EMPLOYMENT TRIBUNALS

Claimant: Mr J McKenzie

Respondent: Mears Ltd

Heard at: London South Croydon

On: 27-30 January 2020 (in person hearing) and 23 & 24 February 2021, 22 (CVP hearing), 25 February & 22 March 2021 (CVP in chambers)

Before: Employment Judge Tsamados
Mrs C Wickersham
Mr N Shanks

Representation claimant:
Mr D Deeljur, Counsel
respondent: Mr A Roberts, Counsel

Part of this hearing took place remotely and this was not objected to by the parties. The form of remote hearing was video by Cloud Video Platform (CVP). A face to face hearing was not held because it was not practical because of the Covid-19 virus.

RESERVED JUDGMENT

The **unanimous** judgment of the Employment Tribunal is as follows:

1) The complaint of victimisation is dismissed on withdrawal;
2) The complaint of unfair dismissal is not well founded and is dismissed;
3) The complaints of direct race discrimination are not well founded and are dismissed.

REASONS

Claims and issues

Background

1. The claimant, Mr McKenzie, who is Black, has brought three separate Employment Tribunal claims against Mears Ltd, the respondent. These all relate to his employment with the respondent between 14 May 2014 and 14 June 2019.

2. The first claim in case number 2303646/2017 was received by the Employment Tribunal on 9 December 2017 following a period of Early Conciliation between 27 and 29 November 2017. This contained a complaint of race discrimination principally brought against Ms Caroline Peacock, the respondent's General Manager and later its Operations Director.

3. The second claim in case number 2300158/2019 was received by the Tribunal on 14 January 2019 following a period of Early Conciliation between 8 and 10 January 2019. This contained complaints of victimisation and underpayment of wages.

4. The third claim in case number 2302420/2019 was received by the Tribunal on 20 June 2019 following a period of Early Conciliation which started and ended on 20 June 2019. This contained a complaint of unfair dismissal.

5. The respondent denies all of the complaints. Its grounds of resistance are set out in its responses to each claim received on 15 March 2018, 1 February 2019 and 12 September 2019 respectively.

6. There have been a number of Preliminary Hearings on case management.

7. The first of these took place on 15 March 2018 and was conducted by Employment Judge (EJ) Pritchard. At that hearing EJ Pritchard was only dealing with the first claim and the claimant was unrepresented. EJ Pritchard identified the list of issues and ordered the claimant to produce additional information in the form of what is known as a "Scott Schedule", setting out his complaints in more detail.

8. A further hearing took place on 16 January 2019 conducted by EJ Baron. At that hearing the claimant was represented by Mr Abu, a Solicitor. EJ Baron was only dealing with the first claim. He set a full hearing date for 27-30 January 2020, the usual case management orders and broadly identified the complaints as race discrimination with some alleged acts causing financial loss. EJ Baron also considered the Scott Schedule which by then had been provided by the claimant. The record of the hearing notes that Mr Abu accepted that the claims numbered 1 to 19 inclusive in the Scott Schedule were out of time and he did not seek an extension of time in respect of them. The record also notes that Mr Abu sought an extension of time in respect of later allegations of discrimination and it was not opposed by the respondent. This was dealt with in a separate Judgment, also dated 16 January 2019, in which EJ Baron extended the time limit for presentation of any complaints to 21 July 2017 (this giving the Tribunal jurisdiction to hear the later acts of discrimination set out in the claimant's Scott Schedule).

9. A further hearing took place on 8 August 2019 conducted by EJ Wright. By this stage the claimant had presented all three of his claims, although the third claim had not been processed by the Tribunal's administration. EJ Wright made a number of case management orders. These included the following: the claimant to reissue his Scott Schedule in a legible portrait format, the respondent to update it to include further and better particulars provided by the claimant and for the claimant to then provide his comments on the updated document.

10. A further hearing took place on 22 November 2019 and was conducted by the, then, Acting Regional Employment Judge (AREJ) Davies. At that hearing, the claimant was represented by Mr Otaru, a Solicitor. AREJ Davies directed that all three claims should be heard together and made a number of case management orders. These included further provision of a Scott Schedule to include particulars of the third claim, agreement of a list of issues between the parties, provision of documents and exchange of witness statements.

<u>The respondent's application to postpone this hearing</u>

11. On 22 January 2020, the respondent requested that this full hearing be postponed. The claimant objected. The request was refused by AREJ Davies.

12. At the start of the hearing on 27 January 2020, Mr Roberts, acting for the respondent, renewed the postponement request which he submitted had moved on since the request made and refused by AREJ Davies. Mr Deeljur, acting for the claimant, responded to Mr Roberts' submissions.

13. In essence, Mr Roberts said as follows. The claimant has not provided proper particulars of all of his claims. The list of issues has not been agreed. Witness statements were exchanged belatedly by the claimant. Two of its witnesses are not available for the hearing: 1) Mr Edmonds, the grievance appeal officer, due to a recent bereavement of a close family member and his resultant inability to direct his attention to the matter or to finalise his witness statement; and 2) Mr Bagnall, the dismissing officer, the respondent only belatedly having obtained his contact address and then sought a witness order on 8 January 2020 to secure his attendance, which has not yet been dealt with by the Tribunal.

14. In essence, Mr Deeljur, responded as follows. Both parties received the witness statements at the same time so any prejudice cuts both ways. The respondent has had a significant amount of time in which to get its house in order and make arrangements for production of witness statements and for the attendance of those witnesses. The issues are clearly identified by EJ Baron, the Scott Schedule and within the claimant's witness statement.

15. After adjourning to consider the request, we gave the following decision:

The adjournment request

a) We have considered the representations by both parties, the Employment Tribunal's overriding objective and the Presidential Guidance on Seeking an Adjournment of a Hearing and have decided to refuse the respondent's request to postpone the hearing.

b) We believe that it is possible to proceed with a fair hearing which whilst causing some prejudice in equal amounts to both parties is more desirable than further delay in setting a fresh hearing date (which would not be until 28 September 2020 at the earliest) and given that the case involves matters which occurred between at least 2017 to 2019.

The issues

c) We are aware of course of the legal issues involved in these claims (race discrimination, victimisation and unfair dismissal).

d) We feel that there is enough information before us to determine the matter.

e) The claims are limited to those identified by the Employment Tribunal at the previous Preliminary Hearings held on 15 March 2018 and 16 January 2019 and within the Scott Schedule but limited to those matters which the claimant deals with within his witness statement.

Witness Statements

f) Whilst there was some delay in exchange of witness statements, the respondent agreed to an extension and the further delay by the claimant was of 1.5 hours. Any prejudice is minimal and equal on both sides.

Witnesses

g) Whilst Mr Bagnall is not present for this hearing, we were not satisfied that the respondent's solicitors had made sufficient attempts to secure his attendance. It was apparent that he would be required to give evidence on receipt of the third claim raising the complaint of unfair dismissal. Whilst he has subsequently left the respondent's employment, we are surprised that the respondent did not retain a contact address for him or perhaps even an email address. We were very surprised to learn that despite belatedly obtaining his contact address, no attempt had been made to contact him to ask him to attend the hearing voluntarily, but it has simply been assumed he would not come willingly. This is not the basis on which to seek a witness summons. In any event, Mr Bagnall only dealt with the matter on paper, the claimant's position as to the alleged unfairness is set out sufficiently within his witness statement, it is a neutral burden, and the respondent can adequately address the issues

in evidence with the claimant from the documents relating to the capability procedure and the ultimate dismissal.

h) We were more concerned as to the absence of Mr Edmonds and the allegations against him. We are surprised that the respondent does not have a witness statement for Mr Edmonds given that he was identified as involved in at least March 2018 at the first preliminary hearing. We have factored this into our consideration of the prejudice caused to the respondent by proceeding in his absence as opposed to the prejudice to the claimant in vacating the hearing for at least a further 8 months.

i) As a compromise we proposed that the hearing proceeds as listed, and we hear evidence from the claimant and from the respondent's available witnesses. If at the end of that evidence, the respondent still wishes to call Mr Edmonds as a witness, we will make arrangements to reconvene the hearing at a future date. This would be easier and quicker to accommodate than to postpone the hearing outright. The respondent should, if needs be, make precise enquiries as to the witness's availability. We would add that we had little to go on. We did not know who the close relative is who had passed away, or even when, for example, the funeral is taking place and treading with obvious care for Mr Edmonds' feelings, we would need to know more than we have to enable us to deal with the matter. But we have taken that into account in arriving at the proposed compromise.

j) We directed that we would spend the rest of the day reading the witness statements and referenced documents. The parties should not assume we will read the entire bundle and so should give us a suggested reading list if they want us to look at anything more.

<u>The claimant's application for leave to amend</u>

16. On the second day of the hearing, 28 January 2021, the claimant made an application for leave to amend to include particulars of his complaint of victimisation. We heard submissions from both parties and after an adjournment gave the parties the following decision:

    a. The application for leave to amend is refused;

    b. An Employment Tribunal claim can be amended at any time, but the claimant needs the Tribunal's permission. The Tribunal has a broad discretion to consider amendments under rules 29 and 30 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013;

    c. In deciding whether to allow an amendment, the Tribunal must take account of all the circumstances and balance the hardship and injustice of refusing the amendment against that of allowing it (<u>Selkent Bus Co Ltd</u>

v Moore [1996] IRLR 661, EAT; Transport and General Workers Union v Safeway Stores Ltd UKEAT/0092/07);

d. The claimant has brought three claims, the first on 9 December 2017 complaining of direct race discrimination, the second on 14 January 2019 complaining of victimisation and the third on 20 June 2019 complaining of unfair dismissal;

e. At the Preliminary Hearing held on 15 March 2019, EJ Pritchard identified the direct discrimination in a series of paragraphs from 3.1 to 3.11. The claimant appeared in person. EJ Pritchard also ordered the claimant to provide a Scott Schedule setting out the details of that complaint. The claimant provided this on 28 March 2018 by reference to those paragraphs, the respondent added comments and numbered the boxes 1 to 41 on 12 April 2019;

f. At EJ Baron's Preliminary Hearing held on 16 January 2019, at which the claimant was represented, he limited the Scott Schedule to those matters within boxes 20 to 41 onwards and paragraphs 3.8. 3.10 and 3.11 of EJ Pritchard's list of issues;

g. There was a further Preliminary Hearing on 8 August 2019 before EJ Wright, where the claimant appeared in person and the amended version of the Scott Schedule was provided by the respondent. EJ Wright made case management orders for the claimant to provide further and better particulars, the respondent to include them in the Scott Schedule and for the claimant to then provide comments on the revised Schedule. We have the latest version of this in the pleadings bundle at page 114 onwards. There was no response from the claimant, and this is still in its raw state. There is an anomaly in numbers, but no explanation has been provided (the numbers run to 41 and then jump to 44). It may be of no significance. Each version of the Schedule faithfully repeats the claimant's original draft save for the deletion of paragraphs 3.1 to 3.7 and 3.9 (which limits the Scott Schedule to those matters in boxes 20 to 41);

h. The claimant brought his second claim containing the complaint of victimisation on 14 January 2019. This was not served on the respondent until 15 February 2019. It is not recorded by EJ Baron as having been raised by the claimant at the Preliminary Hearing held on 16 January 2019. It was identified by EJ Wright at the Preliminary Hearing held on 8 August 2019, by which time the claimant had brought his third claim (of unfair dismissal). It appears implicit from paragraph 7 and the Orders at paragraphs 1.3 and 1.4 of the record of that hearing, that the claimant was to provide further and better particulars of the second and third claims. The claimant did not do so;

i. A further Preliminary Hearing took place in front of AREJ Davies on 22 November 2019, at which the claimant was ordered to provide particulars of claims two and three by 2 December 2019 and the parties to agree a

list of issues by 16 December 2019. The claimant provided further details which are included in the latest version of the Scott Schedule (at page 114 onwards of the pleadings bundle). He did not respond to the respondent's requests to particularise the claim of victimisation and did not respond with any additions or comments to the list of issues;

j. What has been presented today moves entirely away from the complaint of victimisation set out in the claim form and within the Scott Schedule. Whilst the application relies to a large extent on factual matters already set out in the claimant's witness statement, it seeks to link them in a substantially different way to the amendment sought. This is not something that is dealt within the claimant's witness statement, the case is now in its second day, the respondent does not have the necessary witnesses and could not have contemplated that it would be necessary to call them. To further complicate matters the claimant has in effect abandoned the complaint as set out in box 44 of the Scott Schedule in place of the victimisation amendment sought today, although those matters are an overview of the matters relied upon as amounting to direct discrimination;

k. Whilst we of course have to consider whether the amendment is in time or not and whether to exercise our discretion to extend time, we have not been provided with any explanation as to why it has only been raised now, and we are aware that the claimant has been represented continuously since at least the November 2019 Preliminary Hearing;

l. We take the view that there is a substantial difference in the legal issues raised by this amendment which would require the respondent to call additional witnesses to address it. In addition, the amendment, whilst listing events relied upon chronologically, does not set out the evidence that the claimant wishes to rely upon, and his witness statement does not deal with those events in that context. He would need to provide a further witness statement, the respondent would need time to consider this and call further witnesses, including Mr Edmonds and Mr Bagnall who are not here for this hearing;

m. Whilst we accept that there is some prejudice to the claimant were we to refuse his request, we agree with the respondent that this is entirely of his own making. The prejudice to the respondent is substantial in that it takes them by surprise at a hearing which has already started and there have been several attempts to get the claimant to set out his case;

n. We have already identified our concerns about delaying the hearing of this matter in considering the respondent's request for a postponement which the claimant objected to. To allow the amendment would of course delay the hearing further and would most likely result in postponement to another date and release to a differently constituted Tribunal given we all have different sitting commitments;

o. For all of these reasons we refuse the application for leave to amend;

p. From the history of this matter and the Scott Schedules, we do note that the word "victimisation" is used in all of the other paragraphs, ie 20-41, and this is a document that originated prior to the second claim. We accept that this word was used in an informal way, more by way of being picked upon, rather than in the strict legal sense. We will of course consider these matters in the context in which they have been raised, in as far as they fall within paragraphs 3.8, 3.10 and 3.11 of EJ Pritchard's issues and are dealt with in the claimant's witness evidence, but as complaints of direct discrimination. These complaints essentially allege that Ms Peacock influenced those matters and of course the respondent is calling her to give evidence.

17. After seeking clarification as to the status of the existing victimisation complaint from the claimant, I recorded that complaint as dismissed on withdrawal.

<u>The issues</u>

18. For the avoidance of doubt, the issues arising from the complaints are set out at paragraphs 3.8, 3.10 and 3.11 of the issues identified at the Preliminary Hearing held on 15 March 2018 (EJ Pritchard's hearing) as further particularised at paragraphs 20-41 of the Scott Schedule at pages 114 to 126 of the pleadings bundle, paragraph 45 of the Scott Schedule at page 126 of the pleadings bundle and as set out by the respondent in its list of issues.

19. During the course of the hearing, Mr Deeljur abandoned the allegations within paragraph 3.8 of the list of issues identified by EJ Pritchard.

20. What this left in summary is as follows:

a. paragraph 3.10: did Caroline Peacock improperly cause the respondent not to follow its own policies and procedures, in particular that it delayed matters relating to the claimant and also failed to follow other policy matters;
b. paragraph 3.11: did Nemendra Singh and Neal Edmonds failed to treat the claimant's situation as sufficiently serious and tell the claimant he should return to work;
c. paragraph 45: that the respondent advertised the claimant's role in October/November 2018 in breach of contract;
d. the list of issues: was the claimant unfairly dismissed?

21. It was agreed that the hearing would deal with liability first of all and remedy if necessary.

Conduct of the hearing

22. The hearing took place in person on 27 to 30 January 2020. We were able to read the witness statements and referenced documents on the first day. However, given the applications made by each party, we did not commence hearing the claimant's case until 3.10 pm on the second day. We interposed Ms Peacock for the respondent at 1.45 pm on the third day, given her limited availability to attend the hearing and we completed the claimant's case on the fourth day at 1.40 pm. After lunch that day, Mr Robert's made an application of no case to answer. We heard submissions from both Counsel and then adjourned at 4.10 pm reserving judgment. Judgment with reasons was sent to the parties on 28 February 2020, refusing the respondent's request and directing that the case be listed for a further two days.

23. It took some considerable time to agree further dates for the hearing. The hearing resumed by CVP on 23 and 24 February 2021, the Tribunal panel having met in chambers on 22 February to re-read its notes, the witness statements and documents. We met again on 25 February and 22 March 2021 to reach our decision.

Evidence

24. We were originally provided with paper copies of the documents and then electronic copies of the bundles at our subsequent CVP hearing.

25. The respondent provided us with a bundle of documents running to 466 pages. We refer to this as "R1" where necessary. The respondent also provided us with a pleadings bundle running to 132 pages. We refer to this as "R2" where necessary. In addition, the respondent provided us with a list of issues and a chronology. During the course of the hearing, the respondent adduced further evidence, which we admitted. This consisted of email correspondence between Mr Stevens and Ms Beasley from May/June 2017 and job specifications for the role of Quantity Surveyor and Commercial Manager. We refer to these documents as "R3" where necessary.

26. During the course of the hearing the claimant provided us with a copy of a letter from Lambeth Talking Therapies to his GP dated 5 February 2020.

27. We heard evidence from the claimant by way of a written statement dated 22 January 2020 consisting of 96 paragraphs and in oral testimony. The claimant provided a witness statement for a former work colleague, Mr James McCormack. There was some concern as to whether this had been signed by him or not. However, he was not present to give evidence and his statement was limited in scope, and so we did not attach any weight to its contents. The claimant also provided a witness statement from a former work colleague at a previous employment, but this appeared to be more of a character reference, although the claimant indicated it was relevant to remedy. In the event, we did not consider it for the purposes of our hearing which dealt with liability only.

28. We heard evidence on behalf of the respondent by way of written statements and in oral testimony from Ms Caroline Peacock and Ms Trudy Hillman, the respondent's former Senior HR Advisor. We also heard evidence by way of oral testimony from Mr Neal Edmonds, the respondent's former Divisional Managing Director. His attendance was secured by way of a witness order which I had granted to the respondent on 19 February 2021.

Findings

29. We set out below the findings of fact we considered relevant and necessary to determine the issues that we are required to decide. We do not seek to set out each detail provided to the Tribunal, nor make findings on every matter in dispute between the parties. We have, however, considered all the evidence provided to us and have borne it all in mind.

30. Originally the claimant's complaints of unlawful discrimination were very wide ranging. However, much of his claim has been ruled out of time or withdrawn and what we are left with are very specific complaints falling under paragraphs 3.10 and 3.11 of the list of issues identified at the Preliminary Hearing held on 16 January 2019 at R2 36 and paragraph 45 of the Scott Schedule at R1 126 and the unfair dismissal complaint set out in the list of issues. Most of the earlier events that are covered in evidence are therefore out of time and can only form background to the complaints that we are empowered to adjudicate upon. We will therefore only recite those events where appropriate, but will not necessarily make findings on them, unless we consider it relevant to the background to the live issues to do so.

31. The claimant commenced employment with the respondent via an agency in February 2014 and was working at its Croydon Branch as a Finance Assistant.

32. The respondent provides managed outsourced services to a range of public and private sector clients. Its core business is the provision of repairs and maintenance services to social housing.

33. We were referred to the following respondent's policy documents:

    a. The Grievance Policy and Procedure (at R1 1-6);

    b. The Ill-health Absence Management Policy and Procedure (R1 6-29 at R1 19 & 20).

    c. We also noted the contents of the Equality & Diversity Policy (at R1 3043), which at R1 34 sets out Diversity: Our Strategy, the penultimate aim of which is to "have no discrimination cases upheld against us". We would comment that in our view it is perhaps more appropriate for the respondent to aim not to discriminate and thereby avoid having discrimination cases brought against it in the first place;

d. The Bullying and Harassment policy excerpt (at R1 43A);

e. The excerpt from the Employee Handbook (R1 43B-M as to bullying, harassment and the Grievance Procedure).

34. The claimant's duties as a Finance Assistant were as follows: dealing with daily finances, purchase orders, invoices for sub-contractors, reviewing the description of the work job, looking at operations, work from sites, profit and loss, reviewing data provided by users via a handheld device called a PDA used to feed back information as to the work on site.

35. The claimant alleged that as time went on, he was undertaking duties at a higher level, as Quantity Surveyor, although he had no formal qualifications for that role. He said in evidence that these duties were: analysing the work done on site, the length of time taken to do it, reviewing the standard of work, and, if there was a discrepancy, highlighting this to the supervisor.

36. Similarly, the claimant stated that as time went on, he was undertaking the duties of a Commercial Manager. He said in evidence that the Commercial Manager heads the financial part of the Branch, runs many more reports, interacts directly with the Branch Manager and the other Managers in the team. He gave the example of when he covered the role, he worked directly with the Commercial Manager, worked a lot more closely with the Branch Manager, providing updates and liaising more as to the work.

37. Caroline Peacock joined the Croydon Branch as General Manager in March 2014.

38. The claimant stated in evidence that he applied for a permanent role as a Quantity Surveyor, was successful, but Ms Peacock only offered him a permanent role of Finance Assistant at a lower salary. Ms Peacock denied this. Her position is that the claimant was only offered the role as Finance Assistant.

39. The claimant was then employed by the respondent on a full-time basis in the role of Finance Assistant from 27 May 2014 at a salary of £24,000 pa.

40. We were referred to his contract of employment (which more properly is a statement of main terms and conditions of employment provided under the Employment Rights Act 1996) at R1 44-54. This is signed by the claimant and on behalf of the respondent and dated 23 May 2014 (at R1 54).

41. The claimant's position is that in reality, as time went on, he was carrying out the duties of a Quantity Surveyor and Commercial Manager but was not paid at the correct rate for those roles. The respondent denied that the claimant undertook the roles of Quantity Surveyor or Commercial Manager.

42. The claimant's further position is that:

a. he was referred to as a Quantity Surveyor and later on, when he transferred to the respondent's Sutton Branch, as a Commercial Manager;

b. that other members of staff acknowledged that he was carrying out those duties and that he should be promoted accordingly; and

c. he was held out to the respondent's clients as being a Quantity Surveyor and later on a Commercial Manager.

43. The respondent denied this and stated that job titles varied from client contract to client contract. However, the claimant accepted that the respondent was holding him out to clients as having a more senior role than he actually had.

44. Paul Stevens was the General Manager of the Sutton Branch, who took over from Chloe Hutton whilst she was on maternity leave. Mr Stevens thought highly of the claimant's work and wanted to promote him to a Finance Manager or Commercial Manager role earning £32,000 pa, but Ms Peacock did not approve this for the reasons set out in her email at R1 72. However, she was willing to offer the claimant the role of Quantity Surveyor at a salary of up to £30,000 pa if warranted.

<u>Ms Peacock's behaviour towards the claimant</u>

45. The claimant makes a number of allegations about Ms Peacock:

a) As to her behaviour towards him, interacting differently with others to the way she did with him;

b) As to her telling others he was a bad influence and to stay away from him;

c) That staff did not talk to him because they were concerned about her reaction if she caught them doing so;

d) As to her not acknowledging his performance when others complimented him and were not complaining about him. He gave a number of examples.

    a. By reference to emails from November 2016, at R1 155-157, in which colleagues congratulated the claimant for his work and Ms Peacock did not. In evidence, she stated that his line manager had already acknowledged the claimant's effort and she was asking a question as to information she required for a meeting the following day.

    b. By reference to emails at R1 160-161. In February 2016, the claimant emailed information for the KPI Run for January 2016 to Ms Peacock,

in the absence of the Finance Manager at the Croydon Branch, who usually provided this to her. Ms Peacock replied querying what it was and why he had copied everyone in. The claimant confirmed what it was and said didn't the Finance Manager usually copy this to those others. Ms Peacock replied no, it was only sent to her, and she queried the information because the figures seemed too high. She further stated that she would wait for the Finance Manager to return and send it to her. Ms Peacock said in evidence that she needed this information to present to a client and it was important that it was correct. The Finance Manager subsequently confirmed that the claimant's figures were correct.

46. The respondent denies these allegations.

47. We noted that Ms Peacock had a direct management style, and this came across when she gave evidence.

Transfer to Sutton Branch

48. Around October 2016, the claimant applied for a Quantity Surveyor role at Sutton on a salary of £30,000 pa. Ms Peacock offered him the role at £28,000 pa on the basis that he was not qualified as a Quantity Surveyor and so she wanted to see how he fared in the role before considering increasing his salary.

49. On 1 November 2016, the claimant transferred to the Sutton Branch to commence his role as Quantity Surveyor. We were referred to the variation to his terms and conditions dated 24 October 2016 at R1 55. We were also referred to the letter sent to the claimant dated 3 November 2016 confirming the changes to his terms and conditions of employment and attaching a copy of his revised statement of main terms and conditions of employment (at R1 57-67).

Timekeeping issue

50. The claimant was picked up for his time keeping. His position is that he was late, but it was marginal, and one occasion was due to his car having a flat tyre. He alleged that Ms Peacock used other members of his team to work against him to find faults to take action on.

51. We considered a number of the claimant's Performance Action Plans ("PAP"s) some of which we were referred to. At R1 127 the PAP dated December 2016 indicates that the claimant's timekeeping was an issue. At R1 128, which is a further copy of the PAP from December 2016, there is an additional note dated 7 February 2017 which states that the claimant's timekeeping is still an issue, and this is set out in more detail in the notes of the meeting held on that date at R1 130. There is an appendix setting out the claimant's dates and time of attendance at R1 129.

52. The claimant attended a disciplinary hearing with Lee Waller, the respondent's General Manager, on 10 February 2017. The outcome letter to the claimant dated 17 February 2017 indicates that the claimant was given a written warning because of lateness. The letter further states that the claimant must ensure that he is logged on and ready to start work by his start time of 8 am. This letter is at R1 144.

53. At R1 137-143, there is a record of a PAP meeting held on 17 February 2017 which at R1 137-138 deals with timekeeping and indicates that the issue was dealt with separately, the claimant was spoken to, there has been some improvement, but he needs to be consistent. We would note that timekeeping was indicated to be an ongoing issue within the outcome to the claimant's later grievance, in a letter dated 23 August 2017 at R1 150.

<u>Ill-health absence & initial grievance</u>

54. From 30 June 2017, the claimant was absent from work due to ill-health. We could not find a certificate of fitness for work covering this period within the bundle. This date is only recorded within the Chronology. In a later letter to the claimant as to the outcome of a welfare meeting, the respondent indicates that the claimant had been absent from the workplace due to psychological problems since 4 July 2017 (at R1 169).

55. The claimant was sent a letter by the respondent dated 10 July 2017 inviting him to a welfare meeting (at R1 74). The letter states that this is an informal meeting and sits outside the respondent's Ill Health Absence Management Policy & Procedure. The claimant's position is that this was after only 5 days of sickness absence when he had provided a 14 day fitness for work certificate. 5 days absence is more or less consistent with the absence period commencing on 4 July 2017 as set out in the letter at R1 169, but it is not consistent with absence commencing on 30 June 2017.

56. In evidence, Trudy Hillman, who was at the time the respondent's Senior HR Advisor, stated that an invitation to a welfare meeting depended on the expiry date of the fit note and that there may have been concerns that the claimant's absence was stress related. The claimant's absence certainly did not appear to activate any of the trigger points set out in the Ill Health Absence Management Policy & Procedure at R1 15.

57. The respondent wrote to the claimant again on 21 July 2017 rescheduling the welfare meeting for 26 July 2017, the claimant having advised that he had not received the previous letter (at R1 79). We know that the claimant changed address at some point, but we were not provided with any evidence as to why the respondent continued to write to his old address or whether the claimant explained that he had not received the previous letter because he had changed address or provided the new address.

58. The respondent wrote to the claimant again on 28 July 2017 by a letter hand delivered to his old address. This letter indicates that it had attempted to

contact him on a number of dates in July by letter, and then by telephone, but received no communication from him. The letter reminded him of his obligation to keep in contact with his line manager, that communication is a two-way process and that he must attend and fully participate in the meeting with his line manager on his return to work from his ill-health absence. The letter asked for him to contact Mr Waller by 3 pm on 31 July 2017 and that in the absence of a fit note being submitted he would unfortunately be recorded as "absent without paperwork" and not receive any sick pay until one had been submitted. This letter is at R1 80.

59. The claimant sent a letter of grievance dated 27 July 2017 to the respondent by email dated 29 July 2017 (at R1 81). This contains a different address to the one that the respondent had been writing to. The grievance is at R1 82-85. It raises clear complaints of race discrimination on the first and last page.

60. We were referred to the claimant's statement of fitness for work dated 31 July 2017 at R1 98A. This states that the claimant was not fit for work because of "[V]Psychological problems" from 31 July to 14 August 2017 and that the doctor would not need to assess the claimant's fitness for work again at the end of this period.

61. The welfare meeting eventually took place on 3 August 2017 between the claimant and Mr Waller. We refer to the outcome of that meeting in a letter from Mr Waller to the claimant dated 1 September 2017 and sent to the claimant at his new address. This letter is at R1 169.

62. We were not referred to any documents containing the notes of this meeting. However, we have found an incomplete undated form at R1 104-105 which appears to relate to the welfare meeting and also a Stress/Anxiety/Depression Questionnaire dated 3 August 2017 at R1 106107 that expressly states that it relates to that meeting.

63. The letter itself states that the claimant has been absent from work due to psychological problems since 4 July 2017 and that he felt he was unable to return due to feeling underappreciated within the branch and not rewarded/thanked for his work. The letter also states that the claimant said that he felt there was a high turnover of staff and he felt pushed to one side, and that if this could be remedied, he could return to work and, if not, he would consider a move to another branch. In the letter Mr Waller further states that the claimant is welcome to apply for vacancies within the business if he wishes to do so. The letter reports on a general discussion about the claimant's health position and states that at present it was not felt appropriate to refer the claimant to occupational health. Finally the letter records that the claimant was unable to provide a possible return to work date at present, but it was hoped it would be as soon as possible.

64. On 17 August 2017, the claimant attended a meeting with the respondent to discuss his grievance. This was conducted by Nemendra Singh, the respondent's Operations Director, with Vernon Corea taking notes. We were

referred to the respondent's notes of that meeting at R1 115-117. We were also referred to the claimant's notes of that meeting at R1 117A-AH.

65. In evidence, the claimant explained that he provided his own transcript taken from a covert audio recording that he had made of the meeting. Whilst Mr Roberts confirmed that the claimant had provided a copy of the recording with a copy of the transcript to the respondent during disclosure in preparation for this hearing, it was not clear to him if this was the same as the transcript appearing in the bundle and in any event that transcript had not been agreed.

66. The respondent's notes of the meeting contain no reference to the allegations of race discrimination. Whilst Mr Singh was not present to give evidence, the respondent's position is that this is because the claimant did not raise the matter at the meeting.

67. The claimant's notes of the meeting are divided into two columns one headed "My notes" and the other headed "Mears notes". The first column indicates that the meeting was a much longer discussion than the one set out in the second column, although both covered roughly the same ground.

68. Within the claimant's notes, there is one reference to discrimination, Mr Singh stating, "like you have been discriminated somehow" and the claimant responding "yes, because if I work here this is my office and I sat in here by myself, I would be fine with it" (at B117AC). The respondent's notes do not mention race, discrimination or race discrimination at all.

69. From the respondent's notes, it does appear that Mr Singh viewed the claimant's concerns as being influenced by rumours and by Ms Peacock's style of management although the claimant does state that the treatment he complained of only happened to him. Mr Singh suggests that the way forward is a resolution meeting between the claimant and Ms Peacock. The claimant agrees, but states that he wants his union representative present. This is all echoed in the claimant's notes, but in more detail.

70. On or about 30 July 2017, Ms Peacock saw the email attaching the grievance (which had been redirected to her in Mr Stevens' absence) and she read the attachment. Having realised it was about her, she contacted Ms Hutton and asked her to provide an outline of any issues regarding the claimant from his recruitment to date as well as data in support. Her position in evidence is that she knew that Ms Hutton was about to go on maternity leave and wanted her to put together the information before she left.

71. We felt that this was highly inappropriate given that the grievance was against her and she was seeking information about issues involving the person raising that grievance. By doing so she was setting the framework for the investigation. Someone of Ms Peacock's level of management should have known that this was highly inappropriate.

72. Mr Singh spoke to Ms Peacock by telephone and discussed the claimant's grievance, although Ms Peacock was unable to recall any details of their discussion beyond Mr Singh phoning her to obtain information. We do not know when this telephone discussion took place. However, we found it very surprising that Ms Peacock could not recall what was discussed given that the grievance made a complaint of race discrimination against her which she has denied. Further, there is no written statement or communication from her within the bundle in which she sets out her position regarding the allegations made against her in the grievance. This again is surprising given the seriousness of those allegations.

73. Ms Peacock sent information to Mr Singh regarding the claimant by email on 18 August 2017 (at R1 118). This read as follows:

"Please find attached statement and support pack from Chloe regarding JM as discussed. The last document details the Performance action plan for timekeeping and also details the reviews whereby performance was not being met. There is also a statement around JM recruitment (sic) and discussions around salary with Chloe who was GM. Also I had already asked Wendy to provide her own account of her working relationship with JM."

74. The emails states that it contains a "statement and support pack from Chloe regarding JM as discussed". This would indicate that the email was sent after the telephone discussion.

75. The email also states that the last document details the claimant's PAP for timekeeping and also details the reviews whereby performance was not being met. This is a reference to the statement from Ms Hutton who was then General Manager of the Sutton Branch dated 4 August 2017.

76. The email further states that there is also a statement around the claimant's recruitment and discussions around salary from Ms Hutton. This is the statement dated 1 August 2017.

77. In addition, the email states that Ms Peacock has already asked Wendy (Prendergast, the Regional Finance Manager) to provide her own account of her working relationship with the claimant. This would indicate that she had asked for this at some earlier point and again we find this to be highly inappropriate.

78. From the email and the attachments the focus of the information is on the claimant's personality and performance. The information does not address the complaint of bullying or race discrimination at all. The email ends with the words "I know you still have staff to speak to", although we heard no evidence whatsoever of who, beyond Ms Peacock, Mr Singh spoke to, if anyone.

79. One of the attachments to the email is the statement of Ms Prendergast at R1 120-121. This is headed "to whom it may concern". It sets out Ms Prendergast's observations of what the claimant is like and as to his demeanour.

80. Another of the attachments to the email is the statement of Ms Hutton dated 4 August 2017 at R1 112-114. This makes reference to the claimant's grievance and indicates that Ms Hutton is setting out a timeline of the history of the claimant becoming the Quantity Surveyor at Sutton Branch before she goes on maternity leave.

81. A further attachment to the email is another statement from Ms Hutton dated 1 August 2017 which focuses on the reasons why the claimant did not receive a pay rise at the requested top bracket and attaches appendices in support (R1 122-145). This raises issues as to the claimant's timekeeping and performance not being met.

82. It does not appear that this email or the attachments were shown to the claimant at the time of the events in question.

83. On 18 August 2017, Mr Singh sent an email to Gemma Macrae, HR Advisor (at R1 146). This refers to the attached notes of the grievance with the claimant held the day before and goes onto state:

"Can you please post him a copy and organise a meeting with Caroline and Jerome to see if they resolve any differences or misunderstanding thanks.

Jerome has mentioned to me that if they can resolve this he is willing to come back to work ASAP."

84. On 23 August 2017, Mr Singh wrote to the claimant advising him of his grievance outcome. This letter is at R1 148-150.

85. The letter refers to Mr Singh's "further investigation". We heard no evidence as to this beyond there being a telephone conversation with Ms Peacock and her email to him containing the statements and support pack. He possibly spoke to other members of staff, but we do not know for sure.

86. The letter identifies the key areas of the claimant's concerns as:

- *You felt you were isolated at your workplace* o *You felt bullied by Caroline* o *Your pay should have been at £30k*
- *You were always blamed when something went wrong."*

87. In essence, Mr Singh rejected the claimant's allegations and his grievance. However, the letter makes no mention of the allegation of race discrimination and does not make any finding in that regard. At R1 150, the letter states:

"In summary, I am not upholding the above allegations that you have made. I firmly believe that this appears to be a series of miscommunications, an issue of rumours in branch being listened to and you not raising this previously with HR when requested."

88. The letter continues:

"It is my belief that the best outcome would be for you to come back to work immediately and organise a meeting with your line manager and Caroline in order to discuss any issues you feel there are in branch and resolve this so that you can move forwards. You did mention that you want to come back

to work as soon as possible so this will be the best opportunity for you to come back and be supported in your role."

89. We would note that at the grievance meeting, Mr Singh suggested that a meeting would be the next stage before the claimant returned to work. In the letter, the approach has changed to a more formalised process and it being a management issue.

90. The letter ends by offering the claimant the right of appeal within 5 working days.

91. On 24 August 2017, the claimant wrote to Jo Fry, the Group HR Director, at R1 151-152. The letter complains that there has been a lack of progression into his grievance and it would appear that it has been neglected and has not been taken seriously. This letter may well have crossed in the post with Mr Singh's grievance outcome letter given it makes no mention of it. We note that the claimant's letter clearly states that he is complaining of race discrimination at the second and third paragraphs. So even if it is correct that he did not mention race discrimination overtly at the grievance hearing, he is certainly very clear about it here.

92. In particular, at B151:

"In the meeting there were a lot of questions about my performance as an employee rather than the issue of me being black, singled out and victimised by Caroline due to the colour of my skin."

93. We were referred to an undated letter from the claimant to Kelly Tapley, HR Business Partner, at R1 153, which is his response to Mr Singh's grievance outcome letter. There are very clear references to race discrimination and to Ms Peacock's prejudice as to the colour of the claimant's skin. Whilst the letter states that the claimant appreciates that the next stage is to appeal, he also states that he does not feel that the initial investigation has been conducted thoroughly and that his concerns have not been considered.

94. It would appear that the respondent nevertheless treated this as a letter of appeal and wrote to the claimant on 14 September 2017 inviting him to an appeal hearing (at R1 173). The letter states that the appeal hearing will be held on 28 September 2017, conducted by Neal Edmonds, the respondent's Divisional Managing Director.

95. The appeal hearing was held on 28 September 2017 (although the outcome letter says 29 September, this appears of no significance). We were referred to the handwritten notes of the appeal hearing at R1 175-180, which were signed at the foot of each page by Mr Edmonds and the claimant. The claimant was accompanied by Hassina Malk, a UNISON steward.

96. We observe from these notes that there is no reference to race discrimination, that supporting documents were provided to Mr Edmonds (at R1 178), that Mr Edmonds stated that he would speak to Mr Singh and anyone else

relevant to the case (at R1 180), that the sickness review process would be put on hold pending the outcome of the appeal (at R1 180) and as to the claimant's return to work and the possibility of a transfer to another branch (at R1 180).

97. We were also referred to Ms Malk's handwritten submissions at R1 181-193 which were also signed at the foot of each page by Mr Edmonds and the claimant. This document contains extensive references to race discrimination. Indeed we thought that it was a very cogent document which set out clearly what the claimant's concerns were. At R1 183-184 it encapsulates what the claimant believed was wrong with the grievance investigation and outcome:

> *"In JM's grievance of 27th July it is very clear that he alleges that the (next two words not legible) less than favourable treatment he suffered +B&H was due to race discrimination.*
>
> *NS's outcome letter failed entirely to consider this or even to make mention of it. This shocking omission is a clear indication of the organisation seeking to avoid dealing with the actual substance of the discrimination JM suffered at the Mears Sutton Branch.*
> *The investigation manager did not consider that the grievance was from the only Black employee in an otherwise entirely white Branch. To be clear the law of discrimination requires a comparator. JM being the only black employee in an office consisting of white staff provides a clear and obvious comparator when considering race discrimination.*
>
> *Mears own Equality & Diversity policy outlines its commitment to not only meet but to 'exceed government legislation and best practice in this area and to ensure that throughout the group no discrimination, direct or indirect, is tolerated'.*
>
> *NS's (Mr Singh's) abject failure to address the issue of race discrimination is evidence of the organisations failure to follow its own policy and or legislation. Your policy advises that issues relating to discrimination will be 'actively addressed and resolved'. Also that recommendations on 'actions to improve fair and equal opportunities for all staff'."*

98. The document then goes on to address each of the outcomes highlighted within Mr Singh's grievance outcome letter.

99. By a letter dated 8 November 2017, Mr Edmonds wrote to the claimant informing him of the outcome of his grievance appeal (at R1 195-198). This letter makes no mention of race discrimination. The letter very much follows the same format as Mr Singh's letter as opposed to what is set out within the appeal documents. The letter reviews what went before and does not attempt to widen out the investigation at all or address the claimant's appeal letter or Ms Malk's submissions. At the top of R1 198 the letter in essence states that the claimant is the problem (although in the context of the final allegation of being blamed when something went wrong):

> *"I would put it to you that some self-reflection is required here as to be placed on a performance action plan for the reasons stated above, after a short time of taking on a new role, can only be directly attributed to your own actions and approach to your job and you are trying to use this allegation to deflect the fact that you have created the problem."*

100. Mr Edmonds rejects the appeal and recommends that the claimant return to his role in the Sutton Branch where:

> *"… the PAP that you currently have live will continue to be worked through with you to enable you to reach the required expectations of the business and assist you in your personal development, part of this plan will detail how you can achieve additional remuneration by achieving consistent performance and improved knowledge and skills."*

101. The letter ended by stating that there were no transfer opportunities available in the area near to where the claimant's lives, but Mr Edmonds did not believe that there was any reason why he should not return to his existing role.

102. In cross examination, the claimant accepted that he had not met Mr Singh or Mr Edmonds prior to the grievance proceedings and had no background to suggest they were racist. He went onto say that he was not suggesting they were racist, but there was a process they should have followed and they supported Ms Peacock's wrongdoing. He added that they reinforced it by disregarding what he said in his grievance. He accepted that he had complaints about the way in which Mr Singh and Mr Edmonds dealt with his grievance but was not saying that they themselves are racist.

103. On 9 December 2017, the Claimant lodged his first claim with the Employment Tribunal.

<u>Ill-health Absence Management Policy and Procedure and subsequent grievance</u>

104. The claimant was put through the respondent's Ill-health Absence Management Policy and Procedure (at R1 30-43) given his ongoing absence from work since either 30 June or 4 July 2017. This commenced prior to raising his initial grievance and continued after that procedure ended on appeal.

105. At stage 1 of the process, the claimant was invited to attend a meeting. The meeting was rescheduled on a number of occasions and invitation letters can be found at R1 174, 199, 200, 201 and 202. It appears that on the first occasion the claimant's union representative was unavailable, on the second occasion the claimant contacted the respondent belatedly and on the third occasion Ms Hutton was unable to attend. Each of the letters stated that the meeting would be at the Abacus Horizon office or at the claimant's home or a location agreeable and convenient for both parties.

106. The meeting finally took place at Sainsbury's supermarket in Wandsworth Road in London on 8 January 2018 and was conducted by Mr Waller. The notes of that meeting can be found at R1 203-208. The outcome letter dated 17 January 2018 is at R1 215-216.

107. The claimant's ill-health absence continued, and the matter then progressed to stage 2 of the process. The invitation letter dated 1 May 2018 is at R1 219-220. The meeting was originally scheduled for 15 May 2017 but was rearranged for 24 May 2017 (at R1 221-222). The meeting again took place at the Sainsbury's supermarket within their café. It was conducted by Ms Hutton. The notes of meeting are at R1 223-229 (handwritten) and at R1 230-232 (typed).

108. The claimant was referred to the respondent's Occupational Health ("OH") advisers. It is clear from correspondence that there was some difficulty in making contact with the claimant. By email dated 25 May 2018, the claimant stated that he was waiting and yet again OH had failed to call him at the required time. This is at R1 233-234. In an email from Ms Hillman to the claimant dated 31 May 2018, at R1 237, she advised that the OH doctor had attempted to contact the claimant by telephone on both his landline and mobile on a number of occasions but received no answer.

109. Dealing with this by way of chronological order, we turn now to the issue of the respondent's recruitment of a Quantity Surveyor in June 2018. We were referred to an email dated 7 June 2018 from Ms Hutton to Ms Hillman at R1 235. This sets out the rationale for the recruitment of a Quantity Surveyor on a fixed term basis, initially for 3 months but possibly extended to 6 months so as to assist the claimant if he were to return to work at the Sutton Branch, given the large backlog of work in progress.

110. Returning to the Ill-health Absence Management Policy and Procedure, by letter dated 25 June 2018, Ms Hutton wrote to the claimant setting out the outcome of the stage 2 absence review meeting.

111. This letter is at R1 238-239. The letter indicates that the claimant explained that the issue was to not to do with how he felt but with the previous management in the Branch along how he was being managed at that time. The letter further indicates that Ms Hutton explained recent changes within the business, that the Sutton Branch is under new management and that Ms Peacock has moved away so that the Branch now falls under Mears Direct.

112. The letter also discussed the OH referral and arrangement for a telephone consultation appointment for 11:30 am on 23 May 2018.

113. The letter ended by explaining that if the parties were unable to facilitate a return to work in some capacity, then the matter will move to stage 3 of the process.

114. As a postscript, the letter indicated that the OH appointment did not take place, that Ms Hillman had been in contact regarding the matter, but the claimant had not responded. Ms Hutton urged the claimant to respond so that they could discuss what happened with the arrangement and how they could progress his case forward.

115. By email from the claimant to Ms Hillman dated 27 June 2018, at R1 241, the claimant confirmed his telephone number, which we can see is the same as the one provided to OH. The claimant also confirmed that the doctor did not call him, his phone did not ring, and he did not have any missed calls. He further complained that this was not the first time he has had this issue with this OH company.

116. The claimant provided a statement of fitness for work for the period 2 July to

2 August 2018 stating that he was unfit to work due to "anxiety and depression". This is at R1 244.

117. The claimant was next invited to a stage 3 ill-health absence meeting in a letter dated 11 July 2018 at R1 247-248, given his ongoing absence and the unsuccessful attempts to arrange an OH appointment with him. The meeting was scheduled for 11 am on 24 July 2018 and again was to be conducted in the Sainsbury's café. Unfortunately, it was cancelled by the respondent due to "unforeseen circumstances" in an email to the claimant sent at 8:53 am on 24 July 2018 which is at R1 250. The meeting was rescheduled for 21 August 2018 at R1 252-253.

118. Both letters contain the following paragraph:

"Our aim is to get you back to work as soon as possible and on suitable terms based on a level of understanding of your medical position. Please note that if at this meeting we are unable to facilitate a return to work either presently or in the near future, the outcome could be that your employment may be terminated due to capability (ill health). Should this be the case, we will discuss your rights and entitlements. We therefore encourage you to be an active participant in the meeting to facilitate the return to work process."

119. The claimant presented a further statement of fitness for work certificate from his GP dated 7 August 2018 indicating that he was unfit to work because of "anxiety and depression" from 2 August to what appears to be 5 September 2018. This is at R1 251.

120. The stage 3 meeting took place on 21 August 2018 as scheduled in Sainsbury's café. It was conducted by Ms Hutton and the typed notes are at R1 254-255 and handwritten notes are at R1 256-261.

121. The claimant sent an email to Ms Hillman on 28 August 2018 commenting that it was another "well held and professional meeting" with Ms Hutton and raising a number of issues: that there had never been any issue as to the quality of his work; that he wanted his salary corrected to the salary advertised for the post when he applied, that his wages will be backdated to the date his salary increase was agreed in line with performance; that HR who have continuously operated outside of their own policies and procedures with regards to his grievance and subsequent sickness will not attempt to penalise or victimise him due to his ongoing court case; and can he have written confirmation and copies of his pervious reviews which confirm that his performance was above that expected and proof of the financial monthly emails showing branch improvements in comparison with other branches. We would note that this did not deal with the capability issue under review and in part raised matters which had already been dealt with in his concluded initial grievance.

122. By email dated 4 September 2018 at R1 267, Ms Hillman responded referring the work issues to Ms Hutton as the claimant's manager and reassuring him that as an HR adviser she did not make any business decisions regarding the day to day management of employees. She also enclosed a consent form as requested by Ms Hutton seeking the claimant's permission to write to his GP for medical advice regarding his health. She asked for this to be returned

to Ms Hutton by 10 September 2018. Ms Hillman set out arrangements for one final attempt to arrange an OH telephone consultation and explained that Dr Kumar would be calling the claimant the following day at 3.45 pm and set out the last confirmed mobile telephone number provided by the claimant.

123. In an email to Ms Hillman dated 6 September 2018, at R1 283, the claimant confirmed that this was a convenient time for OH to contact him. However, in a further email to Ms Hillman on 10 September 2018, at R1 284, the claimant complained that he had been waiting for an hour for a call from OH and yet again they had failed to contact him. In a further email to Ms Hillman dated 12 September 2018, at R1 291, the claimant complained further about the OH provider and the delays being caused to the process.

124. The claimant provided his GP consent on 7 September 2018, at R1 289.

125. By letter dated 1 October 2018, Ms Hutton wrote to the claimant as to the outcome of the stage 3 absence review meeting, at R1 296-297. The letter records that the claimant felt positive, and progress had been made and he had communicated this to his doctor, that the individuals that he had primary concerns with would no longer be part of his work environment, in particular Mr Waller had left the business and Ms Peacock was no longer managing the Branch. The letter went on to state in Ms Hutton's view that the alleged triggers for the claimant's absence had been removed and therefore the chance of further occurrences were incredibly slim and she could see no reason why the claimant's return to work would not be successful.

126. The letter then turned to deal with the concerns that the claimant had raised as to his treatment by HR throughout the process and his ongoing Employment Tribunal claim. Ms Hutton reassured the claimant that she is his manager and is responsible for making decisions and that the Central HR function performed a purely advisory role and were not involved in her dayto-day working relationship with him. She also reassured the claimant that his Employment Tribunal claim was an entirely separate matter dealt with by the Legal Team, which is entirely separate to the Central HR function and the Branch, although HR may provide information to the Legal Team as to his current status.

127. The respondent wrote to the claimant's GP by letter dated 2 October 2018 at R1 299. We were not provided with any evidence as to why this took so long. The letter set out the claimant's role within the organisation and his hours of work, raised some specific questions about his ill-health absence, the prognosis and his ability to return to work and in what capacity.

128. Subsequently, the respondent became aware that the claimant had withdrawn his consent. This is referred to in an email from Ms Hutton to the claimant dated 19 November 2018 at R1 312. The email set out the consequences of having to proceed with an ill-health review with no medical information.

129. The claimant was invited to a further absence review meeting set for 12 December 2018 in the Sainsbury's café, by email dated 29 November 2018 at R1 313-314. The email indicated that Ms Hutton wanted to discuss why the claimant had withdrawn his consent to approach his GP and its impact on the ill-health review process. Ms Hutton sent further emails to the claimant dated 10 and 11 December seeking his confirmation that he would be attending the meeting, at R1 315-316. Her later email made it clear that she needed to know whether the claimant was going to attend because she needed to be in the Branch if he was not.

130. It would appear from the email correspondence that the claimant attended the meeting as arranged, but in the absence of confirmation of his attendance, Ms Hutton did not, and so the meeting was rescheduled, for 20 December 2018 (R1 318-321).

131. The claimant presented a further statement of fitness for work for the period 7 December 2018 to 21 January 2019 indicating that he was unfit to work because of "anxiety and depression" at R1 322.

132. The review meeting took place on 20 December 2018 at the Sainsbury's café between Ms Hutton and the claimant. The handwritten notes of that meeting are at R1 324-329.

133. The outcome of that meeting is set out in a letter to the claimant from Ms Hutton dated 25 January 2019 at R1 332-333.

134. The letter records that the claimant indicated that he would be answering "no comment" to any questions that Ms Hutton asked and as a result it was not possible to discuss any medical advice or information that he had received since the last meeting. The "no comment" answers are set out within the notes of the meeting.

135. The letter also records that the claimant explained that it was his right to withdraw his GP consent and that he had done so because he did not feel comfortable with respondent having access to his medical records.

136. The letter further records that the claimant said there had been numerous failings by the respondent, that he had unanswered questions and he was unsure who at Mears would have accessed his records.

137. In addition the letter recorded that the claimant felt that there had been a lack of duty of care and a breach of data protection because the respondent had already misplaced one of his fit notes. Ms Hutton stated in the letter that she was unaware of that or that there were any unanswered questions. She set out the required action as to future sick notes to be sent directly to her or Ms Hillman and the claimant should to provide any unanswered questions so that she can answer those within the next 14 days.

138. The letter also stated that the claimant was happy to have a consultation with OH provided the respondent did this with another OH company. The letter confirmed that another company would be approached, and it included the relevant consent for the claimant to complete and return to arrange for that company to contact him. The letter also indicated that this would be the last attempt made to obtain medical advice. A further meeting was set for 20 February 2019.

139. From 6 January 2019 onwards the claimant raised a series of grievances against the respondent and in particular the HR Department. We would make it clear that we heard no witness evidence on this sequence of events and were only able to piece together what happened from the documents within the bundle.

140. We refer to the claimant's letter to the HR Department dated 6 January 2019 at R1 330 and his email to Ms Fry dated 28 January 2019 at R1 336-338. At one point the claimant addresses his concerns to senior managers. We refer to his email dated 1 February 2019 at R1 338A which raises allegations of "racial discrimination, bullying, victimisation, harassment, slander and so on". The claimant also sent a document entitled "Worries and Concerns" to the respondent on 11 February 2019. This is at R1 341-342 which in effect raises his earlier grievance and his grounds of appeal. We also referred to an email from Karen Beckley, Executive Director, to the claimant dated 1 March 2019 at R1 355-356. Ms Beckley was appointed to investigate the claimant's concerns and emailed the claimant on 11 February 2019 advising him of the same. It would appear that a meeting took place between them on 21 February 2019.

141. The claimant provided the respondent with a further statement of fitness for work for the period 22 February to 22 April 2019 again indicating that he was unfit for work due to "anxiety and depression". This is at R1 353.

142. It would appear that Ms Beckley made further attempts to meet with the claimant during March and April 2019. She attempted to arrange meetings with the claimant, much of which appears to be around the claimant's concerns that any meeting should not be held on the respondent's premises.

143. John Bagnall, Executive Director was assigned to deal with the claimant's long-term sickness absence. This process appears to have been held in abeyance given the claimant's subsequent grievances.

144. We refer to an email dated 1 April 2019 setting out the respondent's proposed approach at R1 362. This email clearly indicates that Mr Bagnall will meet with the claimant to discuss his current health, options for return including possible other branches/roles, and referral to OH again. The email goes on to state that a final meeting would take place after Mr Bagnall had undertaken any actions required, and at that final meeting, should there be no agreement for a return to work in some capacity, it is likely that the claimant's

employment would be terminated. Whilst this perhaps appears somewhat hardnosed, we see nothing untoward in its contents.

145. We refer to an email from the claimant to Ms Beckley dated 15 April 2019, which included a question asking, “what are Mears doing to facilitate my return to work?”

146. The claimant presented a further fitness for work certificate for the period of two months commencing on 23 April 2019 which again indicated he was unfit to work due to “anxiety and depression”, at R1 364.

147. Mr Bagnall wrote to the claimant by email dated 26 April 2019 at R1 368. He introduced himself and invited the claimant to attend the welfare meeting be held on 9 May 2019 at the respondent’s Lambeth Branch, to discuss his current health status, briefly discuss an overview of his absence to date and then see how the respondent can assist in his returning to work. He asked the claimant to confirm whether he is able to attend at least 48 hours prior to the meeting.

148. By email dated 26 April 2019, the claimant replied to Mr Bagnall’s email, at R1 369. His email is in somewhat strident terms and in essence states that, he knows who Mr Bagnall is, if he had been updated correctly he would be aware that any meetings with the claimant would not be held within the respondent's premises, that the meeting will not be held on 9 May 2019 until he has been given the chance to agree a time and location, and that he does not understand why Ms Beckley is not dealing with the matter given that she is fully aware of the surrounding issues.

149. Mr Bagnall responded on two occasions attempting to agree a location for the meeting on 9 May 2019 – at R1 370 & 372.

150. On 3 May 2019 the claimant sent an email to Ms Beckley which is at R1 373. This email said as follows:

“Due to the high levels of stress Mears have caused as my employer I withdraw from any meetings until other situations have been resolved.

Based on the delays relating to my grievance I doubt that this will have an impact on the outcome once arranged.”

151. On 3 May 2019 the claimant also sent an email to Mr Bagnall which is at R1 374. This email said as follows:

“Thank you for your prompt reply but due to the high levels of stress Mears have caused as my employer I withdraw from any meetings until further notice.”

152. By email dated 9 May 2019, Mr Bagnall replied to the claimant’s email, at R1 376. In that letter, Mr Bagnall stated that he appreciated that the claimant was currently unwell, however they each had a duty to maintain regular contact with each other, for him to keep them updated as to his health and progress and for them to provide support wherever possible. He invited the

claimant to a further ill-health absence review meeting to take place on 21 May 2019 at 11 am at the Lambeth Branch, to discuss his current health status. The letter warned that if at this meeting the respondent was unable to facilitate a return to work either presently or in the near future, the outcome could be that the claimant's employment may be terminated due to capability.

153. By email dated 10 May 2019, at R1 377, the claimant responded to Mr Bagnall expressing his concerns as to the lack of duty of care shown towards him by the respondent, that the meeting was again scheduled to be held at the respondent's premises and that as previously stated:

"… I withdraw from any meetings at this stage and will update Mears with upto (sic) date fit notes as required."

154. By email dated 10 May 2019, Ms Beckley wrote to the claimant, at R1 378, asking him to clarify whether he was saying that he would like to withdraw his grievance at this time. The claimant responded on 14 May 2019 indicating that he had at no point indicated this, at R1 379.

155. By email dated 6 May 2019, Mr Bagnall again wrote to the claimant inviting him to a rescheduled meeting to be held at 10 am on 13 June 2019 at Berridge Road Community Hall. This email is at R1 381A-B. The email set out that the reason the meeting had been rescheduled was as a result of the claimant's email stating that he wished to withdraw from any meetings with the respondent. The email set out a summary of correspondence and meetings during the ill-health absence process. The email went on to indicate that the purpose of the meeting was to discuss the claimant's health and options for his return. It indicated that the claimant could attend with a work colleague or trade union representative, or he could provide a statement submission regarding his condition and prognosis and it made clear that the meeting would not be rearranged and that the review would proceed and a decision made in his absence.

156. By email dated 13 June 2019 at R1 381C, Mr Bagnall wrote to Ms Hillman confirming that the claimant had not attended the meeting by the time that he had left the Community Hall at 10.38 am, that he attempted to call the claimant at 10.49 am but got no answer and was not able to leave a message and he remained outside the venue in his car undertaking work until around noon, at which point the claimant had still not arrived.

157. On 14 June 2019, Mr Bagnall emailed the claimant attaching a letter of outcome of the absence review meeting. This is at R1 381E-G. The letter sets out the claimant's non-attendance at the meeting on 13 June 2019, the purpose of the meeting and a summary of the events taking place during the ill-health absence review process, updated to include events taking place on 13 June 2019. We particularly note the following paragraphs:

"Had you attended this meeting I would have discussed the possible options available to us in relation to your current health status. Unfortunately throughout this process, we have been unable to gain any medical advice or opinion on your condition as you withdrew your consent to do so. I appreciate originally you had, however, due to a number of errors with our Occupational Health team you decided,

which is your right to, to not want to have an appointment with them. Following this you were asked to provide consent in order for us to write to your GP to understand your condition better, again to which you agreed, however, when chasing this up with the GP practice, they informed us that again, you had withdrawn your consent. Due to this, I could take no medical information/advice into consideration apart from the fit notes that you had submitted. These had stated that you were absent originally with psychological problems and then later within your absence this became anxiety and depression. I also considered that the last two fit notes, your GP has signed you absent from work for two months of the time, I also note your current one is due to expire on 23rd June 2019.

I understand, although we have not met, but taking into consideration the meeting you had previously with Lee Waller and Chloe Hutton, paperwork of which I reviewed in order to make a decision, you had concerns regarding the business and how your case had been managed and how you perceived to have been treated that you believe this to be the cause for the reasons of your absence.

I believe these matters had been looked into for you, however you are dissatisfied with the outcomes.

Had you attended this meeting with myself, another option I would have discussed with you would have been other vacancies within the business, but your failure to attend this meeting had meant that we have been unable to agree a way of facilitating your return to work or agree any adjustments or alternative roles that may assist your return.

In the light of the above, I've considered the matter carefully and taking into account all the available information along with the needs of the business and I have decided to terminate your employment due to capability, in line with company procedure."

158. The letter went on to advise the claimant that he was entitled to 6 weeks' payment in lieu of notice as well as his accrued but untaken statutory entitlement for holidays for the last 18 months. Mr Bagnall thanked the claimant for his dedication during employment, wished him all the best for the future and hoped that he would to achieve some improvement with his condition and hopefully at some stage make a return to employment. The letter advised the claimant of his right of appeal within five days of receipt.

159. We heard no evidence as to whether the claimant appealed or not.

160. We note that Ms Beckley wrote to the claimant by letter dated 2 August 2019, at R1 384-387 as to the outcome of his grievance. However this matter was not raised with us in evidence, although we note that the claimant did not attend the grievance hearing which took place on 4 July 2019 and that his grievance was not upheld.

<u>The respondent's witnesses</u>

161. We would make the following comments regarding the absence of witnesses. It is regrettable that Mr Singh and Mr Bagnall were not called to give evidence by the respondent, particularly Mr Singh. We have no explanation as to his absence and the only explanation for Mr Bagnall's absence at the earlier hearing, was that the respondent had not spoken to him and whilst they had the opportunity to call him to the part-heard hearing, they provided no explanation as to why he was still absent. Whilst we do not go as far as drawing any adverse inference from this, it does affect the respondent's ability to address the complaints that the claimant has brought and our ability to adjudicate upon them. Even in Mr Singh's absence we would in the very least

have expected to see the statements and other documents that he considered as part of his investigation, particularly given that Mr Edmonds subsequently based his own decision on having reviewed them.

162. We would make the following comments about Mr Edmond's oral evidence. He was a reluctant witness given he had left the respondent's employment and had his own business to attend to. Nevertheless he was compelled to attend. But in any event his memory was lacking in rigour even when presented with contemporaneous documents setting out what he had done. He did accept that he had signed the notes at the appeal meeting.

163. Mr Edmonds stated that he had extensive experience of disciplinary and grievance hearings. However, he had not followed through whether the resolution meeting mooted by Mr Singh had been picked up on. He was not able to explain how he had satisfied himself that a proper investigation had been carried out. He did not focus on the claimant's concerns about the grievance outcome. He did not go beyond the ambit of the original grievance investigation. His outcome letter followed the same template as the original outcome letter. He did not address the issue of race discrimination at all and by that time it was absolutely clear that race discrimination was a central theme, repeatedly referred to in the appeal letters and at the appeal hearing in the union representative's submissions. The union representative emphasised that as far as the claimant was concerned this was exactly what had happened when his grievance was considered by Mr Singh.

164. On balance of probability we think it more probable than not that the issues of race discrimination were not addressed. It was forcefully raised but simply not addressed or considered. Indeed the appeal outcome letter at R1 196 highlights that Mr Edmonds did no more than review what had been investigated before.

165. By not acknowledging or considering the claimant's race discrimination complaints, Mr Singh and Mr Edmonds in the circumstances did not treat the claimant's situation at work as sufficiently serious.

166. Mr Roberts provided written submissions and we heard oral submissions from both representatives which we have fully taken into account but do not propose to repeat here.

Relevant law

167. Section 98 Employment Rights Act 1996:

"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) [In any other case where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

168. Section 13 Equality Act 2010:

"(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."

Conclusions

Unfair dismissal

169. Section 98 of the Employment Rights Act 1996 sets out how an Employment Tribunal should decide whether a dismissal is unfair.

170. There are two basic stages. Firstly, the employer must show what was the reason, or if more than one, the principal reason, for the dismissal. The reason must be one of the four potentially fair reasons set out in section 98(2) or some other substantial reason of a kind such as to justify dismissal. Secondly, the Employment Tribunal must then decide in accordance with section 98(4) whether it was fair to dismiss the employee for that reason.

171. We first had to determine whether the respondent had a potentially fair reason to dismiss the claimant within sections 98(2) and (3) of the 1996 Act. The Respondent was alleging that this was by reason of capability.

172. It is clear that incapability can stem from sickness, what is necessary is that the sickness or ill-health impacts upon the claimant's capability to do his job which can arise from resultant lack of attendance at work.

173. The claimant had not attended work due to ill-health since at least early July 2017 and by the time of his dismissal in June 2019 had still not returned to work. The respondent dismissed him under its Ill-health Absence Management Policy and Procedure.

174. We accept that the respondent had shown that the potentially fair reason for dismissal was capability.

175. We then turned to consider whether the Claimant's dismissal satisfied the test of reasonableness under section 98(4) of the 1996 Act.

176. The basic question in determining whether the test of reasonableness has been met in a case of dismissal arising from a single period of prolonged absence is whether in all the circumstances the employer could be expected to wait any longer and, if so, how much longer? Each case must be considered on its own facts and an employer cannot hold rigidly to a predetermined period of sickness after which any employee may be dismissed.

177. The Tribunal would expect the employer to have found out the true medical position and to have consulted with the employee before making a decision. A medical report on the implications and likely length of illness should generally be obtained from the employee's GP or an occupational health adviser or company doctor or independent consultant. Where the employer obtains a report from an OH adviser or a company doctor, the employer should also be willing to consider a report from the employee's own GP or specialist. Whereas the former may be more familiar with working conditions, the latter may be better placed to judge the employee's health.

178. The Access to Medical Reports Act 1988 covers workers' access to reports prepared by a medical practitioner who has responsibility for their clinical care. An employer must not apply to a worker's doctor for a report without first getting the worker's written consent, having notified the worker in writing of his/her rights under the Act. Most employers have a standard notification and consent form for this, as indeed the respondent did. The worker is entitled to see the report before it is sent to the employer if s/he so requests and to make amendments with the doctor's agreement. The worker must be told of these rights at the time s/he is asked for his/her consent to the obtaining of the report. This is set out in the respondent's pro forma.

179. If an employee refuses to see a company doctor or allow any medical report, s/he increases the risk of being fairly dismissed.

180. Once the employer has the report, a meeting should be arranged to discuss its contents with the employee. In general, the employer must take such

steps as are sensible in the circumstances to discuss the matter and become informed of the true medical position. Consultation will often throw new light on the problem, bringing up facts and circumstances of which the employer was unaware.

181. Unless the medical advice is obviously inaccurate, based on inadequate information or lack of proper examination, the employer is allowed to rely on what the doctor says, as long as the employee gets a chance to comment. If the employee's GP report is more favourable than the employer's own medical report (often from occupational health practitioners), the employer can choose which report to follow if s/he has a good reason for the choice. Obviously the GP knows the employee better, whereas an occupational health doctor will be more familiar with the work environment. In some cases, the difference could only reasonably be resolved by getting a third opinion from a specialist.

182. The employer's decision ought to be based on the following factors:

    a. the nature and likely duration of the illness;

    b. the need for the employee to do the job for which s/he was employed and the difficulty of covering his/her absence. The more skilful and specialist the employee, the more vulnerable s/he is to being fairly dismissed after a relatively short absence;

    c. the possibility of varying the employee's contractual duties. An employer will not be expected to create an alternative position that does not already exist nor to go to great lengths to accommodate the employee. However, a large employer may be expected to offer any available vacancy which would suit the employee. What is reasonable very much depends on the facts;

    d. whether or not contractual sick pay has run out is just one factor either way;

    e. the nature and length of the employee's service may suggest the employee is the type of person who is likely to return to work as soon as s/he can, but length of service would not necessarily be relevant in any other way.

183. It is important for the employer to have discussions with the employee and for the employee to know when his/her job might be at risk.

184. If the employee is unable to do the job because of injury or ill-health originally caused by the employer, this does not necessarily mean the dismissal is unfair. The Tribunal can take it into account when considering whether it is reasonable to dismiss in the circumstances, but it is unlikely to be a big factor - McAdie v Royal Bank of Scotland [2007] IRLR 895, CA.

185. The reason that we have set out the above explanation of what it is reasonable to expect an employer to do when faced with long-term ill-health absence, is largely so that the claimant understands where we are coming from in terms of our conclusions.

186. With regard to the process followed in the claimant's case it is clear that the respondent was following its Ill-health Absence Management Policy and Procedure and that whilst there were delays in holding meetings these delays were for various reasons and on both sides. We do not believe that any delays rendered the process unreasonable and there were no other procedural failings identified.

187. In terms of the substantive decision to dismiss. The claimant never agreed to the referral to OH for an assessment because he believed that OH had to put it colloquially, messed him about in its attempts to contact him. Indeed he went as far as disputing whether they had in fact made any attempts to contact him. We would say that this was not supported by the evidence which we were taken to. The claimant belatedly provided his GP consent to approach his GP and to release his medical records and then withdrew it. This was on the basis that he was not sure who within the respondent organisation would have access to this information. The respondent repeatedly rescheduled meetings, for a variety of reasons, albeit was not clear just how much the claimant was responsible for this. The respondent was also attempting to deal with the claimant's subsequent grievance against HR and his reprised original grievance which had already been rejected.

188. The respondent involved a lot of different people as and when the claimant lost faith in those people and his grievances went higher and higher up the managerial chain.

189. The claimant then withdrew from both the ill-health absence and grievance process and meetings with no indication of when he would participate.

190. We have reached the conclusion that the respondent did all that they reasonably could in the circumstances and were faced with a situation of an employee who had been absent from work since either 30 June or 4 July 2017 due initially to psychological problems and latterly anxiety and depression and by 13 June 2019 the respondent had been unable to obtain a medical report or the claimant's medical notes, he had withdrawn his consent to approach his GP, he had refused to attend an OH assessment with one OH provider and then simply not responded to attempts to refer him to a second OH provider and then had withdrawn from the process and meetings.

191. The respondent was attempting to ascertain the claimant's medical condition and the likelihood of his return to work. It was further attempting to get him

back into the workplace and had taken steps to recruit another Quantity Surveyor to reduce the burden of work should he be able to return. The respondent had made it clear to the claimant that those managers he had previous issues with no longer worked at the Branch.

192. However, the claimant clearly had in mind that as long as the respondent did not address his original grievance to his satisfaction and his subsequent grievances against HR, he was not able to recover his health and return to work. As he put it, he believed that the respondent had failed in its duty of care to him.

193. We considered the case of McAdie in which the Court of Appeal said, quoting from the headnote in the IRLR report:

> "The fact an employer has caused the incapacity in question (which we are not saying is the case here), however culpably, cannot preclude the employer forever from effecting a fair dismissal. If it were otherwise, employers would in such cases be obliged to retain on their books indefinitely employees who were incapable of any useful work. Employees who have been injured as a result of a breach of duty by their employers are entitled to compensation in the ordinary courts, which in an appropriate case will include compensation for lost earnings and lost capacity. Tribunals must resist the temptation of being led by sympathy for the employee into granting by way of compensation for unfair dismissal what is in truth an award of compensation for injury."

194. With this in mind, we were of the view that even were the claimant able to show culpability on the part of the respondent for his ill-health, that was not something that rendered his dismissal unfair, but was something which, if it is at all actionable, is not within the Tribunal's jurisdiction.

195. We considered whether what occurred fell within the band of reasonable responses test of a reasonable employer. This has been held to apply to both the decision to dismiss and the procedure by which the decision was reached. We concluded that whilst not all employers might have dismissed the claimant in these circumstances, dismissal fell within the band of reasonable responses open to a reasonable employer in these circumstances.

196. We were also careful to remind ourselves that we should not substitute our own decision for that of the employer when applying the test of reasonableness.

197. In all the circumstances we therefore conclude that the claimant was fairly dismissed. The complaint is therefore ill-founded and is dismissed.

Race discrimination

198. Under section 13 of the Equality Act 2010 it is unlawful to treat a worker less favourably because of a protected characteristic, in this case race, by reference to an actual or hypothetical comparator in the same or similar circumstances.

199. Under section 136 Equality Act 2010, if there are facts from which an Employment Tribunal could decide, in the absence of any other explanation,

that a person has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless that person can show that he or she did not contravene the provision. Guidelines were set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258 regarding the burden of proof (in the context of cases under the then Sex discrimination Act 1975). They are as follows:

(1) *Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s.41 or s.42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.*

(2) *If the claimant does not prove such facts he or she will fail.*

(3) *It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.*

(4) *In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.*

(5) *It is important to note the word 'could' in s.63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.*

(6) *In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.*

(7) *These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.*

(8) *Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.*

(9) *Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.*

(10) *It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.*

(11) *To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.*

(12) *That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.*

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

200. The Employment Tribunal can take into account the Respondent's explanation for the alleged discrimination in determining whether the Claimant has established a prima facie case so as to shift the burden of proof. (Laing v Manchester City Council and others [2006] IRLR 748; Madarassy v Nomura International plc [2007] IRLR 246, CA.)

201. Madarassy also found that the mere fact of a difference in protected characteristic and a difference in treatment will not be enough to shift the burden of proof. There needs to be "something more". There has to be enough evidence from which a reasonable tribunal could conclude, if unexplained, that discrimination has (not could) occurred.

202. In Qureshi v (1) Victoria University of Manchester (2) Brazie [2001] ICR 863, the Employment Appeal Tribunal stated that a Tribunal should find the primary facts about all the incidents and then look at the totality of those facts, including the Respondents' explanations, in order to decide whether to infer the acts complained of were because of the protected characteristic. To adopt a fragmented approach "would inevitably have the effect of diminishing any eloquence that the cumulative effect of the primary facts might have" as to whether actions were because of the protected characteristic.

203. We have considered the evidence that was put before us and have reached findings of fact as indicated having looked at the matters individually and then gone back and looked at the matters in their totality, drawing inferences from the primary facts if we felt it appropriate to do so.

204. Whilst there may be time limit issues as to whether the matters complained of are in time or not or form part of a continuing course of conduct, this was not put to us in evidence or submissions and given our eventual conclusions we did not dwell on this matter.

205. As we have indicated above when dealing with the issues, the claimant's case as put is very narrow.

206. What is left arises from paragraph 3.10 and 3.11 of EJ Pritchard's list of issues as further particularised within paragraphs 20 to 41 of the Scott Schedule and paragraph 45 of the Scott Schedule.

207. We are asked at paragraph 3.10 of EJ Pritchard's list of issues to determine whether or not Ms Peacock improperly caused the respondent not to follow its own policies and procedures, in particular in that it delayed matters relating to the claimant and also failed to follow other policy matters. This was not a matter that was covered by Mr Deeljur's submissions. Mr Roberts dealt with it at paragraph 19 of his written submissions onwards.

208. Paragraph 3.10 is imprecisely put. In the absence of anything further, we can only take it to refer to the grievance policy/process.

209. Whilst we find that Ms Peacock's actions in compiling evidence for the grievance and in effect leading the investigation to be highly inappropriate, for the reasons given above, there is nothing to indicate that this caused the respondent not to follow the grievance process and in particular delayed matters. Mr Singh (and Mr Edmonds) dealt with the grievance process and whilst the claimant raised matters of race discrimination which were not addressed, there is nothing to indicate that Ms Peacock's actions improperly influenced Mr Singh. Mr Singh is answerable for his own actions, albeit he did not attend to give evidence. Therefore there is no detriment attributable to Ms Peacock's actions.

210. Further, there is nothing to indicate that Ms Peacock acted in the way that she did by way of less favourable treatment afforded to the claimant because of race. At its highest, Ms Peacock was compiling evidence to answer the grievance brought against her so as to defend herself, albeit as we have said highly inappropriately. The claimant did not put to Ms Peacock that she acted as she did because of race or whether she would have acted differently had the grievance been brought by an employee not of the claimant's race or indeed had the grievance not been one alleging race discrimination. Moreover, there is nothing to satisfy the "something more" test under Madarassy.

211. We therefore find this complaint unfounded.

212. At paragraph 3.11 of the list of issues identified by EJ Pritchard, we are asked to determine whether Mr Singh and Mr Edmonds failed to treat the claimant's situation as sufficiently serious and told the claimant he should return to work.

213. It is clear from the documents that both Mr Singh and Mr Edmonds did tell the claimant to return to work, although this in itself does not indicate that they took the matter insufficiently seriously.

214. But from our above findings, we do have major concerns as to how the grievance and the grievance appeal were investigated and as to the failure to acknowledge that the central concern was one of race discrimination. However, we also note that this issue/allegation as pleaded is quite different to the way in which it evolved during the hearing where the focus became that Mr Singh and Mr Edmonds omitted to address the issue of race discrimination. Nevertheless this recast issue/allegation was addressed in submissions.

215. We asked ourselves the question whether a failure to address the issue of race discrimination could amount to direct race discrimination? We then asked ourselves the question would the respondent have similarly denied the essential content of a grievance on a different topic?

216. At paragraph 22 of his written submissions, Mr Roberts identifies the shift in focus of this allegation but submitted that it was fundamentally flawed. In essence he submits that the claimant has failed to establish any detriment or less favourable treatment and has not satisfied the something more test.

217. Dealing with detriment first of all, we concluded that the claimant did suffer a detriment because his situation at work was not treated sufficiently seriously in that his race discrimination allegations were not addressed, ie acknowledged or obviously dealt with.

218. Where we had some difficulty was as to the correct comparator. Mr Roberts submits that this is someone who did not share the claimant's race who had made an allegation of race discrimination to which Mr Singh or Mr Edmonds rejected the primary facts. We were not convinced this was the correct comparator and return to this later on.

219. Mr Roberts also submits that the claimant conceded that neither Mr Singh nor Mr Edmonds adopted their approach because of his race. That is indeed correct, the claimant did concede this. As a result Mr Roberts submits that is the end of the allegation and that, moreover, the claimant has adduced no evidence to satisfy the something more test under Madarassy.

220. Mr Deeljur referred us to the case of Cordant Security v Singh & Stones UKEAT/0144/15/LA, in which the Employment Appeal Tribunal stated that a mere failure to investigate a complaint of race discrimination can amount to discrimination.

221. We also considered the cases of Sandu & anor v The Leicester Foundry Co Ltd UKET/32180/83 and Eke v Commissioners of Customs and Excise [1981] IRLR 334, EAT.

222. Sandhu is an Employment Tribunal case and so is of persuasive value only. In that case two Asian workers complained persistently to their employer of racial abuse and unfair allocation of holidays. The Employment Tribunal held that the employers' habit of ignoring the two workers' justified complaints, and its failure to investigate those complaints, amounted to a detriment on the ground of race.

223. In Eke, the Employment Appeal Tribunal stated that a failure to deal adequately with complaints does not constitute discrimination merely because the complaint concerned discrimination or harassment. Such a failure will only give rise to a claim if the employer would have behaved differently in response to a similar complaint from an appropriate comparator.

224. We were also guided by the EHRC Equality Act 2010 Employment Code of Practice at paragraphs 17.94-97.

"Dealing with grievances

> *17.94*
> *Employers must not discriminate in the way they respond to grievances. Where a grievance involves allegations of discrimination or harassment, it must be taken seriously and investigated promptly and not dismissed as 'over-sensitivity' on the part of the worker.*
>
> *17.95*
> *Wherever possible, it is good practice – as well as being in the interests of employers – to resolve grievances as they arise and before they become major problems. Grievance procedures can provide an open and fair way for complainants to make their concerns known, and for their grievances to be resolved quickly, without having to bring legal proceedings.*
>
> *17.96*
> *It is strongly recommended that employers properly investigate any complaints of discrimination. If a complaint is upheld against an individual co-worker or manager, the employer should consider taking disciplinary action against the perpetrator.*
>
> *17.97*
> *Whether or not the complaint of discrimination is upheld, raising it in good faith is a 'protected act' and if the worker is subject to any detriment because of having done so, this could amount to victimisation (see paragraphs 9.2 to 9.15).*

225. Our analysis is as follows. To show direct race discrimination, it is necessary to prove that the respondent would not have reacted the same way if an employee of a different race had brought an equivalent complaint; eg the complaint would have been treated more seriously and investigated more thoroughly and the employee would have been kept better informed. It is not necessary to have evidence of any such comparable incident in the past, although of course that may make it easier to prove. And as with any direct race discrimination case, a Tribunal can infer from the evidence generally that a complaint from a white person would have been dealt with in a more favourable manner.

226. However, the difficulty is in formulating a sensible actual or hypothetical comparison for this. Is the question how would the respondent have treated a white employee complaining of: 1) race discrimination by a manager; 2) non-racial discrimination from a manager; or 3) any serious grievance? 1) does not seem to be a helpful comparison because it is far less common for such a situation to occur in most workplaces. 2) and 3) provide a more logical comparison, but even then, are not really comparable as there is not the same stigma attached.

227. That said, whilst we have concerns as to the respondent's handling of the initial grievance, we find that on the evidence before us the claimant has not shown less favourable treatment on grounds of race or pointed to an actual comparator or shown that any hypothetical comparator would have been treated differently. Furthermore, he accepted in evidence that neither Mr Singh nor Mr Edmonds acted as they did because of race.

228. We therefore find this complaint unfounded.

229. We have nevertheless included the above information because these are matters that the respondent should have some significant regard to when dealing with any future complaints or grievances or allegations of unlawful discrimination, particularly the guidance given in the paragraphs of the EHCR Employment Code that we have quoted. We can well understand how the claimant felt when the outcome of his grievance at first instance and on appeal rejected his concerns without mentioning that he had complained of race discrimination or obviously investigated those concerns.

230. Turning then to the allegation at paragraph 45 of the Scott Schedule at R1 126. The claimant's complaint is that his role as Quantity Surveyor was advertised by the respondent in October/November 2018. The detriment is alleged to be a breach of contract. Mr Deeljur's submissions did not deal with this allegation and Mr Roberts dealt with it at paragraph 23 of his written submissions. From our above findings, we reached the conclusion that the respondent had legitimate operational reasons to recruit to the position so as to assist the claimant if he returned to work and that these were not linked in any way to race.

231. We therefore find this complaint is unfounded.

232. Thus we have concluded that all of the claimant's complaints are unfounded and so we dismiss the claim, although we would add that there are lessons for the respondent to learn here as to how it deals with future complaints of race and other forms of discrimination.

Employment Judge Tsamados
Date 29 June 2021