



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4113697/2019

Held via Cloud Video Platform (CVP) on 13 & 14 September 2021

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**Employment Judge M Sangster
Tribunal Member E Coyle
Tribunal Member J McCaig**

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Ms S Okeze

**Claimant
Represented by
Ms L Campbell,
Solicitor**

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Cygnnet Health Care Limited

**Respondent
Represented by
Mr S Hughes,
Advocate
Instructed by
Mr M Creamore,
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The unanimous judgment of the Tribunal is that the claimant was directly discriminated against because of her race. The respondent is liable for this and is ordered to pay the claimant the sum of Three Thousand Pounds (**£3,000.00**), plus interest of Five Hundred and Nine Pounds and Fifty Nine Pence (**£509.59**) by way of compensation for injury to feelings.

The claimant's claim of unauthorised deductions from wages is dismissed following withdrawal.

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E.T. Z4 (WR)

REASONS**Introduction**

1. This was a final hearing which took place remotely. This was not objected to by the parties. The form of remote hearing was video. A face-to-face hearing was not held because it was not practicable due to the Covid-19 pandemic and all issues could be determined in a remote hearing.
2. The claimant presented claims of direct discrimination because of race, failure to make reasonable adjustments, unauthorised deductions from wages and wrongful dismissal.
3. The claim of disability discrimination was dismissed following a preliminary hearing in relation to disability status held on 8 December 2020 (originally scheduled for 4 May 2020, but postponed as a result of the Covid-19 pandemic).
4. The wrongful dismissal claim was dismissed, following withdrawal, on 10 March 2021.
5. Case management hearings took place on 14 February 2020, 4 May 2020 and 15 February 2021.
6. At the outset of the final hearing the claimant's representative indicated that the claimant was no longer pursuing a claim of unauthorised deductions from wages and this was withdrawn. She confirmed that the claimant was content for that claim to be dismissed.
7. The only claim remaining was accordingly that of direct discrimination. The respondent denied that they directly discriminated against the claimant.
8. The claimant gave evidence on her own behalf.
9. The respondent led evidence from 5 witnesses, as follows:
 - a. Carla Boyd (**CB**), formerly a senior staff nurse with the respondent;
 - b. Karen Scott (**KS**), the respondent's activities coordinator;
 - c. Gordon Webster (**GW**), formerly team leader with the respondent;
 - d. Zoe Beaney (**ZB**), the respondent's HR Manager; and

- e. Delip Thapa (**DT**), formerly a support worker with the respondent and currently a second-year nursing student.
10. The parties agreed a joint bundle of documents extending to 162 pages, in advance of the hearing. The respondent also submitted a response to the claimant's further and better particulars.

Issues to be Determined

11. At the case management preliminary hearing held on 15 February 2021, the claimant was ordered to identify each act relied upon as an act of direct discrimination and provide further particulars in relation to each. The claimant did so, setting out her claims under 8 separate headings. It was agreed at the start of the hearing that this document encompassed all of the claims being brought. The issues to be determined by the Tribunal were accordingly as follows:

Direct discrimination because of disability - s13 Equality Act 2010 (EqA)

12. Did the respondent subject the claimant to the following treatment?
- a. Katrina McArthur being dismissive of the claimant during meetings and Katrina McArthur and other senior members of staff not providing the claimant with guidance or assistance, which made the claimant feel isolated;
 - b. Failing to take action to address or remedy a conflict the claimant had with a colleague and making an inference this was due to cultural differences;
 - c. Karen Scott not providing the claimant with support or guidance in relation to concerns the claimant raised with her;
 - d. Katrina McArthur failing to investigate or take any action in relation to concerns raised by the claimant;
 - e. Dismissing the claimant;
 - f. Issuing the claimant with a warning for using her phone;
 - g. Taking no action in relation to the complaints the claimant submitted following the termination of her employment; and
 - h. Providing an incomplete and inaccurate reference in relation to the claimant.

13. If so, was that treatment '*less favourable treatment*', i.e. did the respondent treat the claimant less favourably than they treated, or would have treated others ("comparators") in not materially different circumstances?

14. If so, was this because the claimant is Nigerian?

5 **Findings in Fact**

15. The Tribunal found the following facts, relevant to the issues to be determined, to be admitted or proven.

16. The respondent operates Wallace Hospital in Dundee. Wallace Hospital is a 10-bed specialist high dependency complex care service, providing assessment and treatment for individuals with learning difficulties, with or without autistic spectrum disorder, as well as complex needs and behaviours. The service users generally require continuous observation, either on a 1:1 or a 2:1 basis.

17. The claimant is Nigerian. She commenced working with the respondent on 13 June 2019. She was engaged on a zero-hour contract, as a support worker. She was engaged to work at Wallace Hospital. Her duties involved providing care and support at the hospital. This included conducting observations on service users, either on a 1:1 basis herself, or a 2:1 basis, with a colleague.

18. A number of other support workers were engaged by the respondent, including DT. The support workers reported to senior support workers, who in turn reported to a team leader. The team leaders ultimately reported to the Hospital Manager, Katrina McArthur (**KM**).

19. The respondent also engaged nurses and an activities coordinator (KS) who worked alongside the support workers, but had no line management responsibility for them.

20. The respondent has an HR Team, consisting of around 6 HR professionals. The respondent has policies in place to deal with grievances and in relation to Equality, Diversity and Harassment.

21. Given that each service user generally required to be continuously observed on a 1:1 or 2:1 basis, the claimant frequently worked on shift

with numerous other support workers. In addition she often worked closely with other support workers, when a service user required to be observed by two support workers.

- 5 22. On the commencement of her employment, the claimant shadowed senior colleagues as part of her training. Guidance was provided to her in the course of doing so, as to how she should undertake the role. Those senior colleagues, as well as the nurses, such as CB, continued to provide assistance and guidance to the claimant throughout her employment.
- 10 23. The respondent does not permit staff to have or use mobile phones while working. Staff are reprimanded if they are caught doing so. Exceptions are made for this, with prior approval, for example if someone has a partner or relative who is very unwell.
- 15 24. The claimant was overpaid £1,296 gross at the end of her first month of employment. KM met with the claimant at the start of July 2019 to discuss this. The claimant raised that she would have difficulties paying her rent if this was recovered in one month. She stated that she was already in rent arrears and was worried that she was going to be thrown out of her flat. She showed KM the letters she had received from her landlord in relation to this. KM contacted the payroll team, while the claimant was in her office, 20 to discuss with them what could be done and whether the overpayment could be deducted over a longer period. It was agreed, as a result, that it would be recovered in equal instalments over the next two months. KM also spoke to the claimant's landlord, at the claimant's request, to discuss a payment plan for her rent arrears.
- 25 25. The claimant worked on the same shift as DT on numerous occasions and conducted 2:1 observations on service users with him on at least two occasions. DT noticed the claimant leaving observations on several occasions, without warning and without ensuring appropriate 'floating' cover was in place. He was very concerned about this, as this created a risk for the service user, as well as the staff on duty. He also saw her using 30 her mobile telephone while on duty, on one occasion to watch videos whilst observing a service user in their room, while they were sleeping. Whilst sympathetic to the claimant, given that he felt she was going

- through a difficult time, he felt that it was not appropriate for her to be upset, or to speak about issues such as self-harm, in front of service users. On a number of occasions, he tried to provide constructive feedback to the claimant in relation to these issues, but she did not respond well to this, stating that DT must have a personal vendetta against her to be raising such issues. She did not alter her behaviour following feedback from DT. DT reported his concerns to the senior support workers.
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26. CB received a number of complaints from service users in relation to the claimant. These related to her manner (verbally forceful, crying and speaking about inappropriate personal issues), as well as the claimant leaving observations and repeatedly using her phone while on duty.
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27. In/around July 2019, the claimant had a dispute with another support worker, in relation to whether a service user should go outside, notwithstanding the fact that they did not wish to do so. The claimant felt they should and the other support worker disagreed. In the course of the disagreement the other support worker stated to the claimant that she was perceived by her colleagues and some service users to be loud, annoying and abrupt.
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28. The claimant and her colleague discussed the disagreement with the senior support worker on duty. The senior support worker indicated that there was no point in taking the resident outside at that point, that it was clear there was a clash of personalities and, in future, they should try to work better together.
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29. Later that day, the claimant spoke to KS. The claimant was upset. She informed KS about the disagreement she had had with her colleague and they chatted about it. During that discussion the claimant queried whether she was treated in the way she was because she was the only black female employee. KS stated to the claimant in response that she didn't want her to think anyone was being racist. She was concerned that the claimant had raised this and was uncomfortable continuing the discussion with claimant without someone else present. She suggested that they go to the nurses' room. The claimant declined and the conversation came to an end with KS seeking to reassure the claimant. The claimant thanked
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KS for taking the time to chat things through with her. KS reported the terms of the conversation she had with the claimant to her line manager.

30. On 19 July 2019 it was reported to KM that the claimant had been using her phone while conducting observations, which had upset the service user she was observing at the time. KM asked GW to raise this with the claimant. He did so, reminding the claimant that this was prohibited. He recorded the conversation in a file note, which both he and the claimant signed.
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31. On 2 August 2019, the claimant attended work, but was not feeling well. The shift was due to last from 8am to 8pm. The hospital was understaffed that day, as someone else was absent due to illness. At around 9am she stated to the nurse on duty, CB, that she was not feeling well and may not be able to work the full day or the following day. CB highlighted to the claimant that she would require to speak to the manager if that was the case. The claimant went to see KM at around 11am. She stated that she was feeling unwell. Following discussion however she agreed that, as they were understaffed that day, she would continue with her shift. KM raised with the claimant that she had heard that the claimant had been stating that her colleagues were racist. The claimant denied that she had used that word and asked who had said that she had. She asked why KM was accusing her of that, rather than making enquiries of her. KM stated that she had heard this from several members of staff and she believed what they said, as they were like family. She stated that there was no evidence that staff were being racist.
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32. CB spoke to the claimant at about 4pm that afternoon. She informed the claimant that KM would like to see her in her office and that CB would cover her observation duties, while she went. The claimant went to KM's office. GW was also in the office, working at his desk.
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33. KM stated to the claimant that she thought it may be helpful for the claimant to transfer to nightshift for a while. She stated that it seemed that the claimant was struggling with the demands of day shift and not enjoying it. She stated that she had received complaints from service users and staff regarding the way the claimant spoke to them, as well as complaints

from numerous sources that the claimant had been using her phone repeatedly, crying in front of service users and leaving observations without ensuring cover. She indicated that the demands were less on night shift, as the majority of service users were sleeping, so this would allow her time to settle into the team. The claimant became defensive at the concerns being raised with her and refused to take on board what was being said to her. She expressed a strong reluctance to move to night shifts. The meeting became heated, with raised voices on both sides. KM took the view as a result, given the concerns raised throughout the claimant's probationary period and her behaviour during the meeting while KM was trying to provide support to the claimant, that her engagement should be terminated. KM asked GW to escort the claimant out of the building, which he did.

34. The claimant's employment terminated on 2 August 2019.
35. The respondent wrote to the claimant that day, confirming that her employment had been subject to a probationary period and that a number concerns had been raised in relation to her performance in her role, which had been discussed during the meeting on 2 August 2019. The letter confirmed that her employment was terminated for the following reasons:
- a. Complaints [from] Advocacy, Staff and Service Users;
 - b. Refusal to engage with the Manager around support;
 - c. Leaving service users observations; and
 - d. Constant use of [her] mobile phone while on duty.
36. The claimant did not receive the initial letter. It was resent to her and received by her on 23 August 2019.
37. On 5 August 2019, the claimant sent a lengthy email to the respondent's HR team raising complaints about her dismissal and treatment in the workplace on 2 August 2019. She also stated that she did not feel the team was inclusive or diverse and there was racial tension and bias towards her, the only Black African employee at the hospital, from her work colleague and manager.

38. The respondent conducted an investigation into the allegations raised by the claimant. This was conducted by an independent Service Manager, Susanna Gormley (**SG**). She interviewed the claimant, KM, KS and a further individual who worked for Dundee Independent Advocacy Service and who had highlighted complaints in relation to the claimant. SG investigated the following allegations:
- a. Unfair failing of the claimant's probationary period;
 - b. Racially motivated discrimination against the claimant;
 - c. Disability discrimination against the claimant; and
 - d. A culture of poor practice within Wallace Hospital.
39. SG prepared a detailed investigation report, setting out her findings. She concluded that there was no evidence to support any of the allegations, but made a number of recommendations, including that the respondent's supervision/probationary period guidance be reviewed, to ensure a consistent approach to discussing areas of concern with staff members.
40. The claimant was informed that the complaints she raised were not upheld, but was not provided with any further detail.
41. The claimant applied for a number of roles following the termination of her employment. She was offered the role Relief Support Worker with Sense Scotland on 13 August 2019, subject to receipt of satisfactory references. They requested a reference from the respondent. This was provided by KM. As a result of the reference provided by KM, Sense Scotland telephoned the claimant to say that they had been informed by KM that the claimant was the subject of an ongoing investigation and they should not employ her. Sense Scotland then wrote to the claimant on 29 August 2019, formally withdrawing their offer of employment. They stated *'Unfortunately, the reference received from your most recent employer was unsatisfactory. Furthermore, we feel that you have not been open and honest about the current investigation being conducted by your employer.'*
42. The claimant was very upset about this. She contacted the respondent's HR team. They confirmed to the claimant that no investigation was being

conducted in relation to her, rather the investigation was in relation to KM's conduct. They confirmed that that information could be passed to Sense Scotland, but Sense Scotland declined to reinstate the claimant's offer of employment.

5 43. Since the termination of her employment, the claimant has been in receipt of a student bursary.

44. The claimant started alternative work with Hermes on 1 July 2021. She is contracted to work 20 hours per week, plus overtime. She is paid £10 per hour. Her take home pay ranges from £700 to over £1,000, if she works
10 overtime, which she regularly does.

Claimant's submissions

45. In summary, Ms Campbell, for the claimant, submitted that:

15 a. If there are facts upon which a Tribunal could conclude that the claimant had been discriminated against then the Tribunal must hold that this was the case.

b. Any form of discrimination is rarely overt.

20 c. Reasonable inferences can be drawn of less favourable treatment in comparison with British colleagues. While something more than a protected characteristic and a difference in treatment is required, not a great deal more is required.

25 d. The claimant has proved facts from which the Tribunal could conclude that the claimant has been directly discriminated against because of her race. The burden of proof has accordingly shifted to the respondent. They have not demonstrated that they did not discriminate against the claimant.

e. The claimant seeks compensation for injury to feelings. Ms Campbell was unclear on whether the claimant also sought compensation for financial losses and sought, in her submissions, to reserve the claimant's position in relation to this.

Respondent's submissions

46. In summary, Mr Hughes, for the respondent, submitted as follows:

- a. The respondent's evidence should be preferred over that of the claimant.
- 5 b. No less favourable treatment has been established.
- c. The reasons for the claimant's dismissal are supported by the evidence. Any employee would have been dismissed in these circumstances.
- 10 d. Any award should be in the lower **Vento** band. There is no evidence which would support an award of compensation for financial losses.

Relevant Law

Direct Discrimination

47. Section 13(1) EqA provides that:

15 *'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.'*

48. The basic question in a direct discrimination case is: what are the grounds or reasons for treatment complained of? In **Amnesty International v Ahmed** [2009] IRLR 884 the EAT recognised two
20 different approaches from two House of Lords authorities - (i) in **James v Eastleigh Borough Council** [1990] IRLR 288 and (ii) in **Nagarajan v London Regional Transport** [1999] IRLR 572. In some cases, such as **James**, the grounds or reason for the treatment complained of is inherent in the act itself. In other cases, such as **Nagarajan**, the act complained
25 of is not inherently discriminatory but is rendered so by discriminatory motivation, being the mental processes (whether conscious or unconscious) which led the alleged discriminator to act in the way that he or she did.

49. It is unusual to have direct evidence as to the reason for the treatment
30 (discrimination may not be intentional and may be the product of

unconscious bias or discriminatory assumptions) (**Nagarajan**). The Tribunal should draw appropriate inferences as to the reason for the treatment from the primary facts with the assistance, where necessary, of the burden of proof provisions, as explained in the Court of Appeal case of **Anya v University of Oxford** [2001] IRLR 377. “Most cases turn on the accumulation of multiple findings of primary fact, from which the court or tribunal is invited to draw an inference of a discriminatory explanation of those facts” (**Madarassy v Nomura International Plc** [2007] IRLR 246).

50. In **Shamoon v Chief Constable of the RUC** [2003] IRLR 285, a House of Lords authority, Lord Nichols said that it was not always necessary to adopt a sequential approach to the questions of whether the claimant had been treated less favourably than the comparator and, if so, why. Instead, they may wish to concentrate initially on why the claimant was treated as they were, leaving the less favourable treatment issue until after they have decided on the reason why the claimant was treated as they were. What was the employer’s conscious or subconscious reason for the treatment? Was it because of a protected characteristic, or was it for some other reason?

51. The **EHRC: Code of Practice on Employment (2011)** states, at paragraph 3.5 that ‘*The worker does not have to experience actual disadvantage (economic or otherwise) for the treatment to be less favourable. It is enough that the worker can reasonably say that they would have preferred not to have be treated differently from the way the employer treated – or would have treated – another person.*’

52. For direct discrimination to occur, the relevant protected characteristic needs to be a cause of the less favourable treatment ‘*but does not need to be the only or even the main cause*’ (paragraph 3.11, **EHRC: Code of Practice on Employment (2011)**). The protected characteristic does however require to have a ‘*significant influence on the outcome*’ (**Nagarajan**).

Burden of proof

53. Section 136 EqA provides:

'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. But this provision does not apply if A shows that A did not contravene the provision.'

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54. There is accordingly a two-stage process in applying the burden of proof provisions in discrimination cases, explained in the authorities of ***Igen v Wong*** [2005] IRLR 258, and ***Madarassy***, both from the Court of Appeal. The claimant must first establish a first base or prima facie case of discrimination or harassment by reference to the facts made out. If the claimant does so, the burden of proof shifts to the respondent at the second stage to prove that they did not commit those unlawful acts. If the second stage is reached and the respondent's explanation is inadequate, it is necessary for the Tribunal to conclude that the complaint should be upheld. If the explanation is adequate, that conclusion is not reached.

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55. In ***Madarassy***, it was held that the burden of proof does not shift to the employer simply by a claimant establishing that they have a protected characteristic and that there was a difference in treatment. Those facts only indicate the possibility of discrimination. They are not of themselves sufficient material on which the Tribunal could conclude that, on a balance of probabilities, the respondent had committed an unlawful act of discrimination. Something more is required, but that need not be a great deal (***Deman v Commission for Equality and Human Rights and ors*** 2010 EWCA Civ 1279, CA). The Tribunal has, at the first stage, no regard to evidence as to the respondent's explanation for its conduct, but the Tribunal must have regard to all other evidence relevant to the question of whether the alleged unlawful act occurred, it being immaterial whether the evidence is adduced by the claimant or the respondent, or whether it supports or contradicts the claimant's case, as explained in ***Laing v Manchester City Council*** [2006] IRLR 748, an EAT authority approved by the Court of Appeal in ***Madarassy***.

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Observations on Evidence

56. The claimant was emotional while giving evidence. While the Tribunal found that she gave evidence to the best of her ability, and that she believed what she was saying, it was clear that in some respects her evidence differed from the documentary evidence presented, which was prepared contemporaneously. This undermined her evidence in certain respects.
57. The Tribunal found that both CB and DT were entirely credible witnesses. Neither remained employed by the respondent both presented their evidence in a clear and straightforward manner. The Tribunal accepted the evidence of each of these individuals.
58. The Tribunal did not find GW to be particularly credible. For example he indicated that there were no raised voices in the meeting between the claimant and KM on 2 August 2019, but both the claimant and documents referencing KM's position indicated there were. In addition, he was not able to recall anything about the meeting on 2 August 2019, other than being asked to escort the claimant out of the building at the end. This is despite the fact that he stated during his evidence that he was there to observe the meeting.
59. KS gave evidence by reference to the documents and appeared to have limited recall without reference to them. CB appeared to have very limited involvement in relation to the issues the Tribunal required to determine.
60. The Tribunal did not hear evidence from KM or SG. While the Tribunal were referred to some documentary evidence in relation to their involvement, there were certain elements of the claim which were not covered in the evidence presented by the respondent, as a result of these individuals not giving evidence.

Discussion & Decision

61. The Tribunal considered each allegation of direct discrimination, considering whether the alleged treatment occurred, whether it amounted to less favourable treatment and if so, what the reason for that treatment

was: was it because of disability? The Tribunal reached the following findings in relation to each alleged act of direct discrimination.

5 a. **KM being dismissive of the claimant during meetings, and KM and other senior members of staff not providing the claimant with guidance or assistance, which made the claimant feel isolated.** The Tribunal firstly considered the claim that KM was dismissive of the claimant during meetings. The only example provided by the claimant of KM being dismissive of the claimant in
10 meetings (other than the meetings of 2 August 2019, which are addressed separately below) was in relation to KM not supporting the claimant in relation to the overpayment of wages. The claimant asserted that KM offered no support or effort to try and resolve the situation and did not try to help the claimant. The Tribunal found
15 that this was not the case and that KM had provided support to the claimant in relation to this, by speaking to payroll and arranging for the payment to be deducted in instalments, rather than one lump sum and also speaking to the claimant's landlord, at her request. The Tribunal accordingly did not accept that the conduct alleged
20 was established. As the alleged treatment was not established, it was not necessary to determine whether the treatment amounted to less favourable treatment because of race.

In relation to the claim that KM and other senior members of staff did not provide the claimant with guidance or assistance and she
25 felt isolated as a result, no evidence was led in support of the assertion that assistance and guidance was not provided to her. In her further particulars, the claimant asserted that she was treated differently than two of her colleagues, Charlie and Scott, who were both Caucasian and started at the same time as her. She asserted
30 in the further particulars that Charlie and Scott would have no difficulties obtaining help from KM and other senior members of staff, but the claimant would not receive this. No evidence was led as to any assistance or guidance provided to either Charlie or Scott. No evidence was led in relation to the claimant being treated
35 differently to either Charlie or Scott. No evidence was led in relation

to the claimant asking for assistance or guidance from KM or senior members of staff and it not being provided. The Tribunal accordingly did not accept that the conduct alleged was established. As the alleged treatment was not established, it was not necessary to determine whether the treatment amounted to less favourable treatment because of race.

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- b. **Failing to take action to address or remedy a conflict the claimant had with a colleague and making an inference this was due to cultural difference.** This claim related to the conduct of the senior support worker, to whom the dispute between the claimant and the other support worker was referred. In her further particulars, the claimant stated that further action would have been taken to address or remedy the conflict, rather than making an inference that this was due to cultural differences, had she been Caucasian. The Tribunal did not accept that the senior support worker made any reference to a 'clash of cultural personalities' at this meeting. The Tribunal noted that the claimant made no reference to this in the detailed complaint she raised with the respondent following the termination of her employment, nor was this referenced by the claimant in the meeting in relation to her complaint with SG. The Tribunal concluded that this undermined the claimant's position and that, if this had been stated by the senior support worker, the claimant would have mentioned it in either her complaint, or the meeting to discuss this, if not both. The Tribunal accordingly held that conduct alleged was not established. As the alleged treatment was not established, it was not necessary to determine whether the treatment amounted to less favourable treatment because of race.

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The Tribunal did not accept that no action was taken to address or remedy the conflict the claimant had with her colleague. When the disagreement was brought to her, the senior support worker made a decision as to the action to be taken in the circumstances (that the service user should not be taken outside at that point), and directed the claimant and her colleague to try to resolve their differences, so they could work together more effectively going

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forward. This was entirely appropriate in response to a minor disagreement between colleagues. The Tribunal accordingly did not find that the treatment alleged was established. Notwithstanding this conclusion, the Tribunal considered why the senior support worker responded in this way and whether race was a cause. The Tribunal concluded that the same action would have been taken if the claimant had been British/Caucasian. The claimant was not treated less favourably than a British/Caucasian employee would be treated in similar circumstances.

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c. **KS not providing the claimant with support or guidance in relation to concerns the claimant raised with her.** The claimant's position in her further particulars was that some action would have been taken if a Caucasian employee had raised serious concerns of this nature with KS. The Tribunal noted that KS was not the claimant's line manager and she had no line management responsibility for her. She was not her senior. Rather, she worked alongside the claimant in a different role, as the activities co-ordinator for the service users. The Tribunal did however hear evidence that, on a number of occasions including on this day, the claimant called KS 'Kat', suggesting that the claimant may have mistaken her for KM, who she only had limited contact with. The Tribunal found that, in the circumstances, KS provided as much support and guidance as was appropriate. She listened to the claimant's concerns and sought to sympathise and offer support. She reported the concerns raised with her to her line manager following the discussion with the claimant. The Tribunal concluded that, had a British/Caucasian support worker raised the same concerns with KS, she would have acted in exactly the same manner. The claimant was not treated less favourably than a British/Caucasian employee would be treated in similar circumstances.

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d. **KM failing to investigate or take any action in relation to concerns raised by the claimant.** The claimant stated in her further particulars that KM's actions, in:

- i. believing the claimant's colleagues;
- ii. not taking any action to investigate or discuss with the claimant whether she had stated that colleagues were racist; and
- 5 iii. failing to conduct any investigation in relation to the claimant's concerns

amounted to direct discrimination. The respondent did not lead any evidence in relation to what occurred at this meeting, from KM or anyone else. It was not put to the claimant that her recollection of
10 this meeting was incorrect or that the conversation did not occur. The Tribunal accordingly accepted the claimant's evidence and found that KM stated that she had been informed that the claimant had been stating that her colleagues were racist and believed that to be the case, as the individuals who informed her of this were like
15 family. She did not take any steps to consider what the claimant may have said and whether she had any genuine concerns which required to be considered or investigated. Instead she concluded, without conducting any investigation, that there was no evidence that staff were being racist.

20 The Tribunal found, on the balance of probabilities, that the claimant was treated less favourably. The respondent has well defined policies to address complaints of discrimination and takes complaints of this nature seriously. A hypothetical comparator, namely a British/Caucasian employee who raised allegations of
25 discriminatory treatment would not have been informed that they were not believed, or had their concerns dismissed, without investigation or at least discussion.

The Tribunal determined that there were sufficient facts, and inferences which it was appropriate to draw from those facts, upon
30 which the Tribunal could conclude, in the absence of an explanation from the respondent and on the balance of probabilities, that KM had directly discriminated against the claimant. The Tribunal took into account a number of factors in reaching this conclusion, including the following:

- The fact that KM undertook no investigation whatsoever prior to reaching the conclusions she did, including that there was no evidence that staff were being racist;
- 5 • The fact that the respondent has a large HR team, but they were not consulted or asked for assistance by KM;
- The fact that the claimant was not referred to the respondent's grievance procedure by KM, as would be normal for a manager to do on being informed that an employee has, or may have, complaints of a serious nature;
- 10 • The fact that KM had a duty under the respondent's Equality, Diversity and Harassment Policy to bring that policy to employee's attention, promote equality and diversity by their behaviour and manner and ensure that complaints under that policy are dealt with in a fair and consistent manner,
- 15 which she did not.

The Tribunal accordingly concluded that the burden of proof had shifted to the respondent to prove that they did not directly discriminate against the claimant because of race. KM did not give evidence and no explanation was provided for her actions. The Tribunal accordingly concluded that the respondent did not demonstrate that the treatment was in no sense whatsoever because of race. As the respondent has not discharged the burden of proof, it is necessary for the Tribunal to conclude that the complaint should be upheld.

- 25 e. **Dismissing the claimant.** The Tribunal was satisfied that the alleged treatment occurred: the claimant was indeed dismissed. The Tribunal was not however satisfied that this amounted to less favourable treatment. The Tribunal was satisfied that the reasons for the claimant's dismissal were as stated in the letter to her dated
- 30 2 August 2019. The Tribunal accepted that each of these issues arose during the claimant's short period of employment with the respondent. The Tribunal concluded that a hypothetical comparator, namely a British/Caucasian employee in their

probationary period who acted in this way and had the same complaints in relation to their conducts would have been treated in exactly the same way. They would also have been dismissed by the respondent. The reason for the claimant's dismissal was her conduct, not her race.

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- f. **Issuing the claimant with a warning for using her phone.** The claimant accepted that she had been using her phone. It was accepted that she was issued with a warning for doing so. The conduct in question was accordingly established. The Tribunal found that it was entirely appropriate for the claimant to be issued with a warning for doing using her phone, given the respondent's policy that staff should not do so. The claimant did not note any objection to the warning on the file note, prior to signing. In evidence to the Tribunal the claimant suggested that she was authorised by KM to use her mobile phone that day. That was not however stated in the complaint she issued shortly after the termination of her employment, or in the interview SG conducted with the claimant during the investigation of those complaints. Rather, at that time, the claimant stated that this was unfair as others used their phone also. This undermined the claimant's position that she had received authorisation from KM to use her phone. Had this been the case, the Tribunal concluded it would have been mentioned at the time the warning was given and in her grievance.

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In her further particulars, the claimant stated that she was treated differently to a Caucasian Scottish employee, who answered a call during shift and was not reprimanded. In evidence she clarified that the call received by that colleague was to inform him that his partner had passed away. The Tribunal concluded that the circumstances of that individual were materially different to that of the claimant. He was accordingly not an appropriate comparator.

The Tribunal heard and accepted evidence that employees were not permitted to use their mobile phones while on duty and were reprimanded if caught doing so, other than in exceptional circumstances. The Tribunal concluded that the claimant was not

treated less favourably than a hypothetical comparator, namely a British/Caucasian employee who was using their phone in similar circumstances, would be treated. They would also have been reprimanded for doing so by the respondent.

5 g. **Taking no action in relation to the complaints the claimant submitted following the termination of her employment.** The Tribunal found that the complaint was properly investigated by SG. The claimant was interviewed in the course of the investigation, so was aware that SG was conducting an investigation. Whilst the
10 claimant was not provided with a copy of the detailed investigation report, she was informed of the conclusion of the investigation, namely that her complaints were not upheld. The Tribunal accordingly did not accept that the conduct alleged was established. As the alleged treatment was not established, it was
15 not necessary to determine whether the treatment amounted to less favourable treatment because of race.

 h. **Providing an incomplete and inaccurate reference in relation to the claimant.** The Tribunal were not referred to the reference provided and no evidence was led that this was incomplete. That
20 element of the complaint was accordingly not established.

 The Tribunal did however find that the claimant was given an inaccurate reference, which stated that there was an ongoing investigation into the claimant's conduct, when this was not the case. No evidence was led by the respondent in relation to the
25 reference and the claimant was not cross examined on this point. The Tribunal concluded, on the balance of probabilities, that the claimant was treated less favourably in the provision of the reference. Accurate references are provided by the respondent, so an inaccurate reference would not have been provided in respect
30 of a hypothetical comparator, namely a British/Caucasian former employee of the respondent. The Tribunal determined that there were sufficient facts from which it could be inferred, in the absence of an explanation from the respondent and on the balance of probabilities, that KM had directly discriminated against the

claimant when providing an inaccurate reference for the claimant. The Tribunal took into account a number of factors in reaching this conclusion, including the following:

- 5 • The fact that the reference was entirely inaccurate, as no investigation was being conducted in relation to the claimant;
- The fact that the respondent has a large HR team, but they were apparently not consulted or asked for assistance by KM in relation to the wording for the reference;
- 10 • The fact that KM previously concluded that there was no evidence that staff were being racist, without undertaking any investigation whatsoever, and stated that she believed the claimant's colleagues over her, despite not discussing matters with the claimant at all, or conducting any investigation, contrary to the respondent's policies.

15 The Tribunal accordingly concluded that the burden of proof had shifted to the respondent to prove that they did not directly discriminate against the claimant because of race in the provision of an inaccurate reference in respect of the claimant. KM did not give evidence and no explanation was provided for her actions. The
20 Tribunal accordingly concluded that the respondent did not demonstrate that the treatment was in no sense whatsoever because of race. As the respondent has not discharged the burden of proof, it is necessary for the Tribunal to conclude that the complaint should be upheld.

25 **Calculation of Compensation**

62. No medical evidence was presented to the Tribunal in relation to injury to feelings. The claimant gave oral evidence in relation to this, stating simply that she was upset by KM's actions and the terms of the reference provided.
- 30 63. In the circumstances, and given the very limited evidence led in relation to this point, the Tribunal concluded that an award at the lower end of the

lower Vento band was appropriate, namely £3,000, plus interest from 15 August 2019 to the calculation date, at the prescribed rate of 8%.

- 5 64. The claimant did not lead evidence to establish any financial loss. No financial loss was reflected in the schedule of loss lodged and included in the joint bundle of productions. This simply made reference to an award for injury to feelings and stated that the claimant was in receipt of a student bursary and had been unsuccessful in her attempts to secure alternative employment. In these circumstances, the Tribunal declined to make any further award.

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Employment Judge : M Sangster

Date of Judgment : 27 September 2021

Date sent to parties : 28 September 2021

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