Case Number: 3201502/2020

EMPLOYMENT TRIBUNALS

Claimant: **Ms D Lepadatu**

Respondent: **Tesco Stores Limited**

Heard at: **East London Hearing Centre**

On: **11th and 12th March 2021 (in chambers 16th April 2021)**

Before: **Employment Judge Reid**
Members: **Mrs A Smith**
Ms V Nikolaidou

Representation

Claimant: Ms A Hurwood, Oakwood Solicitors

Respondent: Mr J Cook, Counsel (instructed by Pinsent Mason)

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was V by Cloud Video Platform. A face to face hearing was not held because the relevant matters could be determined in a remote hearing.

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The Respondent directly discriminated against the Claimant on grounds of her race (nationality) contrary to s13 Equality Act 2010.

The majority judgment of the Tribunal is that:-

2. The Respondent did not victimise the Claimant contrary to s27 Equality Act 2010 and that claim is dismissed

3. The Respondent did not harass the Claimant contrary to s26 Equality Act 2020 and that claim is dismissed.

Note: a remedy hearing will be required – see Conclusion.

REASONS

Background and claim

1 The Claimant is employed by the Respondent in its Dagenham Distribution Centre. She has worked there since 2017. She presented a race (nationality) discrimination claim on 4th June 2020. The Claimant is a Romanian national.

2 The claim arose out of an incident with a colleague, Ms McNeely, in the warehouse on 2nd February 2020. The Claimant made claims of direct discrimination, harassment and victimisation arising out of that incident and the way the Respondent then responded to it and to the grievance she raised. In relation to the direct discrimination claim as regards the way her grievance was handled by the Respondent (para 7.3 list of issues as amended – see below), she compared herself to a hypothetical comparator, being a British employee who had raised a grievance about another more 'benign' kind of issue – see Claimant's submissions page 2.

3 There was a list of issues which had not been finally agreed, there having been some more recent suggested amendments on behalf of the Claimant. After hearing from both parties the Tribunal decided firstly that new para 12.1 could be added as a further protected act (oral complaint made on 2nd February 2020); although the ET1 was ambiguous (para 5 and 8) the Respondent had responded on this issue in its ET3 and it was not a surprise. The Respondent was given leave to amend its ET3 (para 10) to say that it was not accepted that a complaint about race discrimination had been raised by the Claimant orally on 2nd February 2020. The Respondent accepted that the other actions said to amount to protected acts were protected acts (paras 12.2-12.4).

4 Secondly as regards para 7.3 and 13.4 of the list of issues, it was established that the ET1 (para 19) had raised the complaint that the Claimant's grievance was not treated as a grievance, but rather as a disciplinary issue. An amendment to paras 7.3 and 13.4 of the list of issues was therefore allowed to that extent, but not to the extent as drafted which more widely said that the Respondent's failure was not to uphold her grievance (rather than just a failure to deal with it as a grievance). It was identified that Mr Llewellyn could cover the issue of the way the written complaint was treated in his oral evidence, to the extent he had not already covered it in his witness statement.

5 The Claimant, her partner Mr Felegyhazi and Mr Terciu (both of whom also worked there at the relevant time and Mr Felegyhazi still works there) provided witness statements and gave oral evidence. The Respondent's witnesses who provided witness statements and who gave oral evidence were Ms Jones (the Claimant's Team Manager), Ms McNeely (with whom the incident occurred) and Mr Llewellyn (Warehouse Service Team Manager, who investigated the incident). There was an electronic bundle of 135 pages, to which two photos of workplace posters were added during the hearing. There was a chronology and cast list. Due to lack of time final submissions were provided subsequently in writing. The Tribunal had identified at the outset that given the number of witnesses the hearing would cover liability issues only, with a second remedy hearing required if the Claimant won any of her claims.

6 Due to the nature of the allegations, the Tribunal advised that whilst it might be necessary at times to repeat the words claimed to have been said during the incident on 2nd February 2020, they should not be unnecessarily repeated. The Tribunal agreed to the Claimant's request that Ms McNeely turn off her camera while the Claimant was giving evidence. The Tribunal offered the same arrangement to Ms Jones and Ms McNeely as regards the Claimant's camera when they were giving evidence, which they declined. Ms McNeely became very upset during her evidence and disconnected herself. The Tribunal therefore heard from Ms Jones pending Ms McNeely being contacted and re-joining the hearing. After Ms Jones completed her evidence, Ms McNeely completed hers.

Findings of fact

The warehouse incident on 2nd February 2020 between the Claimant and Ms McNeely

7 The Tribunal's majority findings are set out as follow. The Tribunal's minority findings regarding the evidence of Mr Terciu and the conclusions taking into account that evidence, are set out at the end of this section.

8 The Tribunal finds taking into account her oral evidence that Ms McNeely had recently had surgery to her right hand and that 2nd February 2020 was her first day back at work. She still had some restrictions in that hand, being unable to use the hand fully to manoeuvre her truck in the warehouse because although she could also use her left hand, she could not use her right hand to press the buttons to move backwards. The Tribunal therefore finds that when she was in a confined space she was likely to be anxious to protect her hand and with some restrictions which she would not normally have had. Ms Mc Neely was also being treated for anxiety at the time. The worry about her hand was likely to be exacerbated if in a more confined space as she did not have full use of her hands to manoeuvre her truck as she would normally have done.

9 The Tribunal finds that Ms McNeely manoeuvred herself into a confined space close to the Claimant and that it was difficult for her to get past the Claimant. The Tribunal finds based on the evidence of Mr Ivanov who was standing nearby (page 73-74) that it was Ms McNeely who was aggressive first when the Claimant asked her not to get so close. The Tribunal finds that they both then swore at each other and things quickly escalated with both being upset and angry with the other. Ms McNeely also swore at Mr Terciu an agency (TRG) employee who was nearby and had moved aside to let Ms McNeely get past him. In the context of raised voices, a heated atmosphere and a degree of confusion it was likely that accurate communication would be impaired.

10 The Tribunal finds that both the Claimant and Ms McNeely were genuinely upset at the time of the incident and still genuinely upset about it at the hearing when recalling it.

11 Whilst it was claimed by Ms McNeely that the Claimant had been involved in past bullying of her the previous year, related to her taking medication at work for her MS, the Tribunal finds that the Claimant had not been involved in it because at the time when discussing it with her manager Ms Jones, Ms McNeely had said it had been agency staff and not direct employees of the Respondent (page 85).

12 The Tribunal finds that the claimed use by Ms McNeely of the phase 'get off my

land' not to be natural idiomatic English (or Scottish, Ms Mc Neely is Scottish). The use of the word land in the claimed phrase used is something a farmer would say when someone was in his field and the natural phrase to use if wanting to be offensive to someone of a different nationality would be more likely to be 'get out of my country'.

13 Taking into account the oral evidence of the Claimant's partner Mr Felegyhazi that she was unable to tell him why she was so upset until a couple of hours after they had both been back at home after work, the Tribunal finds that the Claimant was trying to make sense of what had happened in what had been an upsetting incident.

14 The Tribunal finds that Mr Terciu heard something along the lines of Ms McNeely saying that the Claimant was on Ms McNeely's land (page 75, interview in February 2020). He did not when interviewed in February 2020 say the other comments he referred to in his later statement in November 2020, some nine months later. The account he gave to support the Claimant's claim in November 2020 (page 113) claimed that what Ms Mc Neely had said was the 'you are spread everywhere' and 'I am on my land' and ' I didn't come to work on your land' comments (ie the more extensive comments also reported in her grievance in March 2020 by the Claimant, page 62). Both Mr Felegyhazi and Mr Terciu had identified in around March 2020 that Mr Terciu's February interview had not recorded those more extensive claimed comments (TF para 15) and yet they took no steps to go back to the Respondent to say that the interview notes were not a complete account of what had been said in the warehouse. Even though Mr Terciu left the UK in April 2020 he was still there when Mr Felegyhazi identified the issue with his interview record. Mr Felegyhazi has remained working at the warehouse so there was a clear opportunity to take steps to tell the Respondent that the interview notes did not give the full picture. This was despite Mr Felegyhazi being the person supporting the Claimant at her interview on 12th March 2020 and despite knowing that there were two different accounts from the Claimant and Ms McNeely as to what had been said. The Claimant also had a good relationship with her manager Mr Brandon to whom her grievance was originally provided and she could have raised this issue with him. The Tribunal finds that Mr Terciu had been given a proper opportunity to give his account in the February 2020 interview because he was asked in general terms what happened and asked if he had anything further to add. Mr Llewellyn had arranged paid time for that interview so that Mr Terciu was not under pressure to be at work or worry about losing money. The failure to give the fuller account in February 2020 affects the credibility of Mr Terciu's account. (See findings below as to the allegation that he was asked to rip up the handwritten statement he says he took to his February 2020 interview and the allegation that the interview notes were deliberately incomplete.)

15 Taking the above findings of fact into account and the fact that Mr Ivanov did not hear the comments claimed to have been made but only the swearing (despite the Claimant saying in her oral evidence that she was sure Mr Ivanov had heard it), the Tribunal finds that Ms McNeely said something to the Claimant about getting off her hand and swore aggressively at the Claimant and at Mr Terciu when he came forward. The Tribunal finds however that the 'get off my land' phrase is what the Claimant genuinely thought she had heard and was therefore deeply upset, but it is not what was said.

16 The Tribunal finds that the Claimant retaliated by making a comment along the lines that Ms McNeely should get an education, given in her view Ms McNeely was not behaving as she should at work. Given the Tribunal's findings that the Claimant had not in

fact been involved in the past bulling allegations about Ms McNeely taking her medication for her MS at work, the Tribunal finds it unlikely that the Claimant said something about Ms McNeely needing to take her medication. This was also a conclusion both Ms Jones and Mr Llewellyn were subsequently to come to. Ms McNeely thought she heard a comment about 'medication' (because sensitive to such comments given what she reported to Ms Jones the previous year, even though the Claimant was not involved in it) but that was not what was said.

17 The Tribunal minority (lay member) findings on the land/hand issue and the weight to be given to Mr Terciu's account of what was said are as follows. The minority gives less weight to the fact that Mr Terciu's account changed between February and November 2020 and finds (see below) that Mr Terciu did produce a pre-prepared written statement (containing the more extensive comments) at his interview in February 2020 which was read and he was then asked to rip up. This means his overall credibility in supporting the Claimant's account of what Ms McNeely said is less affected by the change in his account. Less weight is also given to the use of idiomatic English issue because Ms McNeely uses 'land' in the context the Claimant says it was used in para 7 of her witness statement when saying she would not in any event have referred to England as her 'land' because she is Scottish. The minority finding is therefore that Ms McNeely did make the 'get off my land' comments and the spreading comments and that these were acts of harassment related to the Claimant's nationality.

<u>The discussions with Ms Jones immediately after the incident</u>

18 The Tribunal minority's (employment judge) finding about whether the Claimant raised the alleged racist comments at this meeting are set out at the end of this section.

19 Both the Claimant and Ms McNeely were upset by the incident and wanted to report it to a manager. Ms McNeely got there first but the Claimant was already intending to report it and was on her way with Mr Terciu when Ms Jones called her in to discuss what Ms McNeely had reported to Ms Jones. Ms McNeely had told Ms Jones when identifying it was the Claimant she had just had the incident with, that the Claimant was one of the people who had been involved in the bullying the previous year.

20 The Tribunal finds that it was not inappropriate for Ms Jones to ask Mr Terciu to go back to work as the primary issue was between the Claimant and Ms McNeely and she needed to get to the bottom of that first of all and hear from each of them.

21 The Tribunal finds that Ms Jones when she called in the Claimant did make a 'you're in trouble' comment because she had just been told by Ms McNeely that the Claimant had been involved in the bullying the year before. However Ms Jones then accepted that the Claimant had not in fact made the claimed medication comment to Ms McNeely (MJ para 11) and so any element of the Claimant being in trouble in Ms Jones' view evaporated because she decided the Claimant had not made the medication comment and already knew that when reporting it the previous year Ms McNeely had not included any non-agency workers in her complaint.

22 The Tribunal finds that because Ms Jones had spoken to Ms McNeely first before the Claimant was called in Ms McNeely had had more of an opportunity to get her point across in a calmer atmosphere. When both the Claimant and Ms McNeely were present

the atmosphere was very heated and voices were being raised. It was therefore less easy for the Claimant to get her point across given a degree of pandemonium. The Tribunal finds that Ms Jones understandably had to raise her voice with a 'girls stop now' comment and was banging the table but the Claimant accepted that this was directed at both the Claimant and Ms McNeely (page 68) and not just at the Claimant.

23 The Tribunal finds that Ms Jones' priority was to achieve an outcome in the meeting and calm things down sufficiently that everyone could move on and then go back to work (the stop this right now comment, page 68, C para 11). She wanted to achieve the handshake at the end of the meeting (page 69) and draw a line under the incident. In that context the Tribunal finds that Ms Jones was not listening as carefully as she should have done to the Claimant's version of events, whatever that version was, and the Claimant felt not listened to. The Tribunal finds that the handshake at the end was very half hearted and it was not the case that matters for the Claimant had been resolved, even though the Claimant and Ms McNeely were prepared to go back to work.

24 At this stage Ms McNeely did not want to take the matter further whereas the Claimant did. Ms McNeely's issue could have amounted to bullying because of disability as in her view the medication comment had in fact been made.

25 The Tribunal (majority) found that the Claimant did tell Ms Jones at this meeting that Ms McNeely had made a racist comment to her; taking into account she gave a detailed written account shortly afterwards in her subsequent grievance (page 62) it is likely that she accused Ms McNeely of making a racist comment, even if she did not go into the detail she subsequently went into in her grievance.

26 The Tribunal minority (employment judge) found that the Claimant did not tell Ms Jones at this meeting that Ms McNeely had made a racist comment. This is because she needed to process what had happened at the end of the day before she was able to articulate to Mr Felegyhazi what had happened and that is more consistent with trying to make sense of what happened later that day and needing time to do so, rather than being clear from the outset on the words Ms McNeely had used.

27 The Claimant accepted in her oral evidence that she could not say whether the claimed treatment of her at this meeting said to amount to harassment by Ms Jones was connected to her race (nationality). The Tribunal therefore finds, taking into account it was also accepted that Ms Jones' behaviour was directed at both of them, that it was ultimately not the Claimant's case that her treatment at the meeting with Ms Jones and Ms McNeely was related to her race (nationality). The meeting was however not handled well and the matter had not been resolved for the Claimant.

28 The Claimant was then signed off sick for stress at work between 6th February 2020 and 18th March 2020 (page 114). This was consistent with a high degree of distress about what had happened and what she thought had been said to her.

<u>The investigation and interviews by Mr Llewellyn</u>

29 The Tribunal (lay member) minority findings about the allegation that Mr Terciu was told by Mr Llewellyn to rip up his pre-prepared statement and his account deliberately

recorded incompletely at the meeting on 12th February 2020 are set out at the end of this section.

30 The Tribunal finds that Mr Llewellyn had no vested in interest in defending Ms Jones' handling of the initial meeting due to a personal friendship between them. He was also unaware that Ms Jones had recently received a final written warning for failing to report an incident in October 2018 (page 85B).

31 Mr Llewellyn became involved because he had a wellbeing call with the Claimant on 4th February 2020 because she was off sick. The Claimant told him about the incident when explaining why she was signed off for stress.

32 Mr Llewellyn met with the Claimant on 12th February 2020 by which time Mr Felegyhazi had already handed in her handwritten 8 page grievance to her usual manager Mr Brandon, with whom she had a good relationship. Having heard the Claimant's account at the meeting (she read out her grievance) Mr Llewellyn rightly interviewed the other relevant witnesses to the incident, namely Mr Ivanov, Mr Terciu and Ms McNeely. He also interviewed Mr Thwaites who was said to have some knowledge about what Ms McNeely said had happened the year before, even though Ms McNeely had never and did not at this stage herself pursue any bullying allegations by way of a grievance.

33 The Tribunal finds that Mr Terciu prepared a written statement for the meeting with Mr Llewellyn on 12th February 2020 but that he did not produce it at the meeting. This finding is because Mr Llewellyn had already additionally accepted a pre-prepared statement from Mr Ivanov (page 70) and it is therefore likely that had he been offered something similar by Mr Terciu he would have taken it in the same way. The Tribunal also finds that Mr Terciu's account given on 12th February 2020 was not deliberately minimised by Mr Llewellyn and the notetaker Mr Richardson to only record the something about land comment and not the more extensive comments Mr Terciu was later to go and record in his November 2020 statement. Whilst accepting that a note will not be verbatim, the more extensive comments would be a significant omission which would have involved a decision by the notetaker not to write down even the gist of them as they were spoken and a joint decision by both Mr Llewellyn and Mr Richardson to minimise what Mr Terciu was in fact saying down to only recording that something about land had been said. See also findings of fact above regarding the circumstances of that meeting and both Mr Terciu's and Mr Felegyhazi's failure to follow up on the claimed omissions despite being aware of them at an early stage.

34 Given the allegation and counter-allegation situation which Mr Llewellyn identified from his meeting with Ms McNeely it was however nonetheless reasonable to also investigate the allegation made against the Claimant (the claimed medication comment) as that was potentially an act of disability discrimination given Ms McNeely's MS and anxiety. He also obtained a statement from Ms Jones. He re-interviewed both the Claimant and Ms McNeely on 12th March 2020 and asked them to comment on each other's account and showed them the statements he had obtained.

35 The letter inviting the Claimant to that meeting on 12th March 2020 was slightly inept (page 86). It gave the impression that the matter was possibly a disciplinary investigation only, when in fact the meeting covered both the Claimant's allegations about what had happened and Ms McNeely's allegations. Although in practice the meeting with

the Claimant dealt with both (and it was reasonable to have investigation meetings which doubled up as both investigating her grievance and investigating the counter-allegation as it was all the same incident), the letter gave the impression that despite having raised a formal written grievance, that part of the incident was being overtaken by Ms McNeely's counter allegation. The Claimant however accepted in her oral evidence that it was reasonable for Mr Llewellyn to investigate both ways and that both she and Ms McNeely had had equal opportunities to comment on the other's account of the incident. She was not therefore confused by what was happening as claimed.

36 The Tribunal (lay member minority) findings as to the allegations about Mr Terciu's pre-prepared statement and the allegation that his account when interviewed was deliberately minimised are as follows. These are that Mr Terciu handed Mr Llewellyn his pre-prepared statement and that when Mr Llewellyn read it he handed it back because it contained an account of claimed racist remarks (unlike Mr Ivanov's statement which contained no such allegations). He and Mr Richardson then decided only to record in the notes the brief 'something about being on her land' comment on page 75, even though Mr Terciu in fact gave in this meeting the more detailed account set out in his later November 2020 statement on page 113. The notes are not a verbatim account of what he actually said at this meeting. The Respondent did this because the Claimant had raised an allegation of race discrimination in her grievance.

The outcome

37 The Tribunal finds that the allegations by the Claimant and the counter allegation by Ms McNeely were not, as suggested in the Claimant's submissions (page 13) equal in terms of their seriousness. Both were serious allegations, on one side of racist comments being made and on the other of comments in effect about a person's disability. However the Claimant wanted an outcome specifically to her grievance whereas Ms McNeely did not herself pursue the matter as a grievance.

38 The Tribunal finds that the Claimant's grievance at page 62 was a formal grievance because it was a complaint in writing within the terms of the Respondent's grievance procedure (page 50, section 6). It was not an informal grievance.

39 Mr Llewellyn decided both ways that that there had been a communication misunderstanding. He decided that Ms McNeely had said something about her hand and that the Claimant had said education not medication. He told the Claimant what he had decided as regards the allegation against her at the end of their meeting on 12th March 2020 (page 91). He also said that any outcome for Ms Mc Neely would remain confidential (in line with the Respondent's policy, page 52, section 9) and, as he was yet to see Ms McNeely again that day (page 92) told the Claimant the investigation was ongoing (page 91). The Claimant went on to make a report to Expolink on 23rd March 2020 (page 115) but when then given further contact emails to take it further, did not do so.

40 Both the Claimant and Ms McNeely then received the same template letter (dated 7th April 2020) to say that no further action would be taken (pages 111,112). This letter was not the appropriate letter to send to the Claimant as it in practice focused on the misconduct part of the situation ie the claimed medication comment by her, in effect telling her that there would be no further action about that. It did not tell her even briefly an outcome for her grievance – whilst it might be the case that any action taken against Ms

McNeely would have to be kept confidential it meant that the Claimant had no grievance outcome which could have encompassed a right of appeal or the possible steps to resolve issues between colleagues, identified in the procedure (page 52, section 10). Ms McNeely got the same letter but she had not submitted a formal written grievance and did not want to pursue matters further. Whilst the Claimant could not say when asked at the hearing what it was the Respondent should have done, it remains the case that the Respondent in the final stages did not follow its own procedure and in effect only gave the Claimant half an answer, on the allegations against her but not on the allegations she had raised which had been the trigger for the investigation.

41 The Tribunal finds based on his oral evidence that Mr Llewellyn considered the Claimant's 8 page written complaint an informal grievance. He said he took advice from HR before making a decision about what had happened on 2nd February 2020 but as he thought the Claimant's grievance was an informal one, he told HR that. That is the context in which he received the advice from HR which he says he acted on, namely to treat it as a conduct issue (DL para 29). The Tribunal finds it unlikely that HR would have given only that advice had they been told that there was a detailed written grievance alleging racist comments.

Relevant law

The burden of proof under the Equality Act 2010

42 s136 of the Equality Act 2010 provides as follows:

> (1) This section applies to any proceedings relating to a contravention of this Act.
>
> (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.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

43 This provision requires a claimant to prove facts consistent with his/her claims: if the claimant does this then the burden of proof shifts to the respondent to prove that it did not, in fact, commit the unlawful act in question (*Igen v Wong* [2005] IRLR 258). The respondent's explanation at this stage must be supported by cogent evidence showing that the claimant's treatment was in no sense whatsoever because of race or a protected act (*Fecitt v NHS Manchester* [2012] ICR 372).

44 The Tribunal has borne this two stage test in mind when deciding the Claimant's claims. It has also borne the principles set out in the Annex to the judgment in *Igen v Wong* in mind.

The drawing of inferences in discrimination claims

45 An important task for a Tribunal is to decide whether and what inferences it should draw from the primary facts. The Tribunal has borne in mind that discrimination may be unconscious and people rarely admit even to themselves that, for example, considerations of race have played a part in their acts. The task of the Tribunal is to look at the facts as a whole to see if a protected characteristic played a part (*Anya v University of Oxford* [2001] IRLR 377). The Tribunal has considered the guidance given by Elias J on this in the case of *Law Society v* Bahl [2003] IRLR 640 (approved by the Court of Appeal at [2004] IRLR 799), in particular that unreasonable behaviour is not of itself evidence of discrimination or harassment though a tribunal may infer discrimination from unexplained unreasonable behaviour (see *Madarassy v Nomura International plc* [2007] IRLR 246).

Direct discrimination

46 s13 Equality Act 2010 provides: A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others

47 This provision requires a Tribunal to decide the following:-

1.1 Has there been treatment?

1.2 Is that treatment less favourable than the treatment which was or would have been given to a real or hypothetical comparator?

1.3 Was that difference in treatment because of a protected characteristic?

Harassment

48 s26(1) Equality Act 2010 Act provides:

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.

49 Harassment differs from direct discrimination in that there is no requirement for a comparison with the actual or likely treatment of others: it requires evidence of unwanted conduct which has the 'purpose or effect' of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment related to a protected characteristic. A claim based on 'purpose' requires an analysis of the alleged harasser's motive or intention. This can require the Tribunal to draw inferences as to what that true

motive or intent actually was; the person against whom the accusation is made is unlikely to simply admit to an unlawful purpose. Where the claim simply relies on the effect of the conduct in question, the perpetrator's motive or intention, which could be entirely innocent, is irrelevant. The test in this regard has both subjective and objective elements to it. The Tribunal must consider the effect of the conduct from the complainant's point of view (the subjective element) but it must also ask whether it was reasonable of the complainant to consider that the conduct had the requisite effect (the objective element). Accordingly, if a claimant is peculiarly sensitive to the treatment accorded him/her it does not necessarily mean that harassment will be established (*Driskel v Peninsula Business Services Ltd* [2000] IRLR 151). Finally, the treatment must be related to a protected characteristic for the claim to succeed: simple offensive treatment is not enough.

Victimisation

50 s27 Equality Act 2010 provides:

> (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.

51 This provision is designed to prevent the mistreatment of people who have asserted rights under the Equality Act in good faith (it does not protect those who raise allegations in bad faith). Accordingly, it is not about less favourable treatment because of a protected characteristic but unfavourable treatment because of the assertion of a right or an act done arising under or in connection with the Equality Act ('a protected act').

52 A detriment is something which the claimant reasonably considers has put them at a disadvantage or changes their position for the worse. It does not cover an unjustified sense of grievance (*Shamoon v Chief Constable RUC [2003] ICR 337 HL*). The situation must be looked at from the claimant's point of view but his or her perception must be reasonable in the circumstances.

53 The detriment must be 'because' B has done the protected act. The protected act does not have to be the prime motivation or the conscious motivation. It is enough that it forms some part of the discriminator's conscious, subconscious or unconscious motivation that the victim did the protected act ie it had a significant influence (*Nagarajan v LRT [1999] IRLR 572*). A significant influence is one which is more than trivial but significant does not mean of great importance. (*Igen v Wong [2005] ICR 931 CA*).

Reasons

Harassment claim

54 Taking into account the above (majority) findings of fact the Tribunal finds that Ms McNeely did not make an offensive racist comment to the Claimant on 2nd February 2020. The Tribunal wishes to make it clear that the Claimant genuinely thought she had heard such a comment or comments and that she was therefore genuinely upset by the incident. The Tribunal is not saying the Claimant made it up.

55 Taking into account the above findings of fact the Tribunal finds that Ms Jones and Ms McNeely did not harass the Claimant in the subsequent meeting on 2nd February 2020.

Victimisation claim

56 There were protected acts by the Claimant on 2nd February 2020 (majority finding), in her written grievance and at the meetings with Mr Llewellyn on 12th February 2020 and 12th March 2020.

57 Turning to the claimed acts of victimisation, the Tribunal has found that there was no harassment related to the Claimant's nationality by Ms Jones and Ms McNeely at the meeting on 2nd February 2020, on which to base a claim of victimisation (one of the claimed detriments).

58 Taking into account the above (majority) findings of fact the Tribunal find that Mr Terciu was not told to rip up his pre-written statement at the interview on 12th February 2020 and his account given at that meeting was not minimised to miss out key extra details of what he had witnessed.

59 The Tribunal finds that calling the Claimant to an investigation meeting rather than a grievance meeting was reasonable at that stage because it was reasonable to 'double up' the meetings to cover both aspects, which is in fact what then happened.

60 The Tribunal concludes that the failings at the end of the procedure to give the Claimant a grievance outcome amount to direct discrimination – see below. The Tribunal does not find that to be an act of victimisation because it was not the raising of the complaints which was a cause of that failure. The Respondent followed a transparent and even handed process in its investigation which makes it less likely that it was the raising of the claim by the Claimant which influenced the later failure to complete the process.

Direct discrimination

61 It was said in the Respondent's submissions that the Claimant's case on motive had not been put to the Respondent's witnesses (save in respect of Ms McNeely). The Tribunal identifies that Mr Llewellyn was asked initially to explain why he had not treated the Claimant's grievance as a formal one to which his response was, as set out above, that it was on HR advice. During cross-examination it was put to him that he hadn't wanted to do that at least partly because Ms Jones was on a final written warning which he denied. He was asked about 'recasting' the situation as a tit for tat conduct issue and he again explained that it was because of the HR advice. He said that he concluded they had misheard each other because he considered there had been a muddle. He said again that he had not investigated the Claimant's complaint as a formal grievance because of the advice from HR and because there were allegations both ways. Taking all this into account Mr Llewellyn had several opportunities to answer why he took the steps he did and he gave his explanation. In that context the Claimant's case had been sufficiently put to him.

62 The hypothetical comparator was said by the Claimant to be a British employee who raises a grievance about a more straightforward 'benign' problem such as a personality clash. The issue identified by the Tribunal was a failure to give the Claimant a grievance outcome rather than a failure to react to her grievance at all because the Tribunal has found that it was only at the end that that failure occurred. The grievance procedure sets out what should happen as to outcome, right of appeal and options if the issue is between colleagues. The hypothetical comparator would be a British employee who raises a written grievance on an issue not amounting to race discrimination. The hypothetical comparator is not a British employee who raises a written grievance about race discrimination because the nature of the grievance is relevant, because it is inherently linked to race, thus meaning a comparison between a non-race discrimination grievance and a race discrimination grievance is required.

63 The following facts lead to a shift in the burden of proof as regards the claim for direct discrimination: namely firstly and principally the Respondent's failure to follow its own grievance procedure (giving the Claimant an outcome with a right of appeal) when the Claimant had clearly raised a formal grievance about a serious matter; secondly, there was a mismatch between on the one hand formally investigating what Ms McNeely had alleged (when she had not raised a grievance and never raised one) and on the other hand formally investigating the Claimant but then not giving her a grievance outcome; thirdly they both got the same outcome letter but were in very different situations because it was only the Claimant who had raised a formal grievance; fourthly Mr Llewellyn did not tell HR that he had an 8 page formal written grievance from the Claimant.

64 Given that shift, Mr Llewellyn's explanation for not giving the Claimant an outcome to her grievance as envisaged under the procedure was in effect that he did not think she had raised a formal grievance, because this thinking is why HR gave the advice they did, which he followed. That view that there was no formal grievance is not sustainable. Mr Llewellyn had before him a serious written complaint and at the end of his investigations only gave the Claimant half an answer. Whilst he was limited by what he could tell her about any action taken against Ms McNeely that did not, taking into account the grievance procedure, absolve him from at least giving her an explanation and an outcome, even if the outcome was not to uphold her grievance because concluding there

had been a miscommunication. The Claimant lost out on a right of appeal and on the possible alternative ways of resolving problems between colleagues envisaged by the procedure. In that context given it was a claim of race discrimination the Tribunal concludes that his (unsustainable) explanation for the treatment means that his decision was in some way tainted by an element of unlawful discrimination, bearing in mind that such discrimination does not have to be the sole or the dominant reason. The ineptitude in the way the end of the process was handled with no outcome being given, taking into account the shift of the burden of proof and the Respondent's explanation for the treatment, means that the Respondent did not discharge the burden of proof to show that it was in no way tainted by unlawful discrimination. The Tribunal concludes that it was a failure to complete the process and not a failure to address the grievance from the outset. It was not motivated by a wish to cover up the grievance.

Conclusion

65 The Claimant's claims of harassment (list of issues 1.1 and 1.2) and victimisation (13.1-13.4) are dismissed. The Claimant's claim of direct discrimination for a failure to give her a grievance outcome (7.3 as amended) is upheld. The Claimant's other claims of direct discrimination (7.1, 7.2) are dismissed.

66 A remedy hearing will be required. The parties are to notify the Tribunal by 15th May 2021 of any unavailable dates in the period 1st July 2021 to 30th August 2021 for a one day hearing (CVP). As the Claimant is still employed the only issue will be injury to feelings.

67 The Claimant has already provided a schedule of loss (page 45) in which she claims £22,000 as injury to feelings. Subject to submissions and any further evidence, the Tribunal's findings do not support the assertions in the schedule of loss that the treatment of her was callous, that there was a cover up, that the Respondent manipulated the evidence or that there was hostile and gratuitous treatment by Ms McNeely or by managers. If the Claimant has further evidence to support her assertion of the impact on her including on her mental health she should provide that to the Respondent at least 14 days before the next hearing date; she can serve an updated schedule of loss on the Respondent (copied to the Tribunal) at this time if she wishes to update the current version to take into account the Tribunal findings as relevant or any other more recent factors.

Employment Judge Reid
Date: 30th April 2021