



EMPLOYMENT TRIBUNALS

Claimant: Mr O Obilieye

Respondent: Tavistock and Portman NHS Foundation Trust

Heard at: London Central

On: 10 – 14, 17 May 2021
4 June (in chambers)

Before: Employment Judge H Grewal
Ms C Brayson and Ms S Plummer

Representation

Claimant: Mr S Yahaya, Caseworker

Respondent: Mr M Sellwood, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

- 1 The complaints of direct race discrimination are not well-founded.
- 2 The complaint of breach of contract (wrongful dismissal) is not well-founded.

REASONS

1 In a claim form presented on 12 February 2020 the Claimant complained of unfair dismissal, race discrimination and breach of contract (dismissal without notice). The complaint of unfair dismissal was dismissed on withdrawal on 10 July 2020.

Preliminary Issues

2 We dealt with a number of preliminary issues at the outset of the hearing. We refused the Claimant's applications to amend his claim and for witness orders. The Respondent submitted that the "without privilege" rule applied to a conversation between the Claimant and his line manager that took place on 17 January 2020. We decided that the rule did not apply to that conversation and that evidence of and relating to it was admissible. We gave full reasons orally for those decisions and we do not intend to repeat them here.

The Issues

Direct race discrimination

3 At the preliminary hearing the Employment Judge identified the complaints of direct race discrimination as being about the Respondent invoking the disciplinary procedure, issuing a final written warning and dismissing the Claimant for gross misconduct. It was clear to us from the details of his claim given in section 8.2 of the claim form that the Claimant was also alleging direct race discrimination in respect of the conversation that his line manager had with him on 17 January 2019 and the institution of the capability procedure on 30 January 2019. His case was that all those actions were part of a process to get rid of him because of race. We indicated to the parties at the outset that we would consider those two matters as well. The Respondent objected. We concluded that if a complaint had been made in the claim form and had not been withdrawn, we had to consider it even if the Judge had not noted it in the list of issues. There was no prejudice to the Respondent as we were going to hear evidence about those matters anyway.

Breach of contract

3 The only issue was whether the Respondent had been entitled to dismiss the Claimant without notice (i.e. whether the Claimant's conduct had amounted to a repudiatory breach of his contract).

The Law

4 Section 13 of the Equality Act 2010 ("EA2010") provides that a person (A) discriminates against another person (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others. Race is a protected characteristic. On a comparison of cases for the purposes of this section, there must be no material difference between the circumstances relating to each case (section 23). An employer must not discriminate against an employee by dismissing him or subjecting him to any other detriment (section 39(2) EA 2010).

5 If there are facts from which the Tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the Tribunal must hold that the contravention occurred unless A shows that A did not contravene the provision (section 136 EA 2010). Proceedings on a complaint under the Equality Act 2010 may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates or such other period as the Tribunal thinks just and equitable (section 123(1) EA 2010). Conduct extending over a period is to be treated as done at the end of the period (section 123(3)(a)).

6 We had regard to the guidance given in **Igen v Wong [2005] ICR 931** as to the application of the reversal of the burden of proof. The burden of proof does not shift to the employer simply on the claimant establishing a difference in status and a difference in treatment. Those bare facts only indicate the possibility of discrimination. They are not, without more, sufficient material from which a tribunal could conclude that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination – **Madarassy v Nomura International PLC [2007] IRLR 247**.

7 An employer is entitled to dismiss an employee without notice where the employee's conduct amounts to a repudiation of the fundamental terms of the contract and makes the continuance of the contract impossible. The implied term in a contract of employment not to act without reasonable or proper cause so as to damage the relationship of trust and confidence applies to an employee as much as to the employer (**British Heart Foundation v Roy EAT/0049/15**.) In **Mbubaegbu v Homerton University Hospital NHS Trust EAT/0218/17** Choudhury J said,

“It is quite possible for a series of acts demonstrating a pattern of conduct to be of sufficient seriousness to undermine the relationship of trust and confidence between employer and employee. That may be so even if the employer is unable to point to any particular act and identify that alone as amounting to gross misconduct... As stated in Neary, conduct amounting to gross misconduct is conduct such as to undermine the trust and confidence inherent in the relationship of employment. Such conduct could comprise a single or several acts over a period of time.”

The “last straw” principle applies as much to an employer deciding to accept an employee's overall conduct as repudiating the contract as it does to an employee in respect of his employer's behaviour. The conduct of the employee must be as a whole – **Ministry of Justice v Parry EAT/0068/12**.

8 Where there is a repudiatory breach by the employee, the employer must ensure that he does not delay unacceptably or act in some other way inconsistent with electing to terminate the contract. However, an employer faced with a potentially repudiatory action by the employee does not waive the alleged breach merely by taking the employee through the proper disciplinary procedure – **British Heart Foundation v Roy**.

The Evidence

9 The Claimant gave evidence in support of his claim. The following witnesses gave evidence on behalf of the Respondent – Amy Le Good (Associate Director of Contracts), Terence Noys (Deputy Chief Executive and Director of Finance), Udey Choudhary (Director of Financial Operations), Christine Caldwell (Director of Nursing), Sally Hodges (Chief Clinical Operating Officer) and Dinesh Sinha (Director of Quality). The documentary evidence before us comprised about 1260 pages. Having considered all the oral and documentary evidence, the Tribunal made the following findings of fact.

Findings of fact

10 The Respondent is a small specialist mental health trust.

11 The Claimant describes himself as black African.

12 In June 2018 the Respondent advertised a vacancy for a Senior Contracts and Performance Manager (Band 8A). The Respondent's Contracts team is responsible for managing and negotiating a number of large and complex contracts, ensuring that they are processed in line with the Respondent's contracts standards and processes and maintaining excellent relationships with internal and external stakeholders. One of the main duties of the advertised role was stated in the job description as,

“Communicating highly complex, sensitive information to different stakeholders that requires utilising highest level of interpersonal and professional skills.”

13 The Claimant applied for the role. He was interviewed on 12 July by Amy Le Good (Associate Director of Contracts) and Pia Pedersen (Senior Contracts and Performance Manager). Ms Le Good was impressed with the Claimant and decided to offer him the role because she thought that he was the best candidate.

14 The Claimant commenced employment on 6 August 2018. At that time the other members of the Contracts team, in addition to Ms Pedersen, were Ben Nemorin and Drew Davies (who were both Contracts and Performance Managers) and Jude Sackey (who was Contracts and Performance Officer). It was a racially diverse team. Ms Pedersen is Danish, Mr Davies is white and Messrs Sackey and Nemorin are black. They all reported to Ms Le Good who is white.

15 On starting employment the Claimant had the Trust induction. Ms Le Good ensured that the Claimant was trained in all the systems and processes that her team used. That training was not documented.

16 Ms Le Good did not conduct formal 1-1s with her direct reports but regularly had informal discussions with them about their work. They all worked together in a small office.

17 Ms Le Good was on medical leave from 1 October 2018 to 8 January 2019 in order to have knee surgery. In the short period that she worked with the Claimant before she went on leave she had some concerns about how he worked within the team. He was very conscious of hierarchy and made comments about certain tasks being the work of more junior staff (i.e. that he should not be doing them), he made negative comments about how the Contracts teams worked to other teams in the Trust and expressed dissatisfaction that no one in the team, including Ms Le Good, had legal training and was critical of the set way in which Ms Le Good asked him to send emails.

18 Ms Le Good asked Ms Pedersen to deputise for her and to manage the team in her absence. Although she and the Claimant were at the same level, the Claimant was still very new to the role. The Claimant was not happy with that decision. As far as the work was concerned it was agreed that the Claimant would lead on DET (Education and Training) and Ms Pedersen would lead on Clinical.

19 Shortly after Ms Le Good went on leave Ms Pedersen contacted her and said that the Claimant had accused Drew Davies of being racist simply on the basis that he was from the North. Ms Le Good asked her to contact Terry Noys, who was her line manager, to seek his advice on how to deal with it. She did and Mr Noys arranged a meeting on 16 October between himself, the Claimant, Mr Davies and Ms Pedersen. At the meeting the Claimant accepted that he had made the comment on the basis that “everybody who came from north of Watford was racist”. Mr Drew took exception to being called a racist. After some discussion, Mr Noys asked the Claimant whether he would apologise to Mr Davies. The Claimant apologised and Mr Davies accepted his apology. They agreed to put matter behind them and to work professionally.

20 Around 10 December 2018 the Claimant sent emails to the members of the team about a table that he had prepared to record information about the contracts on which they were working. There was a discussion between the Claimant and Mr Davies (copied to all the others) about the circumstances in which Respondent was required to send out Data Processing forms and agreements and how this should be recorded on the Claimant’s table. Mr Davies offered to have a telephone conversation about the issue. The Claimant responded to the team by saying,

“Many thanks, though it was self-explanatory. Will suggest you just follow my instructions... Don’t worry, we’ll finally get there.”

The team complained to Ms Pedersen and Mr Noys about the tone of the Claimant’s emails.

21 On 11 December Ms Le Good spoke to the Claimant over the telephone about the emails. As the Claimant was talking about the other members of the team, Ms Le Good assumed that he was alone in the office and the others had gone to the Christmas lunch which she knew that the Claimant was not attending. He challenged her and the way she managed the team. He said that she needed “a reality check” and that junior members of the team had too much autonomy and scope to deliver their own work without going through the hierarchy in the team. He was critical of Mr Davies and his work and suggested that he did not understand the issue regarding the application of the General Data Protection Rules and said *“this is what I have to put up with”*. Ms Le Good only realised that others were present when she heard him Mr Davies voicing his disagreement with what the Claimant was saying. She spoke to Mr Davies to try to defuse the situation. She later suggested that he move to a different office until she returned to work. He agreed to that. Later that evening the Claimant sent Ms Le Good the emails between him and the others on the issue. She responded,

“I don’t appreciate the tone here, and I didn’t appreciate you telling Ben, Jude and Drew to just follow your instructions when, with all the emails in front of me I can see why there were questions.”

22 At about the same time the Claimant was leading on the reporting of DET contracts to Health Education England (“HEE”). There were disagreements between some members of the DET and the Claimant on the categories of training on which they needed to report to HEE, and they were concerned that the Claimant had agreed matters with the HEE Commissioner which had not been agreed internally. The Claimant was also claiming that the dashboard for reporting to HEE had been

“signed off” by Brian Rock, the Director of DET. Mr Rock raised his concerns with Amy Le Good and, on the basis of what the Claimant said to her, she was initially supportive of him. On 13 December Mr Rock provided Ms Le Good with further information. He denied that he had “signed off” the dashboard template. He said that the Claimant had presented him with “a very draft template of the proposed dashboard” He had thought it “broadly helpful” but had “expressed concerns about the level of possible exposure on particular issues”. The following morning Ms Le Good told the Claimant not to send out any further emails on the topic until he had attended a meeting with the DET team. Later that day the Claimant sent Ms Le Good an email setting out his position. Ms Le Good responded by saying,

*“As discussed on the phone, from now on I would prefer our correspondence in writing as I do not want to be put in this position again. This email today is almost polar opposite of previous discussions with you. Three times this week you stated that Brian had signed off the dashboard and that it had been sent to David and he had approved it and that we were on track to deliver the dashboard for January...
I do not like these Chinese whispers so please ensure that everything is minuted and sent round after meetings.”*

23 Ms Le Good returned to work on 9 January 2019. Within her first week back she attended a meeting with Mr Rock and four women in DET to discuss the dashboard. After Mr Rock left the meeting, the women spoke to Ms Le Good about the Claimant’s conduct. They did not want to raise the matter formally but just wanted to air their concerns. They said that he spoke to them in a demeaning way and discredited and challenged their professional opinions. Ms Le Good said that she would speak to the Claimant about the dashboard and his communication and general approach to work.

24 The Claimant repeatedly made comments about Ms Le Good’s hair and how beautiful it looked. She asked him to stop making comments about her appearance. It made her feel uncomfortable.

25 Ms Le Good spoke to Mr Noys about the issues that had arisen with the Claimant while she had been on leave and since she had returned. He suggested that she seek advice from HR.

26 On 14 January Ms Le Good met with Karen Merchant, HR Business Partner. She said that the Claimant had been in post for less than six months and she had concerns about his performance, his communication style, his relationships with the team and his attitude towards her. Ms Merchant advised that they could manage his performance under the Respondent’s capability procedure or, given the Claimant’s short service, she could have a “protected conversation” with him in which she could tell him that they were going to commence the capability process and give him the option, if he so desired, to leave his employment with payment in lieu of three months’ notice. That was a reference to section 111A of the Employment Rights Act 1996 which provides that evidence of “pre-termination negotiations” is generally inadmissible in proceedings for unfair dismissal. If he did not accept the offer to leave, they could commence the capability process. Ms Le Good decided that she would have the protected conversation.

27 On 17 January Ms Le Good asked the Claimant to attend a meeting with her and Ms Merchant. The Claimant, who had for some time been covertly recording conversations at work, covertly recorded this meeting. Ms Merchant said that the purpose of the meeting was to have a protected conversation and explained what that meant. She said that there were concerns about his performance and that they were contemplating starting the performance management procedure but they wanted to give him, if he wished to take it up, the option of resigning with three months' notice. The Claimant disputed that there were any concerns about his performance and wanted to engage in a debate about that. He was told that those would be addressed when the process commenced if he did not take the option to resign. He was told that the offer would be put in writing and he could seek advice on it.

28 The Claimant's evidence to the Tribunal was that Ms Le Good had asked him to resign and leave the Respondent immediately, and that when he had refused to do that she had said that she had asked him to do that because there were issues with his work. He also said that she had gone on to say that he wrote in "high level English" which made it clear to him that he was "*dealing with racism, a stereotype that a black man should not be in certain way, appear smart, knowledgeable and able to relate at very senior level.*" It was clear from the Claimant's covert recording that that was not how the conversation had gone. It was the Claimant who said that he used "*high level English*", and not Ms Le Good.

29 Following the meeting Ms Le Good wrote to the Claimant setting out what had been discussed at the meeting and gave the Claimant until 28 January to decide whether he wished to take the option of resigning before they started the performance management process.

30 On 23 January it was the Claimant's birthday. Ms Le Good always presented to the members of her team a birthday card and a gift on their birthdays. On 23 January she presented the Claimant with a card and a gift in front of the team. He asked her whether he could hug her to thank her. She made it clear to him that she did not want him to do that. The Claimant's evidence was that he had asked her whether he could hug her and that she had not said that he could. He nevertheless hugged her which caused her distress. She was visibly upset when she gave evidence to the Tribunal about it. She told Ms Merchant about it.

31 The Claimant did not respond to Ms Le Good's letter offering him the option to resign. On 30 January she invited the Claimant to a meeting under the Respondent's Capability Procedure on 8 February 2019. He was advised of his right to be accompanied. Attached to it was a Performance Improvement Plan which would end on 21 March 2019. The areas on which improvement was required were verbal and written communications (in particular, the need to communicate in a way that would be understood by the recipients who were not contract experts), accepting decisions made within the team and the wider service, respecting boundaries and others' opinions, following instructions and working in a timely manner.

32 On 6 February the Claimant responded that he would not be attending the meeting and gave his reasons which, in essence, were that he did not consider that there were any issues with his performance. He said that the Chief Executive had had approached him and had been very complimentary about his work and Mr Davies had said that he was very knowledgeable and an asset to the team. Ms Le

Good sought advice from Ms Merchant and responded that it was within her remit to start a discussion about his capability to fulfil his role and asked him to reconsider his decision not to attend the meeting. The Claimant sent a lengthy email in response headed "confidential" in which he made it clear that he would not attend the hearing.

33 The Claimant was at work on 8 February but did not attend the meeting under the Capability Procedure. The meeting was rescheduled to 19 February at 1 p.m. The Claimant did not attend and did not contact Ms Le Good to say that he would not attend. Ms Le Good and Ms Merchant waited 20 minutes for him to attend. At 1.54 p.m. he sent an email to Ms Le Good, which was copied to Craig de Souza, Director of HR. He said,

"I met with Craig yesterday and prior to this meeting, I had asked for an extension of at least 4 weeks and would appreciate your understanding. Craig is fully aware of the reasons behind this.

Nevertheless, and as mentioned to Craig, I have sought/seeking advice in this regard and had always deposited my willingness to improve myself, under less trauma."

Mr de Souza sent the Claimant an email (copied to Ms Le Good) that he was disappointed to read that. He said that he had explained to the Claimant that he could not interfere in the capability management process and had encouraged him to attend the meeting or to get in touch with Ms Le Good directly about it.

34 On 12 February 2019 Brian Rock, Director of Education and Training, wrote to Ms Le Good to express his "*significant concerns about the lack of progress on the reporting to HEE on the National Training Contract and the many issues that have developed since Femi took leadership of this responsibility for the contracts team.*" He said that he believed that the Claimant had not fully grasped the complexities of the contract and had been alarmed by the Claimant thinking that he had signed off his dashboard proposal when he had not done so. He talked of the relationship between the DET team and the Claimant. He said that there had been a sense of bewilderment about the approach the Claimant was taking and about his understanding and ability to communicate specific requirements. The Claimant often reverted to "contract-speak" using concepts and principles to make his point in a way that was seen as creating a smoke-screen and was at odds with the "real nuts and bolts of the situation."

35 Ms Le Good had suspected for a while that the Claimant was recording conversations in the office. In February 2019 Ms Merchant in HR confirmed to her that the Claimant had been covertly recording meetings at work.

36 Ms Le Good spoke to Terry Noys about the Claimant's failure to engage in the Capability process and the issues that had arisen and her attempts to resolve them informally. Mr Noys consulted with HR and said that he wished to commission a disciplinary investigation into the Claimant's conduct. Mr Noys drafted the allegations that he wanted investigated. On 20 March 2019 HR appointed Robert Hardy, Senior Programme Lead, to conduct the investigation. He investigated the following allegations against the Claimant:

- a. On multiple occasions he had failed to follow reasonable direction from his line manager;
- b. He had failed to attend two formal capability meetings and had failed to provide reasonable explanation for his non-attendance;
- c. He had failed to develop an analytical tool complying with the Contract Department's protocol for checks and balances;
- d. He had engaged with HEE about an analytical tool without prior approval to do so from the Director of DET;
- e. He had covertly recorded on numerous occasions the conversation of staff without their knowledge or permission;
- f. He had accused another member of staff of being racist without just cause or reason, and
- g. His behaviour towards other Trust staff had been inappropriate and unprofessional and could be considered to be bullying or harassment.

37 Mr Hardy conducted his investigation between 20 March and 31 May 2019. He interviewed Ms Le Good, Amy Pedersen, Brian Rock, Drew Davies, Karen Merchant, Beverly Nicholson and the Claimant. The Claimant was accompanied by his trade union representative. Notes were taken of the interviews and the interviewees were given an opportunity to amend their notes. Mr Hardy considered a large number of documents.

38 Mr Hardy produced his investigation report on 31 May 2019. The report with all its appendices comprised over 400 pages. His conclusions on the allegations were as follows:

- a. There had been a number of examples of the Claimant either not following specific directions from Ms Le Good and a general feeling that he was not responding appropriately to her requests. However, he did not feel that there was evidence to substantiate that allegation because there had been no formal induction process when the Claimant started in post and there had not been regular line management meetings between Ms Le Good and her team.
- b. The Claimant had admitted not attending the two formal capability meetings but claimed that he had provided reasonable explanation for his non-attendance. There was evidence to substantiate this allegation.
- c. It was clear that Mr Rock and others in DET had had significant concerns over the development of this tool, but he felt that there was no evidence to substantiate the allegation because there did not appear to be a formal protocol for checks and balances within the contracts team.
- d. It was clear that there were significant concerns that the Claimant was working in isolation and agreeing details of the tool with HEE without sufficient reference and approval from Mr Rock and Ms Le Good. There was no evidence to support the Claimant's assertion that he had agreement to continue the conversations with HEE and develop the tool. There was evidence to substantiate the allegation.
- e. The Claimant had admitted this allegation and had said that he had done so in order to be able to defend himself due to hostile treatment from Ms Le Good and the other members of the team. There was evidence to substantiate this allegation.
- f. The Claimant had admitted that he had made a statement that suggested that Mr Davies was a racist and the statement had deeply upset Mr Davies. There was evidence to substantiate this allegation.

- g. The Claimant's behaviour and attitude had been difficult – there was evidence that he had adopted an extremely hierarchical approach, had been unwilling to listen to female colleagues, was over reliant on technical language, sometimes had an arrogant demeanour and hugged Ms Le Good against her will which had caused her distress. However, with the exception of the last one, Mr Hardy felt that none of the other matters could be construed as “definitively inappropriate and unprofessional” behaviour. Although he accepted that the Claimant's behaviour had “a negative impact on the team as a whole”, he did not consider that there was evidence to substantiate this allegation.

39 While the investigation was continuing the team, with the exception of Mr Davies, continued to work in the same office. There was considerable tension in the office and various members of staff, including Ms Le Good, felt uncomfortable and stressed by the Claimant's behaviour. Others noticed that he undermined her. The Claimant tried to involve Mr Sackey in his disagreements with Ms Le Good. Mr Sackey suffered from anxiety and the Claimant's conduct exacerbated his anxiety. He raised it with his colleagues and Ms Le Good, and it was agreed that he could temporarily work elsewhere in the days when the Claimant was in the office. They all had a discussion about it and they decided that they would go to see the Chief Executive to make a formal complaint about the Claimant's behaviour.

40 On 12 June 2019 Ms Le Good, Ms Pedersen, and Messrs Davies, Nemorin and Sackey met with the Chief Executive, Paul Jenkins, to complain about the Claimant. The Chief Executive discussed the matter with Mr Noys and Mr Noys commissioned a second investigation under the Respondent's Disciplinary policy to investigate whether the Claimant had bullied and harassed the members of the Contracts team. HR asked Rachel Surtees, Director of Strategy, to conduct the investigation.

41 Following the first investigation, the Claimant was initially invited to a disciplinary hearing on 27 June 2019. That was postponed due to the non-availability of his trade union representative. It took place on 4 July 2019 and was conducted by Udey Chowdhury, Assistant Director of Finance. The Claimant was accompanied by his trade union representative.

42 On 11 July 2019 Mr Chowdhury sent the Claimant his decision in writing. He found that five of the seven allegations had been proven. They were the following – the Claimant had on multiple occasions failed to follow reasonable direction from his line manager, he had failed to attend two formal capability meetings and failed to provide a reasonable explanation for his non-attendance, he had covertly recorded on numerous occasions conversations of staff without their knowledge or permission, he had accused a junior member of his team of being a racist because he was from the North without just cause and reason and that his behaviour had been inappropriate and unprofessional and could be considered to be bullying and harassment. The behaviour referred to in the last allegation was that he had hugged Ms Le Good when she had made it clear that she did not want him to and that he had made comments to Mr Davies about his weight, his wife, his seniority and the implied menial value of invoicing. The sanction that he imposed was one of a final written warning that would remain on the Claimant's file for a period of 12 months. He advised the Claimant of his right to appeal. The Claimant appealed on 8 August 2019.

43 In the course of her investigation Ms Surtees interviewed all the members of the Claimant's team and the Claimant. In her interview Ms Pedersen said the following – there was an incident when the Claimant was coming down with a cold and she had said that she did not want to catch it and he had come and stood over her repeatedly saying “shall I kiss you?” She said that it had made her feel uncomfortable. When Ms Le Good raised an issue with him he would stand very close to her boxing her in, he had repeatedly commented on Ms Le Good's hair which had made everyone feel uncomfortable, he treated people who were junior to him in a condescending way and picked on Mr Davies and asked him to do little jobs which he could have done himself, he criticised DET and used derogatory language to describe the staff, he was on a mission to undermine Ms Le Good and her way of working, his treatment of Ms Le Good and Mr Davies had impacted them all, in particular Ms Sackey. Mr Sackey said that the Claimant tried to get him involved in the disagreements that he had with Ms Le Good and that he had not wanted to get involved. He did not trust the Claimant and did not want to be around him, the Claimant undermined Ms Le Good a lot and the way he spoke to her made him feel uncomfortable, before the Claimant came everyone used to communicate freely, now they kept things to themselves, he felt manipulated by the Claimant and it had gotten to the stage where either the Claimant left or he would leave as he was stressed by it. Mr Nemorin said that Ms Le Good and Mr Davies had been bullied and harassed by the Claimant and that Mr Sackey had been unhappy with what was happening in the office and that it had impacted upon his health. He said that on the day they had gone to see the Chief Executive the Claimant had asked him four or five times where they had been and had stood in the doorway when Mr Nemorin got up to leave. It had made him uncomfortable. Mr Davies said that the Claimant referred to him as the office junior and said things like “I think you're confused” or “do as I say”, the Claimant made personal comments about his weight and his partner, he made negative comments about the Respondent to external parties, he had spoken negatively about Ms Davies on the telephone in front of the whole team, he had felt bullied and harassed by the Claimant.

44 Ms Surtees produced her investigation report on 22 August 2019. She broke down the various allegations made by the Claimant's team into 18 separate allegations and looked at each one of them. She decided whether on the basis of the evidence before her she upheld, partially upheld or did not uphold each of the allegations. The role of the investigating manager is to determine whether there is evidence to substantiate an allegation and whether the matter should proceed to a disciplinary hearing. It is not to decide whether the allegations are established. “Upholding” allegations is strange language for an investigating manager to use. Ms Surtees upheld 7 allegations, partially upheld 4 allegations and did not uphold 7 allegations. She concluded that there was a case to answer in respect of 5 of the allegations which she had upheld. These were that the Claimant has verbally harassed Ms Le Good by repeatedly commenting on her hair, he had set up Mr Davies to fail by falsely telling Ms Le Good that S Marshall had made a complaint about Mr Davies, on 11 December the Claimant was excessively critical of Mr Davies during a telephone conversation with Ms Le Good, he had undermined Ms Pedersen's role as acting manager of the team during Ms Le Good's absence and that he had physically intimidated her by asking her whether he should give her a kiss.

45 In respect of the further two allegations that Ms Surtees had upheld, the four that she had partially upheld and one that she had not upheld she recommended that

they be addressed through appropriate management oversight and review of the Claimant's performance and action for a period of 12 months. These were that the Claimant had persistently manipulated Mr Sackey, had sent Ms Le Good inappropriate messages on WhatsApp, had physically intimidated Mr Davies by deliberately blocking a doorway preventing him from entering the office, caused Ms Pedersen and Mr Nemorin stress as a result of working in a toxic environment created by him and had physically intimidated Mr Nemorin by standing in a doorway and blocking his way. Ms Surtees said in her report, "*It is clear to me that there has been a fundamental break down in trust between OO [the Claimant] and all other members of the Contracts team.*"

46 On 16 September 2019 the Respondent invited the Claimant to a disciplinary hearing on 1 October 2019 to answer the five allegations that Ms Surtees had recommended should proceed to a disciplinary hearing. He was advised of his right to be accompanied and was warned that it might lead to disciplinary action, including dismissal.

47 The Claimant's appeal against the first disciplinary sanction was heard on 19 September 2019 by Dr Caldwell, Director of Nursing. She sent the Claimant her outcome in a letter dated 26 September 2019. It is a detailed letter in which she set out her conclusions and the reasons for those conclusions. She concluded that the matter had been adequately and thoroughly investigated and the Respondent's processes had been correctly and fairly implemented. She considered each of the allegations and explained why she believed that Mr Chowdhary's conclusions that they had been substantiated were fair. In respect of the allegation of accusing a member of the team of being racist without just cause or reason, she accepted that it had been substantiated but felt that it should be left out of the reckoning as it had been already dealt with informally by Mr Noys. Hence, she left it out when she considered whether the sanction imposed by Mr Chowdhary had been fair. She concluded that the sanction had been fair and proportionate as Mr Chowdhary might have considered the sanction of dismissal. The appeal was dismissed.

48 The second disciplinary hearing took place on 2 October. It was heard by Sally Hodges, Chief Clinical Operating Officer. The Claimant was accompanied by his trade union representative.

49 Ms Hodges sent the Claimant her decision in a letter dated 7 October 2019. She concluded that all five allegations had been substantiated. She accepted that it had been a complex situation and that there had been other contributory factors. She made recommendations at the end to address the contributory factors and to improve relations in the team and the management of the team. Notwithstanding that, she was convinced that in relation to the five allegations the Claimant's conduct had been unacceptable and constituted bullying and harassment under the Respondent's procedures. She also took into account that the Claimant had a live final warning on his file. She concluded that his conduct amounted to gross misconduct and warranted summary dismissal. The Claimant's employment was terminated with effect from 7 October 2019. The Claimant was advised of his right of appeal. Her recommendations to improve things included a review of the team structure and Ms Le Good attending management training and mentoring.

50 The Claimant appealed against his dismissal on 28 January 2020. The appeal was heard by Dinesh Sinha, Medical and Quality Director, and Dinesh Bhugra,

Deputy Chair and Non-Executive Director, on 2 March 2020. The appeal was dismissed in a letter dated 9 March 2020.

51 Towards the end of his oral evidence to the Tribunal the Claimant said that Mr Davies had likened him to “a primate” and later that he had called him a “monkey.” The Claimant was asked about this incident many times internally and never said that. The allegation for which he was disciplined was that he had accused Mr Davies of being racist without just cause or reason, and he never put forward the defence that he had good reason to accuse him of racism. It is inconceivable that if Mr Davies had referred to him in that way, the Claimant would not have raised it in the course of the disciplinary process. It did not appear in his claim form or his witness statement. We did not find that evidence to be credible.

Conclusions

Direct race discrimination

52 The burden is on the Claimant to prove facts from which we could conclude in the absence of an explanation that the Respondent directly discriminated against him by having the conversation with him on 17 January 2019, starting the capability procedure on 30 January 2021, invoking the disciplinary procedure, issuing a final written warning and dismissing him for gross misconduct. That means that he has to prove facts from which we could infer that in carrying out the above actions the Respondent on the grounds of race treated him less favourably than it treated or would have treated others in similar circumstances. The fact that he is black African and the Respondent took those actions is not in itself sufficient to establish race discrimination. There has to be some evidence from which we could infer that the Respondent took those actions because he is black African.

53 There was no such evidence before us. The Claimant’s case in essence was that the Respondent went through all these processes because it wanted to get rid of him because of race. All the evidence before us pointed in the other direction. Ms Le Good, who had the conversation with the Claimant on 17 January, started the capability process and made some of the complaints that led to the disciplinary action, was the person who interviewed the Claimant and selected him for the role because she thought he was the best candidate. It made no sense that, having recruited a black African into the role, Ms Le Good would try and get rid of him a few months later because he was black African. Ms Le Good managed a diverse team and none of them suggested that she had treated them less favourably because of race. None of them in the internal investigations said that she had treated the Claimant badly. On the contrary they said that he had bullied and undermined her. There was no evidence that anyone else in the team had behaved in the same way as the Claimant but had been treated more leniently by Ms Le Good. There was no evidence from which we could infer that anyone else who behaved in the same way as him would have been treated any differently by her.

54 Mr Noys commissioned the two disciplinary investigations. There was no evidence from which could infer that the Claimant’s race had played any part in those decisions. In fact, the first time a matter was drawn to Mr Noys’ attention, i.e. the complaint that the Claimant had accused Mr Davies of racism without just cause or reason, he had chosen to resolve it informally rather than start the disciplinary process. Four different people looked at the Claimant’s conduct in the course of two

disciplinary hearings and two disciplinary appeals. They all found that there was evidence to substantiate the allegations. There is no evidence that all four of them concluded as they did on the grounds of race. If the purpose of the whole exercise was to get rid of the Claimant because of race, Mr Chowdhary could have done so at the first disciplinary hearing. He could reasonably have concluded that the Claimant's conduct was serious enough to warrant dismissal.

55 We concluded that the Claimant had not established a prima facie case of direct race discrimination. Even if that were not the case, the Claimant's case would fail because the Respondent has provided ample evidence to show that it took the actions that it did because of the Claimant's conduct and that race had nothing to do with it. The Claimant did not follow the reasonable direction of his line manager and undermined her, he hugged her against her wishes, he was rude and disparaging about Mr Davies, his conduct exacerbated the anxiety suffered by Mr Sackey, he made Ms Pedersen uncomfortable by asking her whether he could kiss her, everyone in his small team had issues with his conduct, people outside his team had complained about him, he was not prepared to accept that there were any concerns about his performance, he did not attend the two capability meetings to which his manager invited him and he was covertly recording conversations in the office.

Breach of contract

56 It is clear from the evidence before us that between about October 2018 and June 2019 the Claimant covertly recorded conversations in the office, failed to follow the reasonable direction of his line manager (including to attend two formal capability meetings) and undermined her, subjected her to unwanted verbal and physical conduct that distressed her, made Ms Pedersen uncomfortable by asking her whether he should kiss her, accused Mr Davies of being a racist without just cause or reason, criticised Mr Davies over the telephone in front of him and their colleagues, made inappropriate personal comments about his weight and his family and treated him like an office junior, exacerbated Mr Sackey's anxiety that he wanted to leave if the Claimant remained and had made all the members of the team uncomfortable. It had resulted in two members of the team (Mr Davies and Mr Sackey) being moved to different locations to keep them away from the Claimant and in the whole team raising the Claimant's conduct with the Chief Executive. As a result of the Claimant's conduct the relationship between the Claimant and the Contracts team had irretrievably broken down. We concluded that the Claimant's conduct as set out above amounted to a fundamental breach of the implied term of trust and confidence that made the continuation of the conduct impossible. It was a repudiatory breach of his contract and the Respondent was entitled to dismiss him without notice. The Respondent had not waived the breach by taking the Claimant through the disciplinary process between March and October 2019.

Employment Judge - Grewal

Date: 28/07/2021

JUDGMENT & REASONS SENT TO THE PARTIES ON

28th July 2021.

FOR THE TRIBUNAL OFFICE