unfavourable treatment related to race.

86. In relation to the victimisation complaint, the Tribunal concluded that the claimant had done a protected act – the complaint of race discrimination in his email of 28 April 2018. However, having regard to the findings above about Ms Prichard's handling of the complaint the Tribunal concluded there was nothing whatsoever to suggest that there had been any detriment to the claimant. On the contrary, Ms Pritchard's handling of the complaint was exemplary. She had been provided with no information about the examples or site where the discrimination was said to have occurred. She was prepared to preserve the claimant's anonymity. She was prepared and had in fact instigated a group wide enquiry. The claimant sought to

withdraw his complaint. There was nothing more she could do. The burden of proof did not pass. The claim fails.

Issues 9 and 10 – sharing and making a passport copy and utility bill

87. The Tribunal concluded that taking a copy of his passport was part of the process of verification/validation in accordance with Home Office guidance and the respondent's policy. It was nothing to do with the claimant's race or related to his race.

88. The Tribunal was not satisfied that this was not consensual. It was provided for the PpAC check. Although Mr Wilkinson did not give evidence, Mr Bada was not challenged about whether or why he provided a copy to Mr Wilkinson. It was equally possible Mr Wilkinson saw the outcome of the PpAC check only.

89. Even if this conclusion is wrong, the reason to take a copy was for compliance with Home Office guidance (page 207) and in pursuance of the respondent's policy, not because of the claimant's race. In fact, copies of documents would be taken for right to work checks including EEA Nationals.

90. There was nothing improper or irregular about proof of address checks, including copies, as part of an induction process. It was certainly not because of the claimant's race or related to race.

91. The burden of proof did not pass. The claim thus fails.

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Employment Judge Khalil

23 November 2020

Sent to the parties on:

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For the Tribunal:

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