THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH by CVP**

BEFORE: **Employment Judge Truscott QC**
Ms S Khawaja
Mr G Anderson

BETWEEN:

Mr R Agyeman-Prempeh **Claimant**

AND

Mears Limited

Respondent

ON: 21 and 22 June 2021

Appearances:

For the Claimant: **Mr P Ofori consultant**

For the Respondent: **Mr W Chapman of Counsel**

JUDGMENT

The unanimous judgment of the Tribunal is:

1. The claim of direct race discrimination, contrary to section 6 and 13 of the Equality Act 2010 is not well founded and is dismissed;
2. The claims of harassment, related to the claimant's race, contrary to sections 6 and 26 of the Equality Act 2010, are not well founded and are dismissed.

REASONS

PRELIMINARY

1. The claimant brought claims of direct race discrimination and harassment.

2. He gave evidence on his own behalf and was represented by Mr P Ofori, consultant. The respondent was represented by Mr W Chapman, barrister, who led the evidence of Mr Jonathan Steward, a general manager and Mr Alan Bloomfield, chargehand, the latter attending under a witness citation.

3. There was one volume of documents to which reference will be made where necessary. The numbering in the judgment refers to the pages in the electronic bundle.

4. At the commencement of the second day of the hearing, Mr Chapman sought to add additional documents to the bundle:

i. To support the provenance of the workmanship shown in a photograph in the bundle [84] and
ii. Relating to Mr C Dance and his timekeeping.

The application was refused for two reasons, firstly although the documents were sent to the Tribunal administration, they were not actually available to the Tribunal itself and secondly, it was too late in the hearing process to add the documents, as Mr Ofori pointed out.

ISSUES

The issues for this hearing were identified at a preliminary hearing on 10 December 2019 as follows:

1. Section 26: Harassment on grounds of race

1.1. Did the company or any of its employees engage in unwanted conduct as follows:
through comments made to Mr Chris Dance by Mr Alan Bloomfield on or about 21 December 2018
by being made to sign the form recording a poor work performance on or about 18 January 2019
by Mr Bloomfield consistently swearing at the claimant whenever he gave him instructions
on one occasion, by intentionally smoking cigarettes into his face and asking him "why are you not being a fucking team player?"
being made to work outside in cold conditions to do a job alone which require two people
on one occasion, being sent on to do other work at another site when other team members were sent home.
1.2. (The above points are set out in the Details of Claim at paragraphs 20 to 25)
1.3. Was the above conduct or any of it related to the claimant's race?
1.4. Did the conduct have the *purpose* of violating Mr Agyeman-Prempeh's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him?

1.5. If not, did the conduct have the *effect* of violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him? In considering whether the conduct had that effect, the Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

2. Section 13: Direct discrimination on grounds of race

2.1. In dismissing Mr Agyeman-Prempeh, did the company treat him less favourably than it treated or would have treated the comparators? Mr Agyeman-Prempeh relies upon Mr Dance as a comparator and/or hypothetical comparators.
2.2. If so, can Mr Agyeman-Prempeh prove primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?
2.3. If so, what is the company's explanation? Can it prove a non-discriminatory reason for any proven treatment?

FINDINGS OF FACT

1. The claimant was employed by the respondent from 12 November 2018 [70-82] until he was dismissed on 18 February 2019.

2. He had worked under the supervision of Mr S Jarrett who planned to retire. On 21 December, he met Mr Bloomfield for the first time. Mr Bloomfield introduced himself as his new supervisor. Mr C Dance, Mr P Chandler and Mr L Ryan were also present on the site which was at Edenbridge. Mr Bloomfield neither said nor acted in any way inappropriately when they met on this occasion or during any subsequent time they worked together. The claimant was asked to attend a site in Gillingham later that day or the next, as he lived there, this would have the consequence that he was paid for travelling home.

3. On 8 January 2019, there was a toolbox talk which addressed timekeeping as one of the issues [99].

4. On 18 January 2019, Mr Bloomfield attended the site the claimant was at. The claimant was in his van. Mr Bloomfield sat in the cab and waited until the claimant had finished eating and conducted a review which lasted about 30 minutes. He completed the Probation Review Forms and Performance Action Plan [111-114]. The claimant signed both documents and made no comment on either to signify his disagreement. The Performance Action Plan said that the next review would be on 18 February 2019.

5. There was a further review meeting on 18 February 2019 between the claimant Mr D Nash and Mr Bloomfield. Mr Nash decided, on the recommendation of Mr Bloomfield that there had been no improvement and the claimant was dismissed [146-147].

6. By letter dated 26 February 2019, the claimant appealed against his dismissal [149-152].

7. Mr Steward wrote to the claimant on 22 March 2019 inviting him to attend an appeal hearing [163]. He had available to him:

a. Post inspection book provided by the client [89-98, 101-110,116-143,153-161 and 164-173];
b. Photo of the performance in fitting a sink in poor manner [84];
c. Employee Review Form;
d. Performance Action Plan:
e. Correspondence with the claimant.

8. The appeal hearing took place on 26 March 2019. The claimant sought to be represented by Mr Ofori. The policy of the respondent was that representation should be by a work colleague or trade union representative. Mr Steward decided to allow Mr Ofori to represent the claimant. Minutes of the appeal hearing were taken [174 – 179]. These minutes accurately reflect what took place at the meeting. The grounds of appeal were discussed. The claimant stated that he felt he was unfairly dismissed during his probation period. He advised that his timekeeping was good as was his workmanship. Mr Ofori stated that there had not been a probation review discussion on 18 January 2019, that Mr Bloomfield had completed the Probation Review Form and Performance Action Plan in advance of the meeting and had arrived at the void property where he was working and asked him to just sign the forms while he was sat in his van. The claimant said that Mr Bloomfield had told him that this was the process and 'your likes won't understand' which he took as a comment on his race. The claimant said he was coerced into signing the forms. He advised that the meeting had lasted less than 5 minutes.

9. Following the hearing, Mr Steward had meetings as follows:

a. Meeting Alan Bloomfield – 3 April 2019 [181-184]; He was questioned around the Probation Review Form being completed and if breakdowns of areas for improvement were discussed. He stated that he went through the form with the claimant and completed this as they discussed each point and he provided breakdowns and examples when necessary. The meeting lasted about 30 minutes.
b. Meeting Peter Chandler – 8 April 2019 [187-188];
c. Chris Dance – 30 April 2019 [189 -190].

10. Mr Steward looked at the claimant's PDA (Personal Digital Assistant) which showed the times when he was on route to a job, the duration of his travel and time of arrival on site based on the work ticket tracking software (MCM) [185 – 186]. The system shows time of leaving site and duration of travel home for the period between 21 December 2018 and 15 February 2019. The claimant had failed on 7 occasions to arrive at his first job by 8.00am, his contractual start time and he consistently left his home approximately 15 minutes prior to this start time and often after. His actual start time was closer to 9.00am than 8.00am. He concluded that the claimant had not given him an accurate picture of his timekeeping in his appeal. After the meeting with Mr Bloomfield on 18 January 2019, there were still examples of poor timekeeping on 24, 31 January and 4, 15 February 2019. He concluded that this supported the Performance Review Documentation for poor performance in regard to timekeeping.

11. He also concluded from the Probationary Review Form that the improvements required were basic and therefore achievable [116 -125].

12. The evidence of the claimant's poor standard of workmanship was demonstrated by the post inspection book. In particular, Mr Bloomfield identified to Mr Steward a new kitchen installation where the claimant had cut away part of the backboard of a cupboard to allow access to the pipework which was of very poor quality and not to an acceptable standard for a qualified tradesperson. Another example given by Mr Bloomfield was where the claimant had been working in a void property laying vinyl flooring but when Mr Jarrett, (the Supervisor) went to inspect it, there was a foot long rip in the floor that the claimant had attempted to cover up with silicone sealant. Mr Jarrett confirmed he felt these jobs were not completed to an acceptable standard and that he had also found that the claimant's timekeeping was not acceptable.

13. Mr Steward drew the conclusion that Mr Bloomfield's account of the meeting was more likely to be the more accurate and his assessment that there had been no improvement was correct, hence it was appropriate to warrant a failed probation period.

14. In relation to the claimant's claim that he felt he had been treated differently and unfairly to other employees and that this was because of his race, he gave Mr Steward an example of where he had been asked by Mr Bloomfield to carry out work on 22 December 2018 in the garden of a property in freezing weather, when the other employees working at the same property were working inside. After investigation, Mr Steward found that the claimant had been asked by Mr Bloomfield to complete minor tasks in the garden to secure a fence post and repair a fence panel of just two slats. He was also asked to sweep the patio. These tasks did not require more than one employee to complete and that they should not have taken him more than two hours to complete. The property needed to be handed back to the client before Christmas so a number of tasks were distributed amongst the team working there and Mr Bloomfield was also working there to ensure the work was completed and assisted the claimant at one stage with a concrete base. Mr Dance was working at the same property and he said that the claimant had arrived 2 hours later than his colleagues and so as last on site, he was given the external works to complete as the other tasks had been allocated by this point. Mr Dance could not see evidence of the claimant being treated differently or being spoken to differently. Mr Chandler provided similar information.

15. Mr Steward rejected the appeal by letter dated 2 May 2019 [191-193].

16. The ET1 was sent to the Employment Tribunal on 9 May 2019.

SUBMISSIONS

17. The Tribunal heard oral submissions from both parties and received a written outline of the law from the respondent. These are not repeated here but were greatly appreciated by the Tribunal.

LAW

Direct Discrimination

18. Section 13 of the Equality Act 2010 ("EqA") deals with direct discrimination. It states as follows:

> (a) "(1) 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."

19. Section 23 EqA deals with comparators. It states as follows:

> "(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case."

20. It is only if the Tribunal is satisfied that there is less favourable treatment when comparing the treatment of the claimant to what would have been received by the actual or hypothetical comparator, that the test of whether an alleged act was direct race discrimination arises and this requires a consideration of the reason for the treatment.

21. The Equality and Human Rights Commission: Code of Practice on Employment 2011 ('the Code of Practice') sets out helpful guidance for carrying out the comparator exercise. As to the identity of the comparator, paragraph 3.23 of the Code of Practice confirms:

> The Act says that, in comparing people for the purposes of direct discrimination, there must be no material difference between the circumstances relating to each case. However, it is not necessary for the circumstances of the two people (that is, the worker and the comparator) to be identical in every way; what matters is that the circumstances which are relevant to the treatment of the worker are the same or nearly the same for the worker and the comparator.

22. As to the comparison exercise for a hypothetical comparator, paragraph 3.27 of the Code of Practice confirms:

> Who could be a hypothetical comparator may also depend on the reason why the employer treated the Claimant as they did. In many cases, it may be more straightforward for the Employment Tribunal to establish the reason for the Claimant's treatment first. This could include considering the employer's treatment of a person whose circumstances are not the same as the Claimant to shed light on the reason why that person was treated in the way they were. If the reason for the treatment is found to be because of a protected characteristic, a comparison with the treatment of hypothetical comparator(s) can be found.

23. In **Amnesty International v. Ahmed** [2009] IRLR 884 Mr Justice Underhill (as he then was) (at para 34) confirmed that where the act complained of is not inherently discriminatory, it can be rendered discriminatory by motivation. This involves an investigation by the tribunal into the perpetrator's mindset at the time of the act. This is consistent with the line of authorities from **O'Neill v. Governors of St Thomas More Roman Catholic Voluntary Aided Upper School and anor** [1996] IRLR 372, the Tribunal should ask what is the 'effective and predominant cause' or the 'real and efficient cause' of the act complained about. In **Nagarajan v. London Regional**

Transport [1999] IRLR 572, HL, it was stated that if the protected characteristic had a 'significant influence' on the outcome, discrimination would be made out.

24. The crucial question is why the claimant received the particular treatment of which he complains.

25. Paragraph 3.11 of the Code of Practice confirms:
> The characteristic needs to be a cause of the less favourable treatment but does not need to be the only or even the main cause.

26. Paragraph 3.13 of the Code of Practice confirms:
> In other cases, the link between the protected characteristic and the treatment will be less clear and it will be necessary to look at why the employer treated the worker less favourably to determine whether this was because of a protected characteristic.

27. The burden of proof provisions in relation to discrimination claims are found in section 136 of the EqA.

28. The Court of Appeal, in **Igen Ltd v. Wong** [2005] ICR 931 CA, has authoritatively set out the position with regard to the drawing of inferences in discrimination cases in the light of the amendments implementing the EU Burden of Proof Directive.

29. In **Laing v. Manchester City Council** [2006] ICR 1519 EAT, the Employment Appeal Tribunal held that the drawing of the inference of *prima facie* discrimination should be drawn by consideration of all the evidence, i.e., looking at the primary facts without regard to whether they emanate from the claimant's or respondent's evidence page 1531 para 65. The question is a fundamentally simple one of asking why the employer acted as he did: **Laing** para 63. That interpretation was approved by the Court of Appeal in **Madarassy v. Nomura International plc** [2007] ICR 867 CA at paragraph 69. The Court also found at paragraphs 56-58 that 'could conclude' must mean 'a reasonable tribunal could properly conclude' from all the evidence before it. That means that the claimant has to 'set up a *prima facie* case'. That done, the burden of proof shifts to the respondent (employer) who has to show that he did not commit (or is not to be treated as having committed) the unlawful act, at page 878.

30. Tribunals should be careful not to approach the **Igen** guidelines in too mechanistic a fashion (**Hewage v. Grampian Health Board** [2012] ICR 1054 SC para 32, **London Borough of Ealing v. Rihal** [2004] EWCA Civ 623 para 26).

31. The Court of Appeal has confirmed the foregoing approach under the EqA in **Ayodele v. Citylink** [2018] IRLR 114 CA.

Harassment

32. Under section 26(1), harassment occurs when a person engages in unwanted conduct which is related to a relevant protected characteristic and which has the purpose or the effect of:
> violating the worker's dignity; or

> creating an intimidating, hostile, degrading, humiliating or offensive environment for that worker.

33. Unwanted conduct covers a wide range of behaviour, including spoken or written words or abuse, imagery, graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, acts affecting a person's surroundings or other physical behaviour.

34. In **Betsi Cadwaladr University Health Board v. Hughes** EAT/0179/13 (Langstaff P) the EAT considered the recent cases in relation to harassment under section 26 Equality Act and said as follows:

> [10] Next, it was pointed out by Elias LJ in the case of *Grant v HM Land Registry* [2011] IRLR 748, that the words "violating dignity", "intimidating, hostile, degrading, humiliating, offensive" are significant words. As he said "tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."
>
> [11] Exactly the same point was made by Underhill P in *Richmond Pharmacology* at para 22:
>
> ". . . not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."
>
> [12] We wholeheartedly agree. The word "violating" is a strong word. Offending against dignity, hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence.

35. In relation to the word "environment" in section 26, in **Weeks v. Newham College of Further Education** EAT/0630/11, the Employment Appeal Tribunal said: "…*it must be remembered that the word is "environment". An environment is a state of affairs".* Words spoken must be seen in context and that context includes other words spoken and the general run of affairs within the particular workplace.

DISCUSSION and DECISION

36. The Tribunal did not accept the evidence of the claimant. It concluded that his account of events around 21 December 2018 was not credible. The behaviour described by the claimant in his ET1 and in his evidence was more detailed and more extreme than was provided to the respondent in the appeal against dismissal. Even taking it as initially complained of in the appeal letter, the behaviour complained of would have been so obviously unpleasant and different to the way others were treated that the claimant and the others on the site would have noticed. Even if the others were not willing to raise an issue on behalf of the claimant at the time, they might have

told Mr Steward later or could have given evidence about it to the Tribunal. The claimant was on good terms with Mr Jarrett and could have raised the events with him. He did nothing at the time.

37. The claimant 's account of the review with Mr Bloomfield was not accepted. The Tribunal weighed the conflicting evidence of the only two people at the meeting and concluded that Mr Bloomfield gave a true account. There was no reason for him to fill in the forms in advance of the meeting. The claimant says he challenged each and every topic on the review. This makes it even harder to understand why the claimant signed the review documents and inserted no comment. Mr Bloomfield had no reason to coerce him. The Tribunal noted that the conclusions drawn in the review were more favourable to the claimant than might have been expected in the light of the clear evidence about his bad timekeeping and poor workmanship.

38. The claimant challenged the typed version of the appeal meeting notes. The handwritten version was not available but each page had been signed by the claimant and Mr Ofori according to Mr Steward whose evidence the Tribunal accepted. The Tribunal was satisfied that the typed version was consistent with the handwritten version.

39. The claimant was dismissed because his timekeeping did not improve notwithstanding the comments in the review and the toolbox talk and his work was of poor quality. The Tribunal agrees with the outcome of the internal appeal by the respondent. Mr Steward made a genuine attempt to investigate the allegations made by the claimant.

40. The Tribunal accepts that there was nothing faulty about the claimant's PDA or of the tracking software MCM or his operation of it. It seemed to record accurately the claimant's finishing time. The Tribunal noted that the claimant was paid for the full working day although he often did not work one.

41. The claimant said that he would not have appealed his dismissal but for the comments made by Mr Dance when coming to pick up the van after his dismissal about what Mr Bloomfield had said on 21 December 2018. He said Mr Bloomfield had made directly racist comments. Mr Dance did not give evidence to the Tribunal despite apparently being willing to do so [149]. In his written statement to the respondent, he does not support the claimant's assertions. The Tribunal does not accept racist comments were made by Mr Bloomfield or were relayed to the claimant by Mr Dance.

Conclusion

42. Turning to the issues:

1. Section 26: Harassment on grounds of race

1.1 Did the company or any of its employees engage in unwanted conduct as follows:

through comments made to Mr Chris Dance by Mr Alan Bloomfield on or about 21 December 2018

by being made to sign the form recording a poor work performance on or

about 18 January 2019
by Mr Bloomfield consistently swearing at the claimant whenever he gave him instructions
on one occasion, by intentionally smoking cigarettes into his face and asking him “why are you not being a fucking team player?”
being made to work outside in cold conditions to do a job alone which require two people
on one occasion, being sent on to do other work at another site when other team members were sent home.

1.2 (The above points are set out in the Details of Claim at paragraphs 20 to 25).

The Tribunal concluded that none of the described events occurred. Mr Bloomfield behaved appropriately towards the claimant at all times.

2 Section 13: Direct discrimination on grounds of race

2.1 In dismissing Mr Agyeman-Prempeh, did the company treat him less favourably than it treated or would have treated the comparators? Mr Agyeman-Prempeh relies upon Mr Dance as a comparator and/or hypothetical comparators.

2.2 If so, can Mr Agyeman-Prempeh prove primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?

2.3 If so, what is the company’s explanation? Can it prove a non-discriminatory reason for any proven treatment?

The reason the claimant was dismissed was that he had not improved his timekeeping or quality of work since his review. Race was not an issue. The chosen comparator Mr Dance was outwith his probationary period so he is not a like for like comparison. On a hypothetical comparison, an employee not having the claimant’s protected characteristic would also have been dismissed.

43. For the foregoing reasons, the Tribunal dismissed all of the Claimant’s claims.

Employment Judge Truscott QC

Date 28 June 2021