EMPLOYMENT TRIBUNALS

Claimant: Mr Michael Scott

Respondent: ISS Facility Services Ltd, Mr R Whitehouse, Ms E Todorova & Mr P Parker

Heard at: London South Croydon (by CVP)

On: 4-7 May 2021 and in chambers on 7 July 2021

Before: Employment Judge Tsamados
Ms N Murphy
Dr N Westwood

Representation

Claimant: In person
Respondents: Ms I Egen, Counsel

This has been a remote hearing which was not objected to by the parties. The form of remote hearing was video by Cloud Video Platform (CVP). A face to face hearing was not held because it was not practical because of the Covid-19 virus.

RESERVED JUDGMENT

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

1. The claimant's complaints against the first respondent of direct race discrimination and harassment related to race are not well founded. His claim in case number 2303638/2019 is therefore dismissed.

2. The deposit of £400 paid by the claimant shall be paid over to the first respondent.

(The second claim in case number 3201868/2020 brought against Mr Whitehouse, Ms Todorova and Mr Parker was struck out in a separate Judgment sent to the parties on 12 May 2021.)

REASONS

Background

1. The claimant brought claims against the first respondent and a number of individuals working for the respondent.

2. The first claim, in case number 2303638/2019, was presented on 28 August 2019, at which time the claimant was still employed by the first respondent, ISS Facility Services Ltd. This followed a period of Acas Early Conciliation starting and finishing on 27 August 2019. Whilst the claim was also brought against Mr Richard Whitehouse, Ms Elena Todorova, Mr Phil Parker and Mr John Gibbons (all employees of the first respondent), the claimant had not entered into Early Conciliation in the names of those persons and so the claim was only accepted in respect of the first respondent.

3. A preliminary hearing on case management was conducted by Employment Judge ("EJ") Freer on 16 January 2020, at which the complaints were identified as direct race discrimination and harassment related to race, the issues were agreed and case management orders set. The full hearing was listed for 17 to 19 June 2020 and a further preliminary hearing to determine the respondent's application for a deposit order against the claimant was set for 28 February 2020.

4. The agreed list of issues are at pages 4-5 of the additional bundle that was provided to us. This identifies complaints of direct race discrimination and harassment relating to race each arising from the same four detriments. These are as follows:

"a. Being threatened twice by John Gibbons on 15 May 2019, once with a knife, and once verbally.

b. Ms Todorova recommending that the Claimant face disciplinary action following her investigation of the above incidents, which she adjudged to be false and an act of bullying.

c. The way in which Richard Whitehouse conducted the disciplinary proceedings and his decision to demote the Claimant and transfer him to the London Campus.

d. The way in which Phil Parker conducted the disciplinary appeal and his decision to issue the Claimant with a final written warning (instead of demotion)."

5. At the preliminary hearing on 28 February 2020, EJ Hyams-Parish issued a deposit order against the claimant as a pre-condition of his being permitted to continue to advance his complaints, having determined that the complaints had little reasonable prospect of success. The amount of the deposit was £400, representing £100 for each of the four detriments relied upon in the complaints, as identified by EJ Freer at the previous preliminary hearing, and taking into account the claimant's ability to pay this sum. EJ Hyams-Parish noted in his order that he believed this amount sufficient to encourage the claimant to reflect on the merits of his case. In addition, EJ Hyams-Parish relisted the full hearing for 4-7 May 2021 and set revised case management orders.

6. The claimant's employment with the first respondent ended on 24 March 2020.

7. The claimant paid the deposit of £400 to the Bristol Employment Tribunal office on 1 June 2020.

8. The claimant presented a second Employment Tribunal claim on 16 July 2020. This was brought against Mr Whitehouse, Ms Todorova and Mr Parker. The claimant had obtained Early Conciliation certificates for each. The Tribunals' issuing section directed the claim to the Regional Office of the Employment Tribunals London East because the claimant gave the first respondent's head offices in London E14 as the address for service.

9. An open preliminary hearing was conducted by EJ Gardiner at London East on 16 November 2020. The respondents made an application for the claim to be struck out, but EJ Gardiner declined to hear this because the claimant had not been given 14 days' notice of the hearing. The EJ made a number of case management orders dated so as to prepare the claim for readiness with the first claim and directed that the second claim be transferred to the Regional Office London South.

10. On 15 February 2021 the two claims were consolidated in the London South Region.

Strike out application

11. At the start of our hearing on 4 May 2021, the respondents to the second claim renewed their application for a strike out. We heard submissions from both parties. We gave our decision on the morning of 5 May 2021, striking out that claim partly because it was an abuse of process and partly because it had been brought outside the requisite time limits. Oral reasons were provided at the time. Neither party requested written reasons. Judgment was sent to the parties on 12 May 2021. Neither party subsequently requested written reasons.

12. This left the first claim against the first respondent alone to be dealt with.

Evidence

13. The first respondent provided us with an electronic joint bundle of documents running to 629 pages plus a separate index. The bundle was originally sent in four pdf files but we combined it into one. We will refer to this as "B1" followed by the relevant page(s) number where necessary. We were also provided with an additional bundle of documents running to 25 pages plus a separate index. We will refer to this as "B2" followed by the relevant page number(s) where necessary.

14. We heard evidence from the claimant by way of a written statement and in oral testimony. We heard evidence on behalf of the first respondent from Mr John Gibbons, Mr Lewis Akinbani, Ms Elena Todorova, Mr Richard Whitehouse and Mr Phil Parker, by way of written statements and in oral testimony.

15. Ms Egan also provided us with an opening note which included a chronology and a suggested reading list.

16. During the course of the hearing the first respondent provided us with copies of the Daily Campus Standing Orders.

Conduct of the hearing

17. The case was allocated to us on the afternoon of 4 May 2021. We spent the rest of that day dealing with the strike out application in respect of the second claim.

18. We read the documents and heard evidence and submissions from the parties over the course of 5-7 May 2021. Ms Igen provided written submissions over the course of the lunch break on 7 May. We allowed time by having an extended break for the claimant to read them.

19. There was insufficient time for us to reach a decision on 7 May and so we reserved Judgment. We indicated to the parties that we would reconvene privately in chambers on 7 July 2021 so as to reach our decision. I would apologise to the parties for the length of time it has taken to perfect and issue our Judgment & Reasons.

Findings

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

21. The claimant identifies as Black British and relies upon his colour as being the racial ground for his claim.

22. He commenced employment with the first respondent's predecessors in title, Reliance Security, as a Security Officer on 25 April 2001. In 2004 his employment transferred by way of a TUPE transfer to the first respondent.

23. The first respondent offers a range of facilities management services throughout the UK with particular expertise in the private sector and is segmented into separate operating divisions which have individual boards of directors and semi-autonomous profit and loss accountability.

24. The claimant was promoted to the position of Supervisor at the London Data Centre known as "LDC2" in East Grinstead on 10 March 2007 and has attended a variety of online and classroom-based learning and development activities. He was one of four supervisors who worked at LDC2 and supervised two Security Officers during each shift.

25. Owing to the size of the operation and distance from its London Campus, which is the operational hub for significant numbers of client employees and

up to 200 Security Officers, the first respondent's management team spent a limited amount of time with the team at LDC2.

26. We were referred to the first respondent's Employment Handbook at B1 106-129 (the ISS Security Employment Handbook 2015 Version 6). This contains sections on Equal Opportunities, Equality and Diversity and Bullying and Harassment at Work at B1 112 to 114. We were referred to the Dignity Diversity and Inclusion Policy at B2 7-12.

27. We were also referred to information on Offensive Weapons, Knife Crime and GOV.UK Selling, Buying and Carrying Knives at B1 130-136.

28. The first respondent states in its response that it has an extremely diverse workforce, dedicated People and Culture ("P & C") resource, a robust Dignity, Diversity and Inclusion policy, comprehensive management guidance and provides Equality and Diversity training and acts upon unlawful discrimination when alerted to it.

29. The level of diversity within the management team was certainly supported by the schedules at B1 443-443. Whilst the claimant asserted that there was a lack of diversity of Supervisors, he presented no evidence to support his view.

30. Mrs Todorova had attended training in Equality and Diversity and on holding investigation, disciplinary and grievance hearings, was aware of the company policies and procedures, and always sought advice and support from the P & C team.

31. Mr Whitehouse had attended HR training in his previous and current roles, attended Equality and Diversity training and was aware of the company policies and procedures and always took advice from the P & C department before making important people decisions. As the disciplining officer, he discussed the claimant's case with P & C as to demoting him as an alternative to dismissal and was told that he could. P & C were in agreement with his view although ultimately he had the final decision.

32. Mr Parker had previously worked for the Metropolitan Police and had been a Police Federation representative, for which he had received comprehensive training, had attended many disciplinary and grievance hearings during his career and was aware of the need to treat people fairly and with equity. He had received training from the respondent in Equality and Diversity and disciplinary procedures and was aware of the company policies and procedures. He discussed his potential decision on the claimant's appeal with his P & C manager prior to delivering his outcome to the claimant.

33. The claimant had worked with Mr Gibbons for almost 6 years as his supervisor. He acknowledged that they got on very well and were a good team. Mr Gibbons acknowledged that he had the utmost respect for the claimant. For reasons that will be come apparent later on, we would record that Mr Gibbons is approximately 5'4" tall and at the time of the events in question was 65 years old, whereas the claimant is over 6' tall and approximately 15 years younger than Mr Gibbons. We would also record that

Mr Gibbons is White as indeed are Mr Whitehouse, Mr Parker and Ms Todorova.

34. It was clear to us that the claimant and Mr Gibbons had worked in proximity to each other for a substantial period of time. The claimant said at one point that this had been for 10 ½ years and more than a thousand shifts (at B1 312) and in oral evidence that it was actually six years and 652 shifts. Either way, it was clearly a long period of time.

35. Mr Gibbons requested and moved to another shift in 2016. The claimant's evidence is that this was because he reported Mr Gibbons for leaving an outbuilding door wide open at the end of his shift. Mr Gibbons accepted that the claimant had told him that he would report him for this, but he never heard anything more about it. Mr Gibbons gave evidence that in 2019 the claimant asked him to go back into his team, but he politely declined, although he believed that the claimant had felt insulted because he said no to him. The claimant denied this.

36. On balance of probability, we found Mr Gibbons to be a careful and reliable witness and we accepted his evidence. We find that the two men had a good working relationship up to the time of the incident of leaving the door open.

37. Mr Gibbons brought a fruit knife to work in his lunchbox. He had crowns in his teeth that he did not want to risk damaging, and so he had been bringing the knife to work for three years to every shift he had worked in order to cut his apples. Mr Gibbons said in evidence that the claimant had seen him do this so many times over the years. However, during this period he had not worked with the claimant on a regular basis. Mr Lewis Akinbani, another Security Officer, had seen Mr Gibbons using the knife more frequently but this was because he worked with Mr Gibbons regularly. The claimant's evidence was that he had only seen the knife on one previous occasion and had challenged Mr Gibbons for bringing a knife into work and Mr Gibbons took the knife away to his car. We heard conflicting evidence as to the size of the knife and we were referred to a photograph of it. We are not convinced that the size of the knife is relevant but on balance of probability we find that the knife blade was no more than approximately 3 inches long.

38. On 15 May 2019, the claimant was working with Mr Gibbons. That afternoon, Mr Gibbons took out his fruit knife and cut his apple against his lunchbox at a desk in the Control Room.

39. The claimant said in evidence that he believed that Mr Gibbons was deliberately tapping his knife on the table. We note that in an email dated the day of the incident which the claimant sent to Mr Beveridge, his manager, at B1 288, he states that "John Gibbons was asked to remove a 5 inch knife from site he was using to chop an apple he got from his lunchbox at his work position in the Control room…" We also note that in an interview that the claimant had with Ms Todorova, the Security Manager, on 22 May 2019 at B1 294, he states that "it was a 5-6 inch knife. In brief, I heard the knife first before I saw it and said to John 'You should not have the knife here', John replied 'I need it for my apple'. I said 'Can you take it off-site'? John replied 'I need it for my apple'.

40. On balance of probability, we accept that Mr Gibbons was cutting an apple with his fruit knife on his lunchbox and this was the noise that the claimant heard.

41. Mr Gibbons' evidence in essence is that upon seeing the knife, the claimant suddenly threw his arm out, pointed his finger at it and said "that's a weapon!" This was out of the blue and there had been no argument between him and the claimant. Mr Gibbons' further evidence is that he was shocked and he called the claimant a "big girl's blouse", explained that he needed the knife to cut his apple and pointed out that there were other sharp items in the workplace, such as a large pair of scissors on the desk. However, he did remove the knife off site as requested placing it in his car (we reference his interview with Ms Todorova on 16 May 2019 at B1 292). The claimant does not deal with what was specifically said in any detail within the various emails which he sent at the time or in interviews and he does not use the words that Mr Gibbons states. However, as we have already stated we found Mr Gibbons to be a careful and reliable witness, and we accept his evidence as set out at paragraphs 15 to 21 of his witness statement.

42. After the incident, the claimant sent two emails, one timed at 15:29 to himself and one timed at 15:46 to Mr Beveridge (at B1 287 and 288). The claimant accepted in cross examination that neither refer to any threat by Mr Gibbons. The subject line of the second email referred only to a "Personal kitchen utensil on site to be removed".

43. At around 16:00 hours that day, the claimant telephoned and spoke to Ms Todorova (who was not based at LDC2). She was the duty manager on shift that day and the claimant had not met her before. Mr Beveridge was on annual leave that day. The claimant informed Ms Todorova that Mr Gibbons had had a knife on site but the situation had been resolved. He did not make any allegations that he had been threatened by Mr Gibbons, and, as we have stated above, he accepted this in cross examination.

44. In his written evidence, the claimant states that Mr Akinbani had raised concerns with him earlier in the shift about Mr Gibbons having a knife at work. In oral evidence he suggested that Mr Akinbani had shown him Mr Gibbons' knife. These are not matters that the claimant raised at the time of the events in question or within his claim form. In his oral evidence, Mr Akinbani stated that he was not 100% sure whether he did raise concerns with the claimant, but he considered it "highly unlikely" because he knew Mr Gibbons brought a knife in for every shift before that date (15 May 2019). In cross examination, he stated that he could not recall showing the claimant a knife and in answer to a question from Ms Murphy, that he did not have any concerns about Mr Gibbons having his knife on that shift.

45. We formed the following view. Mr Akinbani appeared to be in a difficult position because he clearly had a cordial work relationship with the claimant and he is still employed by the first respondent. However, the claimant only raised these allegations in his witness statement and then expanded on them in cross examination and of course by then some time had passed. Nevertheless, if this had happened as the claimant alleges, then it is not

something that Mr Akinbani would have forgotten. On balance of probability, whilst we find that Mr Akinbani's evidence is not completely reliable (we note that he said in his witness statement that he did not witness the knife incident but in his interview with Ms Todorova that he had caught the tail end of the discussion), we do not accept the claimant's evidence in this regard.

46. Following the sending of his emails, the claimant approached another supervisor, Mr Beeches, and asked him to sit in on a meeting with Mr Gibbons without briefing him as to what was going on.

47. When Mr Gibbons arrived for his shift at approximately 17:30 hours, the claimant asked to speak to him upstairs in the meeting room with Mr Beeches. The claimant put to Mr Gibbons that he had a knife in the Control Room on the previous night, that he looked at him aggressively and he asked him "would you have used it on me?" Mr Gibbons replied that he was not going to be the claimant's "punch bag" and that he would be speaking to Mr Beveridge about the incident. In oral evidence Mr Gibbons explained that by the words "punch bag" or "punching bag" he meant "someone being bullied over time - they are a punch bag"

48. We refer to Mr Beeches' email to Mr Beveridge dated 23 May 2019 at B1 307 in which he relates a conversation that the claimant had with him on 14 May 2019 and as to what happened at the meeting with Mr Gibbons on 15 May 2019. Mr Beeches states that he felt that the meeting was carried out "wrong and unprofessionally" and that Mr Gibbons was "being treated unfairly".

49. On 16 May 2019, the claimant sent an email to Mr Beveridge and Ms Todorova asking the Duty Manager to call him when free, to discuss the incident on 15 May. His email described a "5 inch knife" and stated that "I now believe John threatened my person twice" (at B1 289). In oral evidence the claimant explained that by 5 inches he was describing the blade alone and that the whole knife including the handle would have been 10 inches or more.

50. Later that morning, the claimant sent a further email to Ms Todorova in which he stated "in the present climate of things, I am requesting a risk assessment while working with John Gibbons" (at B1 290). He subsequently spoke with Ms Todorova by telephone, repeating his belief that Mr Gibbons had threatened him twice, that he felt physically at risk and did not want to be "stabbed in the back". He insisted that the matter be looked into urgently. Ms Todorova considered whether or not the client and/or the police should be informed, given the seriousness of the claimant's assertions. She advised the claimant to call 999 if he felt threatened.

51. Mr Gibbons alleges that at approximately 09:00 hours that morning, the claimant approached him at the reception desk and said to him "you had better get your notes ready", which Mr Gibbons took to be an attempt to frighten him. The claimant said in evidence that he did not recall saying this. On balance of probability, given the way that the claimant reported the event at the time, we find that the claimant did say this to Mr Gibbons. But we do not believe it adds anything to what we need to decide either way.

52. Later that morning, Ms Todorova attended the claimant's workplace to carry out an investigation into the incident of 15 May 2019.

53. She first interviewed Mr Gibbons. We were referred to the notes of their meeting at B1 291-292. During the meeting, Mr Gibbons said the following:

    a. For the last three years he had brought a small kitchen knife, which was approximately 2-3 inches long to site which he used to slice his apple because he had crowns on his teeth. He showed Ms Todorova a photograph of the knife on his mobile phone. This is at B1 298;

    b. He confirmed that he had now left the knife at home. He also confirmed that he was aware of the legal restrictions and consequences of carrying a knife and the client's policy regarding bringing weapons on site;

    c. On 15 May, whilst he was in the Control Room he was cutting his apple with the knife and the claimant looked at him and said that the knife was a weapon and he should not have it with him;

    d. He sat there in disbelief for a few moments looking at the claimant and then replied that he needed the knife to cut his apple and he was not going to be his "punch bag";

    e. He then asked the claimant if it was alright for the large scissors to be at the desk because they could be a weapon as well, to which the claimant replied that they were part of stationery and quickly put them into the drawer;

    f. Having been asked to remove the knife from site he went and put it in his car;

    g. He did not use any threatening words towards the claimant. He pointed out to Ms Todorova his size as opposed to the size of the claimant;

    h. He told the claimant that he was "acting like a big girl" and that he was not going to be his "punch bag". He clarified to Ms Todorova that by the use of the words "punch bag" he meant being bullied by the claimant;

    i. He was shocked by the way that the claimant had behaved and described him as "very power driven";

    j. He will not be bringing his knife to site again and is very upset about the situation;

    k. The claimant asked to meet with him with Mr Beeches that morning and the claimant took notes of their conversation;

    l. He is very upset about the whole situation and told the claimant he would be speaking to Mr Beveridge about it.

54. Ms Todorova ended the meeting by stating that Mr Gibbons would be informed in writing about the outcome of the investigation.

55. Later on 16 May 2019, Ms Todorova interviewed the claimant as to the incident. We were referred to the notes of the meeting at B1 294-295 which we accept were erroneously dated 22 May and not 16 May when the meeting actually took place.

56. In oral evidence, the claimant disputed that this was an investigation meeting and asserted that it was just a "chat", ie informal. However, the notes state "investigation meeting", they set out the purpose of the meeting, the claimant was sent a copy of the notes on 4 June 2019 and did not challenge their accuracy until his oral evidence to us and the notes were taken by a third party. On balance of probability, we accept that this was an investigation meeting and not a "chat" as the claimant alleges.

57. During the meeting, in essence the claimant said the following:

    a. Mr Gibbons' knife was 5-6 inches long;

    b. He heard the knife before he saw it and said to Mr Gibbons that he should not have a knife here. Mr Gibbons replied that he needed it for his apple;

    c. He asked Mr Gibbons to take it off site and Mr Gibbons repeated that he needed it for his apple;

    d. He asked, what are you going to do when the apple is finished, you are just going to have a knife. Mr Gibbons responded "you are a big girl's blouse";

    e. He responded "what do you mean" and Mr Gibbons replied "you are just going to make it harder for yourself". He replied "that's the attitude why you shouldn't have a knife in here" and Mr Gibbons responded "what attitude?", to which he replied, whilst Mr Gibbons was standing over him, "that one you are doing right now. Please take the knife out and put it in your car";

    f. After further discussion, Mr Gibbons came up to his face and said "I am not going to be your punching bag"; that Mr Gibbons' attitude "fitted an assailant";

    g. He had a "quick chat" with Mr Gibbons the next morning; this was an informal meeting at which he wanted to understand what Mr Gibbons meant by not being his punching bag, because he now believed it to be a threat; Mr Gibbons replied "no comment";

    h. The situation gave him "trust issues" with Mr Gibbons.

58. During the meeting, Ms Todorova showed the claimant the photograph that Mr Gibbons had provided of the knife and he confirmed that it looked like the knife in question.

59. At the end of the meeting, the claimant asked Ms Todorova whether he could "suggest punishment" for Mr Gibbons. Subsequently the claimant has stated that this was a joke on his part.

60. In her written evidence, Ms Todorova states that she was taken aback and shocked by his suggestion as to punishment and that there was more to his reporting of Mr Gibbons than there appeared to be. She said that she believes that if he genuinely felt that Mr Gibbons was a threat, he would have said that he did not feel able to work with him again rather than wanting to suggest punishment. She further states that she is aware that the claimant has since stated that it was meant as a joke, but in her view it was not a joke, he did not intend it to be a joke and none of those present laughed. She believes that the claimant's attitude was not of someone fearing for his life, but more about him bullying Mr Gibbons.

61. We considered this issue carefully. We could not see how in the context of the matter at the time that what the claimant said could be a joke. We found Ms Todorova to be a very good witness and that she was conducting the matter in a business-like manner. On balance of probability, we do not accept that the claimant meant his words as a joke and further we find that Ms Todorova's interpretation of what the claimant said and why she believed he said it was reasonable.

62. In his oral evidence, the claimant appeared to suggest that the photograph produced by Mr Gibbons was not of the actual knife, but one that he had "found on the Internet" because it looked "professional". This was not something that he had previously said at the time and he did not put this to Mr Gibbons. On balance of probability, we accept that this was a photograph of the knife in question. Indeed, we can see that in comparison to the size of the apple the knife is clearly in the region of 2 to 3 inches long and not with a blade of at least 5-6 inches as the claimant asserted, unless it is a very large apple, which is even less probable. We formed the view that the respondent took a completely reasonable view of the size of the knife at the time, accepting what Mr Gibbons said and that the photograph was of the knife in question. The claimant's evidence as to the size of the knife did appear exaggerated.

63. Later on 16 May 2019, Ms Todorova also interviewed Mr Akinbani. We were referred to the notes of their meeting at B1 293. Mr Akinbani said the following:

    a. He had not been present during the incident on 15 May, although the claimant subsequently told him it was about a knife;

    b. He only overheard part of the conversation towards the end of the shift and he heard Mr Gibbons saying that he will be bringing his knife as he needs it for his apple. When Ms Todorova queried whether he said he will be or will not be bringing it, Mr Akinbani stated that he was "not to sure";

c. There was no aggression during the conversation, it was more assertive and Mr Gibbons had been more assertive. In response to a question from Ms Todorova, he confirmed that it was "more like standing his ground. It was more like a conversation between two gents";

64. In his oral evidence, Mr Akinbani stated that the claimant and Mr Gibbons were "having a row", but when pressed he stated that he could not now recall much about the incident or what was said because it was a long time ago.

65. We have already indicated our view of Mr Akinbani's evidence. On balance of probability, we did not find him to be a completely reliable witness and it may well be that he was treading a fine line between his allegiance to the claimant and to the first respondent. However, his involvement in the incident was peripheral and we accept Mr Gibbons' account which indicates that the exchange was closer to "having a row" as opposed to "a conversation between two gents".

66. Ms Todorova said in her written evidence that the accounts given by the claimant, Mr Gibbons and Mr Akinbani were very similar, save for the claimant's assertion that Mr Gibbons' behaviour was threatening and assailant like, which were unsupported and was not something that the claimant had raised in his first account to her of what happened. On balance of probability, we accept this and we find that Ms Todorova's conclusions are reasonable.

67. Ms Todorova completed her investigation and provided an Investigation Outcome Report on 22 May 2019. This is at B1 296-297. This sets out the allegation made by the claimant against Mr Gibbons, the background to the allegation, the extent of her investigation and her findings. In conclusion, the report states that there is no case to answer as to the allegation made by the claimant. However, her report finds that there is a case to answer by the claimant for mishandling the situation and time wasting. At B1 297 the report states:

"As a Supervisor, Michael Scott should have handled the situation differently and after the knife was removed from site and the issue escalated to Duty Manager Elena Todorova on 15th May 2019 he should have removed himself from the situation and any follow up actions should have been taken by the management team. There was no evidence to support any of his claims about the size of the blade or any threats made by John Gibbons towards him. Michael was aware that on 16th May John Gibbons did not have the knife with him and still made serious accusations against his colleague which following the investigation carried out on site were found to be unsupported by evidence and exaggerated.

I believe that by doing that, Michael Scott demonstrated a very poor judgement and compromised himself as a supervisor. He made the management team consider escalating the issue to the Police and the client, and his actions could have potentially resulted in his colleague being arrested and losing his licence and his job. I believe that a separate investigation should be carried out into Michael Scott's actions on grounds of harassment or bullying and false reporting."

68. We find that the report and the conclusions reached are reasonable in the circumstances.

69. Mr Richard Whitehouse, who at the time was the respondent's Senior Security Manager, reviewed Ms Todorova's report and he asked Mr Beveridge to attend the site and to conduct an investigation into the claimant's conduct. As part of his investigation, he obtained a statement by

email from Mr Beeches (which is at B1 307) and took a photograph of the knives which were in the site kitchen (which is at B1 299). In addition Mr Beveridge told Mr Whitehouse that other supervisors have confirmed that Mr Gibbons often took a fruit knife on site which was "no bigger than your thumb".

70. Mr Whitehouse considered the information compiled by Mr Beveridge. In his email, Mr Beeches explained that the Claimant asked him to attend a meeting with Mr Gibbons but did not brief him about the matter. He felt that the meeting had been carried out wrongly and unprofessionally and Mr Gibbons was being treated unfairly. The photograph provided showed knives which Mr Gibbons could have used to cut his apple, if he had been prepared to fetch them from another floor, although it would not have been easy to cut an apple given the size of the knives. The photograph also established that the knives were potentially larger and more dangerous than the one that Mr Gibbons had brought in for his apple.

71. On reviewing the outcomes of Ms Todorova and Mr Beveridge's investigations, Mr Whitehouse concluded that there was a disciplinary case to answer against the claimant.

72. We considered the conduct of Mr Beveridge carrying out an investigation on behalf of Mr Whitehouse. However we found nothing untoward in this.

73. By a letter dated 5 June 2019 (at B1 304), Mr Whitehouse wrote to the claimant requiring him to attend a disciplinary hearing on 14 June 2019 to answer the following allegations:

> *"1. Unsatisfactory standards of work performance (Section 13.1.7 / ISS Security Handbook, Version 6) – **Misconduct***
>
> *2. False reporting. (Section 13.1.7 / ISS Security Handbook, Version 6) - **Gross Misconduct***
>
> *3. Workplace bullying and harassment (Section 13.1.7 / ISS Security Handbook, Version 6) - **Gross Misconduct***
>
> *These relate to your alleged conduct and actions when dealing with, and then subsequent actions and reporting of the facts, an incident involving John Gibbons and yourself whilst on duty together on 15 May 2019 at LCD2."*

74. The letter indicated that matters of gross misconduct could place his future employment with the company at risk. The letter attached the notes of the investigation meetings, supporting emails, the Investigation Outcome Report, the photographs of the knives and the ISS Security Handbook, Version 6. The letter also advised the claimant of his right of accompaniment to the meeting.

75. The email from Mr Beeches to Mr Beveridge was omitted from the supporting documents in error. It was subsequently provided to the claimant three days prior to the disciplinary hearing. We note that it is a short statement consisting of just two paragraphs, the gist of which we have already set out above, and that the claimant attempted to have it excluded from consideration at the disciplinary hearing (at B1 308-309).

76. We were referred to the definition of bullying within the ISS Security Handbook at B1 113 and Section 13 Conduct at Work at B1 115.

77. The disciplinary hearing took place on 14 June 2019 and was conducted by Mr Whitehouse. The claimant was accompanied by a work colleague acting as his staff representative. We were referred to the notes of the meeting which are at B1 312-316.

78. At the start of the meeting, Mr Whitehouse explained that it was a disciplinary hearing as to allegations of gross misconduct and if proven could lead to the claimant's summary dismissal without notice.

79. In essence, the following matters arose at the hearing:

    a. The claimant confirmed that he had been a supervisor for 10 ½ years, had attended the supervisor course, had worked with Mr Gibbons for over 1000 shifts and had seen him with the knife twice over the last 3 years. The previous occasion was in either December 2018 or January 2019, when he told Mr Gibbons that he could not have the knife at work. He was aware that Mr Gibbons used the knife to cut up his apple;

    b. There was a discussion about the meeting he had with Mr Gibbons with Mr Beeches in attendance the day after the incident and his telephone calls and emails to Ms Todorova;

    c. The claimant said that he could not be sure that the photograph provided by Mr Gibbons was of the knife he had on 15 May although the handle looked the same. However, he believed that Mr Gibbons should not have had an offensive weapon on him as per the Handbook, which includes a bladed knife;

    d. Mr Whitehouse responded that it was not an offensive weapon, relying on government guidelines and the ex-police amongst the management team who had confirmed this. He said that a knife that is less than 3 inches long, is not a bespoke weapon and if it can be demonstrated is used as part of a person's toolkit or some other use. He added that Mr Gibbons could do so because he had a knife in his lunchbox for over three years which he used for eating his apple, something which was accepted by other supervisors. He also stated that the police would not have taken any action had they attended site. The claimant responded that he doubted that the photograph was of the actual knife then;

    e. There was a discussion as to the scissors in the vicinity and other large knives in the building and the claimant said it was an issue of context and he would know if he was in danger or being threatened;

    f. The claimant was asked to explain why he continued to work for the remainder of the shift and the following shift with Mr Gibbons if he felt threatened by him and as to why it only occurred to him the following day that this danger existed. Mr Whitehouse did not find the Claimant's explanation satisfactory;

    g. Similarly, the claimant was asked to explain why if he felt genuinely threatened by a colleague, he did not leave, report the matter

immediately to the police or call management saying he was not coming in and expected them to do something immediately, and why he had a further meeting with Mr Gibbons the following morning. The claimant responded that he was worried about Mr Gibbons' personal safety and knew that he was "highly medicated" and "maybe he didn't take his tablets that day" but did not know what Mr Gibbons took medication for. Mr Whitehouse did not find the claimant's explanation satisfactory;

h. The claimant explained that the reason he had asked if he could suggest punishment for Mr Gibbons was because he thought the investigation meeting was finished. It was just a comment because he thought that the matter was moving up to the next level and he thought the meeting was his risk assessment anyway. Mr Whitehouse stated that it was clearly an investigation meeting and not a risk assessment. The claimant was then asked regardless of what he thought the meeting was, why did he want to suggest the punishment? The claimant responded that after the way that Ms Todorova had handled the matter and the fact that Mr Gibbons no longer brought the knife to work, he felt that Mr Gibbons was no longer a danger to him, had been warned and Ms Todorova made him feel safe. So he felt the matter was closed and made the comment. He added that he was sorry that he said it, it was a mistake and he was joking. He said he was even laughing as he made the comment. Mr Whitehouse responded that it was a strange thing to joke about;

i. There was then a discussion about the claimant's email to Mr Whitehouse seeking to exclude Mr Beeches' statement from the disciplinary hearing;

j. The claimant said that the only thing he would have done differently was not having the meeting with Mr Gibbons and Mr Beeches the morning after the incident.

80. After an adjournment of approximately half an hour, Mr Whitehouse explained to the claimant that he did not find he had presented any cogent explanations as to why he continued to work with Mr Gibbons until the end of the shift and why he returned to work with him for another 12 hours the following day and also he was unable to adequately explain why he no longer felt threatened by Mr Gibbons, despite the presence of other knives/bladed objects on site. His full reasons are set out in the notes of the meeting at B1 316:

"Your reasons of why you felt at risk of harm just don't stand up. Stating that because the handbook says about offence (sic) weapons together with him stating that he won't be your punch bag is not a reason to think you are in danger and to escalate this up to the point of nearly having the police called.

I don't believe you felt threatened as the fact that you have worked with him for over 10 years without any issue demonstrates. Your actions showed poor judgement, poor leadership and come across as vindictive. From reading the evidence, you only felt in danger after JG had said he wasn't going to be your punch bag and that he would be taking the matter up with your manager David Beveridge.

However, due to the report you produced and request for a RA on him and saying to ET over the phone you felt you might get stabbed by him, meant I was very close to involving the police and GS. The consequences could have been serious, not only for JG but for us as a company too.

This behaviour was then followed by you thinking you could suggest a punishment for him when you were interviewed, and this before ET had even produced an outcome report. You then asked that your

witness, JB statement not be included in your DH because you felt it was not part of the investigation and had spelling mistakes. This further adds to my impression that your actions and intentions even weeks after the event were far below that expected of a person in your position and with your responsibility. This is not the behaviour expected of an ISS/GS Supervisor especially after just having completed the Supervisor's course…"

81. He advised the claimant that in cases of proven gross misconduct, the outcome can be summary dismissal without notice. However, because the claimant was in a Supervisor position, as an alternative to dismissal he had decided to demote the claimant to a Security Operations Officer role with immediate effect. Mr Whitehouse then advised the claimant of his right of appeal. Mr Whitehouse also took into account the claimant's length of service in reaching this decision.

82. The claimant asked where he would be working and Mr Whitehouse replied that if it was not comfortable to continue working at the site, the company could look to relocating him to the London Campus, but it was his decision. The claimant responded that he wished to be relocated to the London Campus.

83. Mr Whitehouse subsequently wrote to the claimant by letter dated 17 June 2019 confirming the outcome of the disciplinary hearing. This letter is at B1 317-318. The letter sets out the reasons for the disciplinary outcome as follows:

"1. That after an immediate and through (sic) investigation by Elena Todorova due to the seriousness of your allegations, that she was unable to find any evidence or witness to prove you had been threatened by John Gibbons, but instead found that the evidence pointed to you having abused your position to make the claims, exaggerating what had happened during the incident so as to indicate (sic) John Gibbons in a very serious allegation.

2. That your behaviour and performance during the incident, and after it, was well below that expected of a Supervisor employed on the ISS/GS Contract.

3. That your false reporting could have led to John Gibbons' arrest or dismissal from the company, and could have had an immense impact on ISS's relations with the client."

84. The letter went onto confirm that Mr Whitehouse had chosen to demote rather than dismiss the claimant, that he would be transferred to the London Campus as a Security Operations Officer with immediate effect from 14 June 2019 at the rate of pay of £15.42 per hour.

85. The claimant's evidence was that at the conclusion of the disciplinary hearing Mr Whitehouse stated that he wanted to dismiss him but he could not and so was demoting him instead. Mr Whitehouse denied saying this pointing to what he actually said being contained within the notes of the disciplinary meeting.

86. On balance of probability, we find that it is improbable that Mr Whitehouse said this as of course he could have dismissed the claimant on the basis of the finding of gross misconduct. Indeed, we were surprised that the respondent did not dismiss the claimant given the nature of his role in which trust and confidence is paramount.

87. In addition we took into account Ms Egan's oral submissions at the end of the evidence. She pointed to a number of occasions on which the claimant did not understand plain discussions and got hold of the wrong end of the stick,

as she put it. One of these was to do with the Deposit Order and the other as to a case management instruction.

88. The first occasion arose during the application to strike out the claimant's second claim when I had cause in that context to reiterate to the claimant the significance of the Deposit Order and the possible effect it could have on him in relation to forfeiture of the deposit and further costs if he was unsuccessful in his claim. In response, the claimant said that the only thing he took from this was that if he wanted to carry on with his case he would pay the deposit and if he did not pay the deposit then he did not want to carry on. I did question him on this because I was surprised that he did not take more from the hearing and the Order than that. Namely that the Judge thought his case stood little reasonable prospect of success, ie that it was very weak. However, the claimant was adamant that this was not the message he took from it.

89. The other occasion arose during the course of the second day of the hearing by which point the claimant was disputing the accuracy of the notes of the various disciplinary meetings for the first time. I instructed him to make a list of all the material inaccuracies in those notes that go to the outcome of the disciplinary process or to his discrimination claim and to provide this in writing to the Tribunal and the Respondent by 9 am the next day. I repeated what I wanted him to do on several occasions and in some detail giving examples of what I meant by material inaccuracies. However, the document that the claimant provided the following day consisted of the list of questions that he intended to ask each of the respondent's witnesses in cross examination and barely touched upon any inaccuracies. Given the nature of the document, I was concerned that the respondent should not have had sight of it. However Ms Egan confirmed that neither she nor her instructing solicitors had read it.

90. In addition, Ms Egan pointed to a number of assertions which were illogical including what the Claimant said initially as to the amount of time and shifts he had worked with Mr Gibbons, as to the size of Mr Gibbons' knife and as to Mr Whitehouse stating that he wanted to dismiss him but could not, when clearly he could. She submitted that generally where there was a dispute of fact we should prefer the evidence of the respondent's witnesses.

91. We were not willing to go as far as that and indicated throughout our findings where we preferred the evidence of one party to the other and the reasons why. However, we did take these matters into account and accepted that the claimant had a propensity to misunderstand what was said to him and that what he alleges that Mr Whitehouse said to him is on balance of probability a further example of this.

92. By a letter dated 20 June 2019, the claimant appealed against the disciplinary outcome. This letter is at B1 319-321. In the letter, the claimant raised the issue of racism:

"I must Highlight the Racism of a Company who I always had Passion to be Employed by, but recent events have caused the Racist Ulgar to raise its head (sic)…

"…The Reason I am Appealling your Decision to Demote me from My Position as a Supervisor is because I believe that not only was I Ganged up by my White Colleagues, also Management who have favourtisms (sic)."

93. We were unclear what the claimant meant by the word "Ulgar" and he was not able to explain to us what he meant.

94. The appeal letter went on to set out the claimant's previous dealings with Mr Gibbons and what the claimant said happened on 15 May 2019, his concerns as to Ms Todorova's investigation and outcome, and Mr Whitehouse's conduct and outcome of the disciplinary hearing.

95. An appeal hearing took place on 28 June 2019, conducted by Mr Phil Parker, the first respondent's Accounts Director. The claimant attended unaccompanied. We were referred to the notes of the appeal meeting at B1 324-330.

96. At the meeting, Mr Parker asked the claimant why he was appealing, why he felt that "racism came into the equation" and why he believed he had been "ganged up upon". Mr Parker said in evidence that the claimant made a number of confusing points about Ms Todorova's investigation decision and suggested that Mr Whitehouse had falsified the disciplinary meeting minutes and had intended to dismiss him, which Mr Parker said of course had not actually happened.

97. Essentially, the claimant raised the following matters at the appeal hearing:

    a. He only reported what had happened, that Mr Gibbons had a knife on site and had issues taking it off site;

    b. He had been bullied by Ms Todorova and Mr Whitehouse, who had said to him "I could dismiss you but I can't so I will demote you". Being demoted was an insult and that certain officers had problems taking instructions from him because of his race;

    c. He had known Mr Gibbons a while, they did not verbally abuse each other, but he felt threatened by him on 15 May 2019 because of his attitude and body language, the tapping of his knife, he had called him a "big girl's blouse", he had said he was not going to be his "punch bag" and he also said "Mike you make things worse for yourself mate";

    d. He raised the issue of racism in his appeal because other members of staff do not accept his instructions very well and gave a specific example of a change in shift times;

    e. He thought that possibly Mr Gibbons was racially motivated because of his interest in the Nazis and a mention of how intelligent Hitler was;

    f. He had not misread the situation on 15 May, he wanted his position back at LDC2 and thought he could work with Mr Gibbons again;

98. At the end of the meeting, Mr Parker said that there was much more to consider and so he would not be able to give the claimant an outcome straight

away. So in effect, Mr Parker adjourned the appeal hearing so as to undertake further investigation into matters raised by the claimant at that hearing. As a result he considered the following:

a. A statement from Ms Todorova in effect answering questions he raised to her in an email dated 28 June 2019 (at B1 331-332);

b. An email from Mr Beveridge dated 1 July 2019 with supporting documents, in response to a discussion with him as to the change to the claimant's start times, a colleague being asked by the claimant to move to a different work area to the claimant and her allegation that the claimant was bullying and harassing her and her subsequent indication that she did not wish to raise a grievance, matters having been resolved between them (at B1 333-339);

99. In addition, Mr Parker received a number of character references from work colleagues: one dated 15 July 2019 at B1 353; one dated 30 July 2019 at B1 357-358; and one dated 1 August 2019 at B1 379.

100. The claimant was absent from work from 8 July to 11 July 2019 due to acute stress at work (statement of fitness for work at B350 and return to work interview/absence review form at B1 354-355).

101. In his witness statement, Mr Parker sets out the details of his further investigation at paragraphs 21 to 30.

102. The appeal hearing was reconvened on 5 August 2019. We were referred to the notes of this meeting at B1 359-360. At that hearing, Mr Parker informed the claimant that he had upheld the finding of gross misconduct but had decided to reduce the sanction to a final written warning. In particular, we note the following passage at B1 359:

"… I looked at the sanction and my proposal is downgraded to a Final Written Warning and to reinstate you in a Supervisor role. The investigation carried out did not exonerate you but I think there are some other hidden facts between you and that individual. That leaves me a lot of questions to be answered so it will be reasonable for me to downgrade your sanction and put you as a Supervisor here in London. That's because there are things regarding attitude and behaviour which could be suggesting bullying or potential misuse of position, which came up and I need to protect the team, yourself and the business of course. By placing you here, in London, as a Supervisor, it will give you also a better support for this role. If you go back as a Supervisor in East Grinstead, I think people will start raising more complaints about you."

103. The outcome was confirmed in writing in a letter to the claimant dated 5 August 2019 which is at B1 361-362, which set out the following:

"The reason for my decision are as follows (sic):

1. *My investigation identified additional evidence which suggested your actions had not been fully reported regarding the incident which mitigated aspects of the disciplinary allegations.*
2. *My complete review of the case provided greater relevance to factors between yourself and other staff members on site.*
3. *That there may well be history to the incident and the individual involved, the true facts of which may never be brought to light.*

The investigation however did not exonerate you from the original allegation and reports from a number of staff members suggested your manner of supervision could be construed as bullying or overbearing, both of which could be perceived as an abuse of position. Your defenced of complying with the ISS handbook and a perception of a genuine threat to your safety is not a convincing explanation considering the facts and therefore places doubt on your decision making in this regard.

Due to additional reports from staff at the East Grinstead Building, it is my opinion that to protect you from further allegations, and the ISS business from future potential HR issues, you will been redeployed as a supervisor to the London campus. This will provide you with greater management oversight and support in your role as supervisor and develop any skills or characteristics to maximise your performance as a supervisor.

The final written warning will remain live on your file for 12 months. Please note that the consequences of further misconduct regardless of seriousness or nature or insufficient improvement will result in further disciplinary action being taken against you in accordance with the Company Disciplinary Procedure."

104. The claimant confirmed during the reconvened meeting that he was happy with the outcome and this was something that he confirmed in cross-examination during our hearing.

105. Mr Parker said in his written evidence that he did not believe that the claimant had been ganged up on because the incident in question was a solo incident, but he also did not believe that the claimant had been exonerated from the bullying allegations and was sure that if he moved him back to LDC2 there would be more conflict and complaints, which would not be good for the claimant, the team or the contract. Mr Parker further stated that this was reinforced to him when the claimant assured him that "they won't do that and "that won't happen again", which felt like he was focussing on the behaviour and response of others rather than his own and indicated that he would go back to his usual over-zealous/bullying supervisory approach which is what had ultimately caused his disciplinary in the first place.

106. Mr Parker's further written evidence was that he did not believe that Ms Todorova or Mr Whitehouse had bullied the claimant and it was clear from the minutes of the disciplinary meeting that Mr Whitehouse simply set out that the outcome could have been summary dismissal not that he wanted to dismiss the claimant but could not for some reason.

107. Whilst it was not raised as being relevant to the matter before us, for the sake of completeness we record that the claimant was subsequently made redundant by the respondent with effect from 18 March 2020. We were referred to a letter from Mr Beveridge to the claimant dated 19 March 2020 at B1 412-413. The decision to make the claimant redundant was upheld on appeal.

108. The claimant's witness statement provided no evidence to support any link between a difference in his treatment and a difference in race.

109. In cross examination the claimant said that Mr Gibbons initially refused to remove his knife from the workplace because he was Black, but then he agreed not to bring the knife to work only when spoken to by Ms Todorova, a "white lady" at the investigation meeting.

110. The claimant also said in cross examination that Ms Todorova was racist in reaching her conclusion in the investigation. He said that this was because she referred to his size and his height which he said was "obviously his colour as well" and to Mr Gibbons', who we know is much smaller. He likened it to what he called "the David and Goliath thing". He would not accept that Ms Todorova simply did not accept his account of the incident and maintained that if he was a tall White person she would have accepted what he said. He did accept that Ms Todorova had not mentioned his size in her investigation outcome report. In cross examination Ms Todorova said that she only mentioned size because it was mentioned by Mr Gibbons, but it did not form part of her conclusions.

111. With regard to Mr Whitehouse, the claimant said in answer to a question from me that his conduct of the disciplinary hearing was linked to his race because Mr Whitehouse told him that everything he had heard about him was true and that he had acted vindictively. The claimant added that Mr Whitehouse did not know him, he talked down to him and he found him unbearable on the two occasions he met him. The claimant added:

"Because of my race I ended up in that position and they were happy to keep me there and I couldn't get out of it. It was like I was wielding the knife, not reporting it. That is how I felt. The way it looked to me was because I reported a white person I got treated extremely badly because I should do that."

112. Ms Egan responded by pointing out that he had previously been supported by the respondent's management when making complaints or reports against White colleagues, he explained that "it's different management". He further stated that new management took over from 2016 which he described as "the Trump period".

113. In respect of Mr Parker, the claimant stated in oral evidence that he felt that his conduct was motivated by race because he did not give him a fair appeal hearing, did not read the evidence but just reached his conclusion because he is Black.

114. Each of the respondent's witnesses denied discriminating against the claimant because of his race both in their evidence in chief and in cross examination.

115. There were a number of earlier incidents involving the claimant which were raised by Mr Parker in his written evidence. Mr Parker stated that it was not until the claimant had submitted his Employment Tribunal claim that he reviewed his file in any detail and became aware of these matters (which arose before Mr Parker was employed by the first respondent). We have set out those relevant to the matters before us below:

    a. In 2007, the claimant brought a grievance against a Security Officer the outcome of which determined that there was a personality clash between the two of them. The Security Officer was moved to a different shift pattern so that they rarely worked together in the future;

    b. In 2013, the claimant was named in a grievance and subsequently as a named respondent in a claim of race discrimination brought by a White Security Officer. The first respondent supported the claimant's position

that he had not discriminated against the Officer. Both parties said that they could not work together and the Officer was moved to another site. We were referred to documents at B1 140-167 relating to this matter;

c. In November 2016, the claimant raised a concern that another Security officer had used the word "coloured" to describe the Black actor Denzil Washington during a discussion about films. This was initially dealt with informally and the claimant considered the matter closed and "linked to the officer's intellect" until the two clashed again in May 2017 and the claimant brought a formal grievance relating to the matter. The outcome of the grievance found that the word "coloured" had been used, had been incorrect terminology, and the Officer, who apologised to the claimant and expressed remorse for unwittingly causing offence, was issued with a disciplinary warning and required to attend four-day Equality and Inclusion training. The claimant's response to the grievance outcome was that "the finding which lead (sic) to the outcome was so well-deserved I'm lost for words… I really do agree with the outcome". We were referred to documents at B1 228-276 relating to this matter;

116. We heard closing submissions from the claimant and Ms Egan. Ms Egan also provided written submissions. We have taken them fully into account and whilst not setting them out in full we do refer to them where it is appropriate to do so.

Relevant Law

117. Section 13 Equality Act 2010:

"Direct discrimination

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others..."

118. Section 26 Equality Act 2010:

"(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."

Conclusions

Burden of proof

119. We have followed the guidance given as to the burden of proof by the Court of Appeal in Igen Ltd and others v Wong; Chamberlin Solicitors and another v Emokpae; Brunel University v Webster [2005] IRLR 258.

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

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

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

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

Direct discrimination

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

125. The claimant relies on four detriments which are set out within the agreed list of issues at B2 4. His claim is that he was treated less favourably in respect of each of these matters in comparison to a hypothetical White comparator in the same circumstances or those which are not materially different.

126. The first detriment is "being threatened twice by John Gibbons on 15 May 2019 once with a knife and once verbally". Having considered the evidence and our findings we conclude that the claimant was not threatened by Mr Gibbons either with a knife or verbally. We have taken the reference to being threatened verbally as the "punch bag" comment which is the first mention that the claimant makes of being threatened - in the email at B1 289. We did not accept that it was a reasonable interpretation of the phrase which in reality means the exact opposite, i.e. that the maker of the comment feels threatened. We therefore find that this detriment did not happen and in any event it was not reasonable to did not amount to a detriment. In any event the other words attributed to Mr Gibbons could not amount to threats or reasonably amount to a detriment.

127. The remaining three detriments complained of related to actions taken by Ms Todorova, in recommending that the claimant faced disciplinary action following her investigation of the incident on 15 May 2019, Mr Whitehouse in

determining that the claimant was demoted and transferred to the London Campus and Mr Parker in determining that the claimant be reinstated to his Supervisor role and upholding his transfer to the London Campus. We find that these happened as a matter of fact and that they are capable of amounting to detriments.

128. We would note that the first respondent was compelled to investigate the incident and as a result of the findings and to take disciplinary action against the claimant, having found that he made a false report.

129. We then considered whether the detriments found amounted to less favourable treatment because of race. The respondent's position is that a hypothetical White comparator would have been treated in the same way as the claimant was treated and relies on the actual comparators set out at paragraph 34 of its response claim (at B2 28-29).

130. The fact that a claimant is unable to point to a real-life, flesh and blood comparator in the workforce is not fatal to a complaint of discrimination. S/he can instead rely upon a hypothetical comparator whose hypothetical circumstances are the same, or not materially different to those of the claimant. It is for the claimant to show that the hypothetical comparator would have been treated more favourably and in doing so the claimant may invite the Tribunal to draw inferences from relevant circumstances, but it is still for the claimant to ensure that the Tribunal is given primary evidence from which the necessary inferences may be drawn, although this is still a matter that the Tribunal should have regard to itself.

131. We were grateful to Ms Egan for the reference to a paragraph from Harvey on Industrial Relations and Employment Law at paragraph 72 of her submissions relating to evidential comparators. This is now contained at division L. Equal opportunities, 3. Prohibited Conduct, A. Discrimination, (2) Direct Discrimination, (c) Comparators, paragraph 246.04.

132. This states as follows. In deciding how a hypothetical comparator would be treated, evidence that comes from how real individuals are actually treated is likely to be crucial, and the closer the circumstances of those individuals are to those of the complainant, the weightier will be the significance of their treatment. Certainly, comparing the treatment of those non-identical but not wholly dissimilar cases -"evidential" rather than "statutory" comparators - is a permissible means of constructing a hypothetical comparator and judging how s/he would have been treated (see Chief Constable of West Yorkshire v Vento [2001] IRLR 124, EAT, per Lindsay J at [7] and the approval such an approach in Central Manchester University Hospitals NHS Foundation Trust v Browne UKEAT/0294/11).

133. The first respondent has provided a number of evidential comparators, some of whom are White and some of whom are Black and have committed serious offences for which some have been dismissed and some of whom have been given final written warnings. These are set out in a table at paragraph 73 of Ms Eagle's written submissions indicating their date, race, nature of the allegation, the sanction and the relevant references to documents contained within B1.

134. The claimant has not provided evidence of any actual comparator in comparable circumstances. A hypothetical comparator would be a White Supervisor who was found to have committed gross misconduct or misconduct or found to have made a false report against and/or bullied a subordinate employee and given a lesser sanction than the claimant.

135. The claimant presented no evidence to suggest that a hypothetical comparator would have been treated differently to him. There was nothing from which we could draw any inferences.

136. Given the evidential comparators provided by the first respondent, this is a means of constructing a hypothetical comparator and determining how such a comparator would have been treated. This indicates that a hypothetical comparator would not have been treated more favourably than the claimant.

137. In any event, the claimant in effect alleges that four White employees of the respondent have conspired against him as the only Black Supervisor and that "some of my colleagues have raised the Racism Head (sic)" (at B1 10 box 8.2). This indicates nothing more than a difference in protected characteristic and an alleged difference in treatment. There is no evidence from the claimant as to why he considered that the first respondent's actions were materially influenced by his race.

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

139. The claimant gave no evidence in his witness statement that dealt with this question.

140. In oral evidence he said that Mr Gibbons initially refused to remove his knife from site on 15 May because he was Black but he agreed not to bring his knife when spoken to Ms Todorova who is White during the investigation meeting. As Ms Egan pointed out in her written submissions, there are a number of difficulties with this assertion:

    a. It is clear from the evidence that Mr Gibbons' response to the claimant was prompted by the way in which the claimant reacted to;

    b. Mr Gibbons did remove the knife on this occasion and had removed the knife on a previous occasion when asked by the claimant and without any bother;

    c. By the time that Ms Todorova spoke with Mr Gibbons, he had already decided following the incident with the claimant not to bring the knife in again and had left it at home. This was not prompted by Ms Todorova's involvement because Mr Gibbons did not know that she would be coming to the site on 16 May 2019;

d. In any event Ms Todorova was more senior to the Claimant.

141. The Claimant also stated in oral evidence that the fact that Ms Todorova relied upon his large size which was intrinsically linked to his race in comparison to Mr Gibbons' small size was evidence that she was motivated or influenced by his race. However, as the Claimant accepted, the Investigation Outcome Report made no reference to his size. It was Mr Gibbons who raised this in his investigation interview in response to allegations that he threatened the claimant.

142. In respect of Mr Whitehouse, the claimant in essence stated that because Mr Whitehouse found that he had behaved vindictively, his conduct must have been influenced by race. However, without anything more this is simply the Claimant disagreeing with the decision Mr Whitehouse made. There was nothing to suggest that Mr Whitehouse had done anything more than considered the evidence before him and reached a decision as to whether the charges were proven against the claimant.

143. In respect of Mr Parker, the claimant stated that he felt that his conduct was motivated by race because Mr Parker was formal and asked him questions during the appeal hearing which shaped the direction of his appeal. There is nothing to indicate how this is related to race. The appeal hearing minutes indicate that Mr Parker was trying to obtain relevant information from the claimant so as to understand his appeal. Moreover, Mr Parker removed the sanction of demotion.

144. As set out above, the claimant said he felt that:

"Because of my race I ended up in that position and they were happy to keep me there and I couldn't get out of it. It was like I was wielding the knife, not reporting it. That is how I felt. The way it looked to me was because I reported a white person I got treated extremely badly because I should do that."

145. However, his grievance against a White colleague in 2017 was resolved to his satisfaction.

146. His reference to the previous management and it being the Trump period made little sense beyond an unsupported assertion perhaps of it being a harsher regime.

147. In conclusion, there was nothing tangible beyond assertion to support the claimant's case. Moreover, the first respondent has defended the claimant in the past both in complaints against him of discrimination by a colleague and in supporting his own complaint of discrimination against a colleague.

148. We would comment that some of the matters that were presented to us were not raised with the claimant at the time and it may have been of assistance to him had he known of the extent of the respondent's investigation and to allow him to respond. It would also have been better had the first respondent addressed the complaint of racism within the appeal letter and explained why it had been rejected.

149. However, we did not believe that this was something that was indicative of unlawful discrimination. It is more a matter of best practice for the first

respondent in dealing with any future complaints of discrimination. As Ms Egan set out in her submissions and we accept, where there were any flaws in the process, there is no evidence that this was because of the claimant's race and this was not an unfair dismissal claim. Indeed, the claimant remained in employment although he was made redundant subsequent to the events we had to consider.

Harassment

150. Harassment is defined under section 26 of the Equality Act 2010. A person "A" harasses another "B", if "A" engages in unwanted conduct related to a protected characteristic, which has the purpose or effect of violating the dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B. In deciding whether the unwanted conduct has such purpose or effect, the Tribunal must consider the perception of B, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

151. We took into account that where conduct complained of does not have that purpose, i.e. where it is unintentional in that sense, it is not necessarily unlawful just because the worker feels his dignity is violated etc. We also took into account, as required, the other circumstances of the case and whether it is reasonable for the conduct to have that effect as well as the perception of the worker bringing the complaint. The starting point is whether the worker did in fact feel that his dignity was violated or that there was an adverse environment as defined in the section and that it is only unlawful if it was reasonable for the worker to have that feeling or perception. But not forgetting that nevertheless the very fact that the worker genuinely had that feeling should be kept firmly in mind (Richmond Pharmacology v Dhaliwal [2009] ICR 724).

152. We were also guided by ECHR Employment Statutory Code of Practice at paragraph 7.18:

"In deciding whether conduct had that effect, each of the following must be taken into account:

a) The perception of the worker; that is, did they regard it as violating their dignity or creating an intimidating (etc) environment for them. This part of the test is a subjective question and depends on how the worker regards the treatment.

b) The other circumstances of the case; circumstances that may be relevant and therefore need to be taken into account can include the personal circumstances of the worker experiencing the conduct; for example, the worker's health, including mental health; mental capacity; cultural norms; or previous experience of harassment; and also the environment in which the conduct takes place.

c) Whether it is reasonable for the conduct to have that effect; this is an objective test. A tribunal is unlikely to find unwanted conduct has the effect, for example, of offending a worker if the tribunal considers the worker to be hypersensitive and that another person subjected to the same conduct would not have been offended."

153. The claimant relies on the same four detriments as referred to above.

154. As we have already indicated we did not find that the first detriment happened as alleged.

155. In any event we did not find that anything that Mr Gibbons did on 15 or 16 May 2019 amounted to unwanted conduct.

156. Further, there was no evidence to indicate that the conduct complained of had the purpose of violating the claimant's dignity etc. As to whether it had that effect, taking into account the claimant's perception and the wider circumstances, it is not reasonable for the conduct to have that effect.

157. The claimant's perception was that Mr Gibbons had a knife at work which he was using to cut an apple and he believed that Mr Gibbons threatened him with the knife and by using the words that he was "not going to be his punching bag". The wider circumstances are that there was clearly some history between them, Mr Gibbons viewed the claimant as someone who could be difficult to work with and had made previous complaints about colleagues and he viewed him as somewhat of a bully and he did not want to be his punch bag. The claimant viewed Mr Gibbons as being unwell and on medication and having far right views (although these matters only came up at the disciplinary and the appeal hearing respectively and were not pursued further by the claimant at all at our hearing). But as we have said, in any event we did not find that the claimant was threatened by Mr Gibbons as a matter of fact.

158. Further, in any event, there was no evidence to link the conduct complained of to the claimant's race.

159. With regard to the remaining three detriments, clearly being investigated and subjected to disciplinary proceedings can amount to unwanted conduct because no employee wants to be investigated or sanctioned. However, we accept Ms Egan's submission that an employer must be allowed to operate a disciplinary policy.

160. In terms of the purpose or effect of the unwanted conduct. There is no evidence to indicate that the conduct complained of had the purpose of violating the claimant's dignity et cetera and when looking at the claimant's perception and the wider circumstances of the case it is not reasonable for the conduct to have this effect.

161. In any event there is nothing to link the unwanted conduct to the claimant's race and the claimant did not provide a coherent explanation as to why he believed this to be so.

162. So in conclusion, we find that the claimant's complaints of discrimination and harassment are unfounded and we dismiss his claim

The Deposit Order

163. Given the terms of the Deposit Order and our decision that the complaints are unfounded, rule 39(5) of schedule 1 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 is applicable.

164. This has the following effect. Having decided against the claimant for substantially the reasons given in the Deposit Order: a) the claimant shall be

treated as having acted unreasonably in pursuing the specific allegations or arguments identified (the four alleged detriments relied upon for each of his complaints) for the purposes of rule 76 unless the contrary is shown; and b) the deposit shall be paid over to the respondent.

Employment Judge Tsamados
29 October 2021