EMPLOYMENT TRIBUNALS

Claimant: **Mr N Seshadri**

Respondent: **Cwm Taf Morgannwg University Local Health Board**

Heard at: **Cardiff-by video hearing** **On: 7 January 2021**

Before: **Employment Judge J Whittaker (sitting alone)**

Representation:
Claimant: In person
Respondent: Mr Walters (Counsel)

JUDGMENT

The Claimant's application to add claims of direct discrimination pursuant to Section 13 of the Equality Act 2010 which are numbered 7 and 9 in document headed "Respondents supplementary response to the Claimant's race discrimination claims", are refused and dismissed. The Claimant's application to add allegation 8 in that Schedule of claims is granted but with amended wording which is set out in a Schedule of the claims of the Claimant under Section 13 which is attached to this Judgment.

The claims of the Claimant numbered 1 – 6 are accepted by the Tribunal and shall proceed to Final Hearing together with claim numbered 8 (but not claims numbered 7 or 9 which are dismissed).

REASONS

1. This Judgment should be read in conjunction with the Notice of Outcome of a Preliminary Hearing which related to a Preliminary Hearing on 4

December 2020 and which was as its summary sent to the parties on 16 December 2020 and which was signed by Employment Judge Whittaker on 15 December 2020.

2. At that hearing in December it was anticipated that the Claimant would have set out precisely his claims of race discrimination in a Scott Schedule. Unfortunately that anticipation did not bear fruit. At the hearing on 4 December the Tribunal was presented with a very substantial bundle of documents, almost 400 pages, and within that bundle was included the Scott Schedule which the Claimant had by Order of the Employment Tribunal been required to complete. The Claimant purported at pages 54 to 57 to set out a list of what he asserted were his claims of race discrimination. Unfortunately that was not a numbered list which made discussion challenging. The list began on page 54 with the Claimant describing a set of circumstances which he said had occurred on 27 September 2019 and it ended on page 57 with the Claimant relating to a set of circumstances allegedly related to events on 30 October 2019.

3. A summary of the Preliminary Hearing relating to the claims of the Claimant as part of the hearing on 4 December has recorded that the Preliminary Hearing involved further attempts made by the Tribunal to ascertain with sufficient clarity the claims of the Claimant under Section 13 of the Equality Act 2010. The Claimant was very clear in asserting that the only claims that he was bringing under the Equality Act were claims of direct race discrimination under Section 13. It was however very clear from the very extended narrative which the Claimant had supplied at pages 54 to 57 claims of the Claimant could not be accurately ascertained and neither could the issues relating to those claims be ascertained either. As the summary of the hearing on 4 December has made clear there was a considerable discussion with the Claimant about the specific wording of Section 13 and how the Claimant would now be required to make a further (and final) attempt to ascertain his individual claims of race discrimination.

4. The Tribunal had, in discussions with the Claimant, ascertained the first 3 claims under Section 13 which the Claimant wished to pursue and the Claimant had been urged to follow the wording of those first 3 examples as they were set out in the summary of the hearing of 4 December. Unfortunately, however the Claimant did not complete that exercise. Instead, the Claimant submitted a further lengthy Schedule. However on this occasion he set out that he had 9 separate claims of discrimination and these were numbered 1 – 9. The purpose of the hearing today was to ascertain which of those claims if any, should be struck out because they were presented out of time, which claims, if any, amounted to amendment and whether any of those suggested amendments would be permitted by the Tribunal to proceed as claims at a Final Hearing.

5. This detailed summary is provided in order to ensure, so far as possible, that at the Final Hearing on 13 – 16 September 2020 it is **not necessary** for the Tribunal to consider. The Scott Schedule at pages 54 – 57 which has been referred to above and the Tribunal is equally not required to consider the detailed additional Schedule which was supplied by the Claimant and which was included in the document which was considered today which is headed "Respondents supplementary response to the Claimant's race discrimination claims". The Respondents had in that document helpfully set out and repeated what the Claimant had said by way of the 9 claims that he wished to pursue and they had then helpfully added their own comments and observations in the right hand column. That is the document which was discussed with the Claimant today and which led to the Judgments which have been set out above.

6. In relation to the first 6 claims numbered 1 – 6, Mr Walters, on behalf of the Respondent, indicated that the Respondents would not be taking any "time issues" in connection with those matters and furthermore where it was suggested that any of the claims numbered 1 – 6 were amendments that the Respondents would not be objecting to those amendments. This was both a responsible and realistic approach to take. The common denominator in all of those 6 claims is the main witness for the Respondent Mary Morris. Somef the claims of the Claimant under Section 13 which were included in the claims numbered 1 – 6 were most certainly made in the original claim form. However that claim form was submitted out of time. As referred to in the detailed Judgment dismissing certain claims of the Claimant (that Judgment having been made on 4 December 2020) the deadline for the Claimant submitting his claim form or perhaps more accurately the deadline for the Claimant engaging in Early Conciliation with ACAS was midnight on 24 January 2020. The Claimant did not meet that deadline. He submitted his claim form in March therefore it was submitted considerably out of time. Furthermore the Claimant was not entitled to any extension of the relevant time limit by virtue of having engaged in Early Conciliation because he did not engage with ACAS within the relevant time limit. That was accepted and not disputed at any stage by the Claimant.

7. By virtue of Section 123 of the Equality Act 2010, any claim under Section 13 of direct discrimination must be submitted to the Tribunal within 3 months of the date of the event in question. Alternatively the Tribunal is permitted to consider "such other period as the Employment Tribunal thinks just and equitable". What was clear was that if the Claimant had submitted his form and circumstances to ACAS approximately 15 minutes sooner than he did in the minutes immediately after midnight on 24 January 2020 then his claims would have been in time. Alternatively, so far as claims numbered 1 – 6 were concerned, the expressed opinion of the Tribunal was that it would be just and equitable to extend time to those

claims though the relevant 3 month deadline had been missed by the Claimant. It had only been missed by a few minutes. It is clear that the Claimant had a number of complaints of discrimination which related to the conduct of Mary Morris. The opinion of the Tribunal therefore was that the claims which were submitted out of time in those listed numbers 1 – 6 should be allowed to proceed although they were out of time because it would be just and equitable on any examination of the short delay which had occurred and those claims would move forward to a Full Hearing. Similarly the view of the Tribunal was that any of the claims numbered 1 – 6 which amounted to an application to submit an amended claim should also proceed on the basis that those claims involved one common denominator Mary Morris. She would be required to come and give evidence in any event in respect of any or all of the claims numbered 1 – 6. The Tribunal reminded itself that it had a broad discretion as to whether or not to allow amendments to be made and included. The Tribunal reminded itself that it was required to take into account all the circumstances and to be firm and fair to both parties. The Tribunal also reminded itself that it was required to carry out "a balance of injustice and hardship". The Tribunal took into account that this was the paramount consideration of the Tribunal. The Tribunal also considered the ***Selkent*** principles whilst at the same time reminding itself that they do not amount to a checklist but simply a list of factors which it is usually appropriate for the Tribunal to take into account when considering whether to grant an application for amendment. The Tribunal equally took into account the responsible approach of the Respondents reflected by the comments of Mr Walters when indicating that the Respondents did not intend to raise any time related issues relating to claims numbered 1 – 6 and neither would they formally object to any of those claims proceeding which amounted to amendments. In all the circumstances therefore the Tribunal concluded it was appropriate for those claims to move forward to a Full Hearing either on the basis that is was appropriate to extend time on a just and equitable basis or that it was appropriate in all the circumstances for those claims to proceed where they amounted to amendments. or where the particulars of the the claims had been included by the Claimant in his original claim form.

8. In essence there was no disagreement between the parties and the Tribunal as to whether or not claims numbered 1 – 6 should proceed to a Full Hearing.

9. Therefore there were 3 disputed claims and those were those which had been given numbers 7, 8 and 9 in the additional particulars which had been filed by the Claimant after the hearing on 4 December 2020. The Judgment of the Tribunal, as expressed above, is that claims 7 and 9 should be dismissed on the basis that they amounted to amendments the Tribunal concluded they should not proceed to a Full Hearing.

10. The Judgment of the Tribunal was that claim number 8 should be allowed as an amendment and should proceed to be heard at the Full Hearing in September 2021.

Claim 7

11. In the additional particulars supplied by the Claimant the Claimant said that his 7th complaint of direct discrimination relatied to the use of "inappropriate language" in an email.. Claim 7 as described by the Claimant had not been included in the Claimant's original claim form. It was however contained in the Scott Schedule supplied by the Claimant and the specific allegation appeared on page 56 of the bundle of documents presented to the Tribunal on 4 December and reconsidered today, wherever appropriate. The email that the Claimant refers to when purporting to describe claim 7 was an email dated 29 October 2019. This was an email which was sent by Carrie Meredith. That email not included in the bundle of documents at all was described by the Claimant at the bottom of page 56 and the top of page 57 in the Claimant's Scott Schedule. It appeared to the Tribunal that Ms Meredith was doing no more than setting out in her letter the explanation which Mr Freeman had given to her as to why the contract to engage the Claimant had been terminated. It seemed to the Tribunal therefore that the email was nothing more than Ms Meredith reporting what Mr Freeman had said to her. There was a long and unfortunately unproductive discussion with the Claimant to attempt to ascertain what was the "less favourable treatment" that the Claimant was alleging in order to establish a claim under Section 13. In the Scott Schedule the Claimant was clearly relying on the words which had been used by Ms Meredith but they were nothing more than her reporting what Mr Freeman had said to her. The Tribunal was unable to see how it amounted to less favourable treatment when all Ms Meredith had been asked to do was report a discussion with Mr Freeman. It was not suggested by the Claimant how if it had been about someone other than the claimant or about anyone else or about anything else how she would have reported it differently. The Tribunal was unable to see how this amounted to an allegation of less favourable treatment by comparison to any appropriate comparator, hypothetical or otherwise. When this discussion. took place with the Claimant in order to seek to ascertain with sufficient clarity what claim 7 was actually about the Claimant began to change his complaint. He went on to say that he was really complaining about what Mark Freeman had actually said to Ms Meredith. That therefore was clearly a complaint which would be about Mr Freeman and not about Ms Meredith. This therefore again seemed to obviously relate to a complaint by the Claimant about the circumstances and reason for his dismissal. As Mr Walters properly pointed out that was already a claim which had been acknowledged by the Tribunal in claim 1 and claim 5. Mr

Walters pointed out to the Tribunal that at today's hearing on 7 January 2021 the Claimant was now attempting to shift the focus of his purported claim 7. Obviously to do that was now a year after the primary time limit had expired and after the Claimant had included the particulars in his claim form and after the Claimant had been given the first opportunity in the Scott Schedule to set out his claims of discrimination. Furthermore the Tribunal noted that it had given the Claimant a further and third opportunity to clarify his claims in the Schedule to which it is now referring in this Judgment.

12. The Tribunal concluded therefore that it was impossible to ascertain how any of the wording set out by the Claimant in support of claim 7 could amount to a claim of less favourable treatment under Section 13. The focus of the claim was completely uncertain. Whenever the Claimant was challenged he changed his language. The Tribunal took into account that the Claimant had now been given many many months in which to carefully consider the basis of his claims and Employment Judge Whittaker was satisfied that detailed guidance and assistance had been given to the Claimant at the hearing on 4 December as to how claims should be formulated and the paucity of words which the Claimant should use. This guidance had not been followed by the Claimant and despite the very best efforts of the Tribunal today it was simply not possible to ascertain with any clarity or certainty what the words used by the Claimant to seek to establish claim 7 actually amounted to. It was not possible for the Tribunal despite its best efforts to identify with the Claimant what the less favourable treatment was or to ascertain what the characteristics of an actual or hypothetical comparator were. At the conclusion of a frustrating and rather lengthy discussion with the Claimant the Judgment of the Tribunal was therefore that whatever the Claimant was purporting to allege in claim 7 would not proceed and would be dismissed.

Claim 8

13. By comparison to the particulars provided by the Claimant in support of the alleged claim at 7, the document and circumstances relating to claim 8 were clear. Although this claim had not been included in the original claim form, it was set out as the final allegation of race discrimination described by the Claimant at the foot of page 57 in the bundle considered by the Tribunal on 4 December. It was described as relating to an email from Nick Lyons on 30 October 2019. In that description on page 56 the Claimant made it clear that he was complaining that the language used by Mr Lyons was "inappropriate" and showed his vindictive nature. However the Claimant also went on to say that "this is against the MHPS Guidelines". The Claimant indicated that these were the professional guidelines relating to his profession and that he alleged that those guidelines had been broken by the steps taken by Mr Lyons.

14. The email in question appeared at page 251 in the bundle. The specific words, towards the top of page 251 which the Claimant complains about are “feedback to his RO on the noise created”. The Claimant told the Tribunal today that a reference to the RO was a reference to the professional body that he is a member of and that it amounted to a suggestion that disciplinary proceedings might be taken by his professional body against the Claimant. The Claimant told the Tribunal today that in his opinion a number of other steps ought to have been taken first by Mr Lyons in accordance with the MHPS Guidelines before making any reference to the RO. Importantly however the Claimant had made reference to alleged breaches of those guidelines at page 56 in his Scott Schedule. The Claimant alleges that the reference to the RO was an act of less favourable treatment because if he had not been of Indian origin the Claimant alleges that that reference would never have been made. The complaint of less favourable treatment therefore is Mr Lyons sending an email at page 251 that there should be “feedback to his RO on noise created”. That reference was made because of his Indian origin. It will be for the Tribunal to ascertain the reasoning of Mr Lyons for making that suggestion in that email and it will be for the Tribunal to decide whether or not there were breaches of the MHRP Guidelines and whether or not that is relevant to any findings of fact made by the Tribunal.

15. It is therefore possible to ascertain with certainty what the complaint of the Claimant is. It clearly refers to the words used in that e mail and set out above. He indicated the relevant comparator is a hypothetical comparator who is not of Indian origin.

16. The Respondents argued that it would be of significant prejudice for this specific allegation to go ahead as an amendment. There is no doubt that it is an amendment because it was not included in the original claim form. The Tribunal however considered the balance of prejudice. The hearing of this allegation, if it went ahead, would not be until September 2021. That is over 9 months away. That would allow the Respondents more than adequate time to plan for the relatively short absence of Mr Lyons from his duties with the Respondent. Within a 4 day hearing the Tribunal is satisfied that the attendance of Mr Lyons at the Tribunal to give his evidence to be cross examined can be kept to a minimum. By contrast it is clear from the language of the Claimant that he is extremely upset by this referral and the reference to “noise created” and he believes that it is “vindictive”. On the balance of prejudice and hardship therefore the Tribunal considers that it is just and equitable for the amendment to be granted and for claim 8 to proceed to be heard at the Final Hearing in September 2021. The Tribunal reminded itself that it had a broad discretion to exercise in cases involving amendment and that it was required to take into account all the circumstances of the case. It did

however fully consider a balance of injustice and hardship as set out above. It considered the delay which had occurred in the Claimant failing to enter this as a claim in his original claim form. However he had included it in his Scott Schedule and after all he had been invited by the Tribunal in that Schedule to set out what his claims of discrimination were. It is clear that the Claimant had little understanding of what was required of him in that Scott Schedule but insofar as claim 8 is concerned the Tribunal is satisfied that at page 56 he had made the claim sufficiently clear and that he had set out the requirements of Section 13 by identifying the less favourable treatment (the words in the email) and indicating that he was relying upon a hypothetical comparator. In all the circumstances therefore the Tribunal considered that it was appropriate to exercise its discretion to allow this claim to proceed to a hearing as an amendment to the claim form of the Claimant.

Claim 9

17. This claim related to an allegation that Mary Morris had allegedly demonstrated certain body language towards the Claimant and had effectively segregated him from his work colleagues. The Claimant alleged that these were less favourable treatment on the grounds of his Indian origin. It was important however for the Tribunal to note that this allegation had not been included in the claim form and neither had it been included in the Scott Schedule. That is despite the fact that the Claimant when setting out his Scott Schedule had been reminded that he should include in it all his claims of discrimination. Mr Walters fairly and reasonably pointed out that the allegations relating to body language and alleged segregation amounted to nothing more than an allegation which the Claimant confirmed today was an allegation that Mrs Morris had put her hands on her waist and had appeared angry. Insofar as segregation is concerned the Claimant confirmed today that that allegation amounted to nothing more than an alleged gesture of the eyes used by Mrs Morris to attempt to dismiss everyone else in the room other than the Claimant. Mr Walters fairly pointed out that if he were to now ask Mrs Morris or any other people who attended that meeting whether this took place that they were being invited to comment on a few moments in a meeting which took place on 25 October 2019 some 15 months ago. When the Claimant was asked why these two alleged actions amounted to less favourable treatment on the grounds of race the Claimant said that he believed that these were deliberate attempts by Mrs Morris to make his life miserable and that they were vindictive steps which were taken on her part. The Tribunal noted however that even in the final Schedule which the Claimant had submitted to the Tribunal after the hearing on 4 December, the Claimant had not included any particulars of segregation but only today, for the first time, was he was specifying that there was nothing more than an alleged use of her eyes, in silence, by Mrs Morris as long ago as

October 2019. The Claimant was asked why he had not included it in his claim form and why he had not included it in his Scott Schedule. He said that he had been stressed out and that he simply wanted to get the Scott Schedule over and done with. After discussions with the Claimant, the Tribunal was unable to ascertain what primary evidence the Claimant would rely upon to indicate that these alleged pieces of behaviour on the part of Mrs Morris were less favourable treatment on the grounds of race. Importantly however the Tribunal considered, as it did in connection with claim 8, the balance of prejudice and hardship. The Tribunal considered that it would be almost impossible for anyone to remember something so minor and of such a short duration in respect of a meeting which took place in October 2019. The Tribunal also found it particularly surprising that if the Claimant believed that these were such significant events and that they were "vindictive" conduct on the part of Mrs Morris that he had failed to include it in his claim form and failed to include it in his Scott Schedule. Balancing therefore the potential merits of this claim and the potential hardship and prejudice to the Respondents about relatively insignificant parts of a meeting on 25 October which on any examination were of short duration, the Tribunal believed that the Respondents would be significantly prejudiced by being asked to call witnesses about a meeting as long ago as October 2019. On this occasion therefore the Tribunal, exercising its broad discretion, refused to allow this claim to go forward as an amendment and claim 9 was therefore dismissed and will not proceed to a Full Hearing.

Summary

18. In summary therefore claims numbered 1 – 6 and claim 8 will proceed to a hearing in September 2021 but claims numbered 7 and 9 are dismissed and will go no further.

19. The Tribunal has prepared a separate Schedule of the narrative of claims 1 – 6 and claim 8 and this is attached to the Summary of the Case Management part of today's Preliminary Hearing which is being prepared and sent to the parties. It is recommended/suggested that the Tribunal in September 2021 refers to that appendix as the detail of the 7 claims of the Claimant rather than attempting to do so by reference to an inadequate claim form, an extremely complicated Scott Schedule and an at times equally complicated additional Schedule which was submitted by the Claimant to the hearing today. The Tribunal indicated to the Claimant that it was in his very best interests to concentrate on the wording of the 7 claims which are permitted to proceed in order to enable him, where possible, to establish less favourable treatment on the grounds of race as claims of direct discrimination under Section 13 of the Equality Act 2010.

Employment Judge J Whittaker
Dated: 14th January 2021

JUDGMENT SENT TO THE PARTIES ON 15 January 2021

……
FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS

NOTE:
This is a written record of the Tribunal's decision. Reasons for this decision were given orally at the hearing. Written reasons are not provided unless (a) a party asks for them at the hearing itself or (b) a party makes a written request for them within 14 days of the date on which this written record is sent to the parties. This information is provided in compliance with Rule 62(3) of the Tribunal's Rules of Procedure 2013.