



EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT

V

RESPONDENT

Mr O Brown-Morgan

IKEA Ltd

Heard at: London South
Employment Tribunal

On: 17, 18, 19 and 20 August 2021

Before: Employment Judge Hyams-Parish

Members: Ms J Forecast and Ms P Barratt

Representation:

For the Claimant: In person

For the Respondent: Mr S Ellerby (Solicitor)

JUDGMENT

It is the **unanimous** Judgment of the Employment Tribunal that:

(a) The claims of direct discrimination (s.13 EQA) fail and are dismissed.

(b) The claims of harassment (s.26 EQA) fail and are dismissed.

REASONS

CLAIMS AND ISSUES

1. By a claim form presented to the Tribunal on 6 February 2019, the Claimant brings claims of direct race, sex, and age discrimination, together with race, sex and age related harassment claims. The claims related to

sex and age were added by way of amendment, the claim having originally been presented to the Employment Tribunal on the grounds of race only.

2. The issues in the case were agreed at a case management discussion on 14 February 2020. Those issues are as follows [sic]:

Time limits

- 2.1. Were all of the claims presented within the time limits set out in sections 123(1)(a)&(b) of the Equality Act 2010 ("EQA")?
- 2.1.1. If any of the allegations are out of time, do they nonetheless constitute part of a continuing act ending on a date which is in time?
- 2.1.2. If not, is it just and equitable to extend time?
- 2.2. It is accepted that the final act complained of (11 October 2018) was in time.

Direct discrimination

- 2.3. Did the Respondent treat the Claimant less favourably than it treated, or would have treated, others? The less favourable treatment relied on by the Claimant is as follows:
- 2.3.1. That on 21 August 2018, the Claimant was unreasonably escorted off the Respondent's premises by security for no good reason. This caused embarrassment and distress to the Claimant.
- 2.3.2. That from 8 September 2018 until 28 October 2018, the Claimant was unreasonably suspended from his employment based upon false allegations that he was aggressive.
- 2.4. The Claimant relies on a hypothetical comparator.
- 2.5. Was the alleged less favourable treatment because of race and/or age and/or sex?

Harassment

- 2.6. Did the Respondent engage in the following unwanted conduct?
- 2.6.1. Unreasonably escorting the Claimant off the premises by security on 21 August 2018.

- 2.6.2. Unreasonably suspending the Claimant on 8 September 2018.
 - 2.6.3. Hurtful and untrue allegations and stereotyped assumptions made in the statement of Michael Robinson, received on 22 September 2018, that the Claimant was agitated and erratic, and that he thought the Claimant was going to be violent and attack them.
 - 2.6.4. Hurtful and untrue allegations and stereotyped assumptions made in the statement of Stephanie Agyei-Tabi received on 22 September 2018, that the Claimant used abusive language and was agitated. That it confirmed her suspicions when Michael Robinson said that he thought the Claimant may attack them.
 - 2.6.5. Hurtful and untrue allegations and stereotyped assumptions made in the statement of Tracy Thoroughgood, received on 22 September 2018, that she had been told the Claimant was behaving aggressively and had something hidden in his shoe and that he was irate throughout the meeting.
- 2.7. Was the above conduct related to the Claimant's sex and/or race and/or age?
 - 2.8. Did the conduct have the *purpose* or (taking into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the *effect* of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?
3. On the first day of the hearing, Mr Ellerby also raised with the Tribunal an issue of jurisdiction, contending that the Claimant was in effect bringing a combined or "dual" protected characteristic discrimination claim pursuant to s.14 EQA, which was not yet in force. The Claimant appeared to be bringing his case, Mr Ellerby submitted, on the basis that he had suffered discrimination for being a "young, black, male"

THE HEARING

4. The morning of the first day was spent reading witness statements and relevant documents in the document bundle which extended to 238 pages.
5. During the hearing, the Tribunal heard evidence from the Claimant and the following witnesses on behalf of the Respondent:

- (a) Ms S Agyei-Tabi, Claimant's line manager.
 - (b) Ms T Thoroughgood, Security Manager.
 - (c) Mr M Robinson, Trade Union Representative, who attended the meeting on 21 August 2018.
 - (d) Mr N Folkes, Security Supervisor.
 - (e) Ms D Healey, Customer Relations Manager.
6. The Tribunal was also provided with a witness statement from Megan Murray-Gray, HR Representative. However, she was not able to attend as a witness because she had left the Respondent's employment. The Tribunal was therefore invited to give such weight to her evidence as was appropriate in the circumstances.
7. The Claimant started giving evidence on the afternoon of the first day of the hearing and continued in to the second day. The Respondent witnesses gave their evidence during the remainder of the second day and the morning of the third day.
8. The parties gave their closing submissions on the afternoon of the third day of the hearing. Mr Ellerby provided written submissions and did not wish to add to those by way of further oral submissions. The Claimant spoke personally about his case for approximately thirty minutes.
9. The Tribunal met in chambers to deliberate on the afternoon of the third day and the morning of the fourth. An oral decision with reasons was given on the afternoon of the fourth day.
10. These written reasons are provided at the request of the Claimant.

BACKGROUND FINDINGS OF FACT

11. The Tribunal decided all findings of fact on the balance of probabilities, having considered all of the evidence given by witnesses during the hearing, together with documents referred to by them. Only those findings of fact that were necessary for the Tribunal to determine the claims have been made. It has not been necessary to determine every fact in dispute where it is not relevant to the issues between the parties.
12. The Claimant has been employed by the Respondent as a sales co-worker from 4 April 2015 and remains in their employment as of the date of this hearing. He worked on Saturdays and Sundays only. At the time of the events leading to this claim, he was employed in the textiles department. His line manager from approximately January 2018 was Ms Agyei-Tabi.
13. In her witness statement Ms Agyei-Tabi described herself as a black African woman, aged 28. As at 21 August 2018, the Claimant was aged 27. Ms Agyei-Tabi said in her witness statement that she found the Claimant to be "*a strange gentleman*". She said that his demeanour was

generally quiet, but his body language and the way he looked at her tended to make her feel on edge and uncomfortable. She said she tried to avoid him around the workplace at times, instead asking Team Leaders in Textiles to keep an eye on him and feed back into her. When questioned about this, Ms Agyei-Tabi could not really provide clarity as to what it was precisely that made her feel this way about the Claimant, albeit the Tribunal accepted that the feelings were genuinely held. The Claimant confirmed in his evidence that he did not have any complaint about Ms Agyei-Tabi prior to 21 August 2018, so far as discrimination is concerned, and he did not suggest to Ms Agyei-Tabi in cross examination that her feelings about the Claimant, prior to 21 August 2018, were in any way influenced by his race, sex and/or age. The Tribunal therefore concluded that such feelings about the Claimant were not borne out of discriminatory attitudes.

14. Concerns about the Claimant's performance were first raised in 2017, under his previous line manager in another department, after the Claimant needed some time off to care for a family member and for bereavement leave. The Claimant felt that no allowances were made for his personal situation then, or after, he moved to Textiles, when Ms Agyei-Tabi became his line manager.
15. Under Ms Agyei-Tabi's line management, the performance process went from informal to formal, and on 20 February 2018, the Claimant attended a capability meeting. Further such meetings were held on 26 March 2018, 1 May 2018, and 8 July 2018. Following the July meeting, the Claimant was given a verbal warning. The Claimant did not accept all of the criticisms of the Respondent and indeed felt that the Respondent continued to move the goal posts, adding new areas for improvement when he believed he had improved in other areas. The Tribunal concluded that the Claimant presented a difficult and challenging situation for Ms Agyei-Tabi to manage because she had no experience of managing a formal capability process and the Claimant did not accept her opinions. She therefore was not at all in her comfort zone when dealing with the Claimant at his performance improvement meetings.
16. The Claimant was invited to attend a further performance improvement meeting on 21 August 2018. This meeting was attended by Ms Agyei-Tabi, who chaired the meeting, and she was assisted by Ms Murray-Gray as the representative from HR. Ms Murray-Gray spent most of this meeting with her eyes down taking notes. The Claimant was accompanied at the meeting by a colleague who he did not know, but who had acted in this role previously for others, Mr Robinson. The Claimant recorded this meeting using his phone but did not inform other attendees that he was doing so.
17. The meeting lasted approximately 23 minutes until it was brought to an end by Ms Agyei-Tabi. The Tribunal was invited to listen to the recording

of the meeting in order to get a sense of its tone and atmosphere. It did so but was mindful that it could not see what was happening.

18. The Tribunal was satisfied that the Claimant did not particularly want to be at the meeting. Nonetheless, the meeting was calm, and from the recording it appeared that everyone was courteous. The Tribunal accepted that as the Claimant was unhappy at being at another performance improvement meeting, talking about aspects of performance that Ms Agyei-Tabi insisted needed improvement, and which the Claimant disagreed with, that he was unhappy, even frustrated, and at times agitated. The Tribunal accepted that he showed this by rolling his eyes, as referred to in the recording. The Tribunal was not persuaded that the Claimant swore during the meeting, and neither could it hear any swearing having listened to the recording, albeit it is suggested such words were said "*under his breath*".
19. At some point in the meeting, Ms Agyei-Tabi saw the Claimant lean down, whilst staring at her, reaching down to his socks or shoes. Ms Agyei-Tabi said that she was unsure what the Claimant was doing and wondered whether he was attempting to tie his shoelaces, but she also said that she would expect someone doing that to look at their shoes. As he continued to stare at Ms Agyei-Tabi, she believed that he may be concealing a weapon.
20. At this point, Ms Agyei-Tabi abruptly called a halt to the meeting and the Claimant was sent to wait in another room. A number of witnesses in these proceedings, including Ms Agyei-Tabi herself, have given evidence to the fact that Ms Agyei-Tabi appeared physically scared. Ms Thoroughgood described her as "*physically shaken*". Mr Folkes, who the Tribunal found to be a particularly credible and reliable witness, said that she "*seemed shaken up and scared*".
21. During its deliberations, the Tribunal discussed at length Ms Agyei-Tabi's belief that the Claimant may have a weapon. The Tribunal concluded that whilst Ms Agyei-Tabi's belief and concerns about the Claimant were genuinely held, causing her to become worried enough to bring the meeting to an abrupt halt and call security, the Tribunal did not think it was a particularly rational or reasonable belief. There had been no previous incidents of employees bringing knives into the workplace. There was also no evidence that the Claimant had previously been violent or physically aggressive towards Ms Agyei-Tabi or any other employee, or that he had brought a knife or weapon to work, or had been suspected of doing so. Ms Agyei-Tabi had no view under the table, did not look under the table to see what the Claimant was doing, or even ask him what he was doing. The Claimant asserted during this hearing that Ms Agyei-Tabi's belief was based on a stereotypical view that a young, black, male is more likely to be carrying a knife or weapon, and that as such he was treated less favourably.

22. Once the Claimant was sent out of the room, Ms Murray-Gray asked Ms Thoroughgood to come to the room they were in. Ms Thoroughgood saw that Ms Agyei-Tabi appeared to be physically shaken and was told by her that she was frightened to be in the same room as the Claimant. Mr Robinson said he had similar concerns about the Claimant and no longer wanted to represent him. What struck the Tribunal, was the way in which there appeared to be no enquiry or challenge by those around her as to the reasonableness of Ms Agyei-Tabi's belief or what it was based on. They simply accepted what she said. Based on Ms Agyei-Tabi's word only, Ms Thoroughgood decided that the meeting should be suspended and that the Claimant should be escorted off the premises. She made this decision before even going to see the Claimant or to obtain his version of events. Given the decision that the Claimant should be escorted off the premises, Ms Thoroughgood requested the assistance of security supervisor, Mr Folkes.
23. Ms Thoroughgood and Mr Folkes entered the room where the Claimant was waiting. By this stage, the Tribunal accepted that the Claimant had become angry at being asked to leave the meeting and then to be confronted by security. When he was told that the meeting was to be suspended, the Claimant protested by saying that Ms Agyei-Tabi was "*trying to get into his head*" and "*trying to get rid of him*". That said, he was not aggressive. He complied with the request to leave the building and did so without incident.
24. The Claimant was affected by what had happened to him and was signed off by his GP for depression from 28 August 2018 until 4 September 2018.
25. In the week that followed the above incident, statements were provided by Ms Agyei-Tabi, Ms Murray-Gray, Ms Thoroughgood, Mr Robinson and Mr Folkes. By 8 September 2018, a decision was taken to suspend the Claimant. It is not absolutely clear who took that decision but there is a letter in the bundle from David Rickford, Showroom Support Manager, referring to a meeting on 8 September 2018. Ms Healey gave evidence that she authorised the suspension but did not question the decision. She simply accepted what she was told about the reason for suspension, which was due to "*aggressive behaviour towards your manager which made her feel threatened*".
26. The Claimant attended a disciplinary investigation interview on 22 September 2018. That meeting was chaired by Mr Rickford. The Tribunal noted that in response to the question "*Having read these statements you can see why you were suspended now and why IKEA treats it with such importance hence the suspension and the meeting today*" the Claimant replied "yes". However, it is clear that the Claimant denied the allegations made about him. The Tribunal further noted that during this meeting, the Claimant did not suggest that the decisions to have him escorted from the

building, or to suspend him, were influenced, as he now alleges, by his race, sex, or age, or that it was based on stereotypes.

27. The Claimant was invited to a further investigation interview on 12 October 2018. It is clear that this meeting took some time to conclude, starting at 10.05 and ending at 13.13, with various adjournments. The Tribunal noted that the Claimant said in that meeting [sic] *“Listening to the recording and the statement I just feel like Stephanie has something for me. I have done everything I was asked to do; I wasn’t argumentative, I was just defending myself, I have done my part and I hope that could be taken into account”*. Again, the Claimant makes no suggestion that her actions are motivated by race, sex, or age, or based on stereotypical views about young black males carrying knives.
28. Following this meeting, Mr Rickford wrote to the Respondent by letter informing him that no disciplinary or other action was warranted. The suspension was lifted, and he was allowed to return to work with effect from 28 October 2018.
29. On 1 November 2018, the Claimant raised a formal grievance about the unfairness of the capability process conducted by Ms Agyei-Tabi and what he referred to as *“an irrational disliking of me”*. Amongst other things, the Claimant asserted collusion amongst all those involved in 21 August 2018 incident. Again, the Claimant made no complaint of discrimination.
30. The Claimant was interviewed as part of the grievance investigation. In his interview he said the following about Ms Agyei-Tabi [sic]: *“I’m not the only one but I’ll voice my opinion if they won’t, she has no respect, people skills, manners I don’t understand why be a manager if you have to manage people and your reluctant to take on board any feedback so I don’t see the point in that. I’ll be happy to continue in textiles without her bullying, I can’t control that, but I don’t feel I should have to move, I was here before her and she’s the one with the problem, its unwarranted”*. Again, the Claimant made no complaint of discrimination in this meeting. Indeed he commented *“Yeah, I hear what you are saying but I take the allegation seriously, I suppose if it were racism, sexist then more serious but its serious to me. I’ll have to find another way, to mediate, to find a resolution then I’ll have to see what I can do”* indicating that he did not believe it was sexism or racism.
31. The Claimant was informed by letter dated 17 December 2018 that the grievance had not been upheld.
32. The Claimant appealed against the grievance outcome by email dated 23 December 2018. As a result of the appeal process, the Claimant agreed to a proposal for him to move to another department.

33. The first time the Claimant mentioned any complaint of race discrimination was in an email to the Respondent dated 18 March 2019. There was no reference to sex and age discrimination in this email.

LAW

Direct discrimination (s.13 EQA)

34. The EQA sets out provisions prohibiting direct discrimination. Section 13 EQA states:

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.

35. The focus in direct discrimination cases must always be on the primary question “*Why did the Respondent treat the Claimant in this way?*” Put another way, “*What was the Respondent’s conscious or subconscious reason for treating the Claimant less favourably?*” It is well established law that a Respondent’s motive is irrelevant and that the protected characteristic need not be the sole or even principal reason for the treatment as long as it is a significant influence or an effective cause of the treatment.

36. It is important to bear in mind that the bare facts of a difference in status and a difference in treatment only indicate a *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. Therefore something more is needed in addition to less favourable treatment.

37. The provisions relating to the burden of proof are set out at Section 136(2) and (3) of EQA which state:

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

38. It is for the Claimant to prove facts from which the Tribunal could conclude, in the absence of any evidence from the Respondent, that the Respondent committed an act of discrimination. Only if that burden is discharged would it then be for the Respondent to prove that the reason for the treatment was not because of a protected characteristic. Therefore, it is clear that the burden of proof shifts onto the Respondent only if the Claimant satisfies the Tribunal that there is a ‘prima facie’ case of discrimination. This will usually be based upon inferences of discrimination drawn from the primary

facts and circumstances found by the Tribunal to have been proved on the balance of probabilities. Such inferences are crucial in discrimination cases given the unlikelihood of there being direct, overt and decisive evidence that a Claimant has been treated less favourably because of a protected characteristic.

39. Notwithstanding what is said above, in **Laing v Manchester City Council and another 2006 ICR 1519, EAT**, the point was made that it might be sensible for a tribunal to go straight to the second stage... where the employee is seeking to compare his treatment with a hypothetical employee. In such cases the question where there is such a comparator — whether there is a prima facie case — is in practice often inextricably linked to the issue of what is the explanation for the treatment.

Harassment

40. Section 26 EQA defines harassment as follows: -

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B

(b) the other circumstances of the case

(c) whether it is reasonable for the conduct to have that effect.

41. There are three essential elements of a harassment claim under s.26(1):
- unwanted conduct
 - related to a protected characteristic
 - which had the *purpose* or *effect* of (i) violating the Claimant's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.
42. The term "*related to*" means there must still be some feature or features of the factual matrix identified by the Tribunal which properly leads it to the

conclusion that the conduct in question is related to the particular characteristic in question. A tribunal considering the question posed by S.26(1)(a) must evaluate the evidence in the round, recognising that witnesses will not readily volunteer that a remark was related to a protected characteristic. The alleged harasser's knowledge or perception of the victim's protected characteristic is relevant but should not be viewed as in any way conclusive. Likewise, the alleged harasser's perception of whether his or her conduct relates to the protected characteristic cannot be conclusive of that question.

ANALYSIS, CONCLUSIONS AND ASSOCIATED FINDINGS OF FACT

Direct discrimination

43. The Tribunal was very conscious of the point raised by Mr Ellerby that as s.14 EQA had not yet been brought into force, the Claimant could not bring a claim based on combined or "dual" protected characteristics pursuant to that section of the EQA. However, there is no reason why the Tribunal cannot consider whether the Claimant has been treated less favourably because of race and/or sex and/or age. This must be right as a particular protected characteristic need not be the sole, or even the principal reason, why a person suffers detrimental treatment in order for a claim on that ground to succeed.
44. This is a case where the Tribunal had some sympathy for the Claimant and the way he was treated by the Respondent. There did not appear to have been any independent scrutiny of the belief held by Ms Agyei-Tabi about her fears and concerns in relation to the Claimant, arising from the meeting on 21 August 2018. The result is that the Claimant was escorted from the building, something which could have been avoided, and he was suspended for a period of time pending a disciplinary investigation which resulted in no action being brought. It is a situation that was, in the Tribunal's view, mishandled by the Respondent. That said, case law is very clear that discrimination cannot be inferred from unreasonable conduct alone.
45. This is a case in which the Claimant relied on a hypothetical comparator. That comparator would either be a black female, the same age as the Claimant, whose performance was being managed, and who behaved in the same way as the Claimant did in the meetings (sex discrimination claim); or a white male of the same age as the Claimant, again whose performance was being managed and who behaved in the same way as the Claimant did in the meetings (race discrimination); or a black male over 40, again with the same features (age discrimination).
46. The Tribunal concluded that all of the actions taken in respect of the Claimant flowed from the concerns raised by Ms Agyei-Tabi on 21 August 2018. Whilst there was no direct discrimination claim specifically against

Ms Agyei-Tabi, the Tribunal was not persuaded that the Claimant was treated less favourably at the 21 August 2018 meeting than any of the above hypothetical comparators would have been treated. The Tribunal reached the same conclusion in respect of Ms Thoroughgood's decision to escort the Claimant from the building and the subsequent decision to suspend the Claimant. In reaching these conclusions the Tribunal considered carefully the evidence provided by the witnesses in this case. As is stated above, Ms Agyei-Tabi was inexperienced at dealing with poor performance, found the Claimant difficult to manage, and thought that he was behaving strangely and looked at her menacingly during the meeting on 21 August 2018. The Tribunal concluded that she jumped to the wrong conclusion about the Claimant, regarding what he was doing when reaching down to his shoe during the meeting, which whilst somewhat irrational, was not borne out of discriminatory motives, whether conscious or unconscious.

47. Even if the Tribunal had reached a different conclusion, namely that the Claimant was treated less favourably, the Tribunal could not identify the "*something more*" that was needed in order to draw any inference of discrimination or decide that the burden of proof should shift to the Respondent. There was simply no other evidence from which the Tribunal could conclude that the Respondent witnesses held discriminatory attitudes which led them to make decisions based on stereotypes, as the Claimant invited us to conclude.
48. The Claimant invited us to conclude that all of the Respondent witnesses colluded to discriminate against the Claimant. The Tribunal was not satisfied that this occurred. The Tribunal accepted that the Respondent witnesses too readily accepted the concerns of Ms Agyei-Tabi, and it would appear, adopted her account of what she believed. That support for each other, however, should not be confused with collusion. The Tribunal certainly did not believe that the Respondent witnesses got their heads together to agree to treat the Claimant less favourably because of his sex, race, or age. All witnesses gave evidence that Ms Agyei-Tabi looked shaken and scared.
49. For all of the above reasons, the claims of direct discrimination fail and are dismissed.

Harassment

50. The Tribunal concluded that each of the allegations of harassment fell within the definition of unwanted conduct because it had the *purpose* and *effect* of creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. Furthermore, it was reasonable in all the circumstances for it to have had that effect. The question which required more consideration was whether the conduct was *related* to a protected characteristic.

51. Whilst the Tribunal acknowledged that s.26 EQA requires that the unwanted conduct is “*related to*”, rather than “*because of*”, a protected characteristic, the Tribunal could find no evidence from which it could conclude that the conduct was related to age, sex and/or race. The Tribunal relies on the same reasoning which it felt bound to conclude that the Claimant had not been subject to direct discrimination.
52. For the above reasons, the claims of harassment fail and are dismissed.
53. Given the above conclusions, the Tribunal did not consider it necessary to determine the time points.

.....
Employment Judge Hyams-Parish
10 September 2021

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.