EMPLOYMENT TRIBUNALS

Claimant:	**Mr T Olanrewaju**
Respondents:	**(1) Munnelly Support Service** **(2) Bishopsgate Contracting Solutions Limited (In Voluntary Liquidation)**
Heard at:	**East London Hearing Centre**
On:	**Thursday 21 and Friday 22 October 2021 and (in chambers) 22 November 2021**
Before:	**Employment Judge Goodrich**
Members:	**Ms J Land** **Mr L O'Callaghan**

Representation

Claimant:	In Person
Respondent:	1st Respondent – Ms K Barry (Counsel) 2nd Respondent – Did not appear nor was represented

JUDGMENT

The judgment of the Tribunal is that:

1. The complaint of race discrimination against the first Respondent succeeds, to the extent further set out below.

2. The complaint of race discrimination against the second Respondent fails and is dismissed.

REASONS

<u>The Claim and the Issues</u>

1. The background to this hearing is as follows.

2. The Claimant's ET1 claim form was presented on 3 March 2020 against the first Respondent only.

3. Before presenting his claim, the Claimant had undertaken Early Conciliation through ACAS, as required. His Early Conciliation Certificate records that ACAS were notified on 2 March 2020 and issued their certificate on 3 March 2020.

4. In section 8 of his claim form the Claimant ticked that he was bringing an unfair dismissal complaint, although his details of claim in section 8.2 referred to allegations of racially discriminatory treatment from the Respondent. The points made in his details of claim included the following:

4.1 The Claimant was working as a lift operative.

4.2 He had been given specific instructions from his site manager and other managers from Canary Wharf not to stop that lift on floor 25 due to recurring technical issues with the doors closing when it stopped on that floor.

4.3 Giving his description of an incident when one of the managers insisted on stopping at floor 25 and shouted at him to demand he did so.

4.4 He believed that his dismissal was unlawful, that he had been sacked without due cause; and strongly believed that he had been discriminated against due to his ethnicity.

4.5 He had been a good long-term worker with no complaints in the past.

5. The first Respondent entered a response denying the claims. Amongst the points made were assertions that the correct Respondent was Bishopsgate Contracting Solutions Limited; that there was no unlawful discrimination; and that the Claimant was not an employee or contract worker pursuant to section 41 Equality Act.

6. Subsequently the first Respondent presented a response in which they accepted that they were the correct Respondent in the proceedings and gave their account of events. This included the following points:

6.1 A manager from their client company, called Mr Croistoru, had informed the first Respondent's manager, Mr Smyth, that the Claimant had been aggressive and shouted at him and grabbed his hand to prevent him from pressing a lift button when he had asked the Claimant to let him out on level 25 and was subsequently ignored by the Claimant. Mr Croistoru reported this incident to Mr Smyth as he was concerned that aggression is not tolerated by Canary Wharf contractors on its sites.

6.2 They accepted that Mr Smyth, the manager from the first Respondent that terminated the Claimant's engagement, was an employee of the first Respondent.

6.3 The decision to terminate the Claimant's engagement was not in any way related to the Claimant's race but solely due to the incident and the client's complaint that the Claimant had disobeyed a direct request to stop the lift and resulted in using physical force.

6.4 The first Respondent has an Equality Policy in place for its employees only and diversity training is delivered, and this does not apply to self-employed contractors such as the Claimant.

7. The second Respondent entered a response contending that the second Respondent had not unlawfully discriminated against the Claimant and disputing that the Claimant was an employee or contract worker for the second Respondent.

8. A Preliminary Hearing was conducted by Employment Judge Massarella on 27 July 2020. He dismissed the Claimant's unfair dismissal complaint because the Claimant lacked the necessary two-year qualifying period of continuous employment to pursue such a claim. He summarised the issues to be determined by the Tribunal and made Case Management Orders.

9. As the issue of whether the Claimant was an employee of the first or second Respondent within the extended definition of the Equality Act was an issue in the case, Employment Judge Massarella directed that this be decided at an Open Preliminary Hearing.

10. The case, therefore, was set down for a Preliminary Hearing to determine this issue.

11. The Respondent's representative wrote to the Tribunal, however, to state that he did not wish the issue of status to be treated as an issue in the case and asking for the Preliminary Hearing to be vacated on the basis that the Respondents conceded (for this case alone) the status issue.

12. At the outset of the hearing the Judge clarified with the parties whether the issues in the case remained those set out in paragraphs 10 and 11 of Employment Judge Massarella's discussion of the Preliminary Hearing on 27 July 2020. They confirmed that they remained the same.

The Issues

13. The Claimant's complaint is a claim of direct race discrimination. The Claimant describes himself as black and of Nigerian ethnic or national origins. He makes the following allegations of direct race discrimination:

13.1 On an occasion in early March 2020, Mr Crositoru demanded that the Claimant stop the lift, which the Claimant was operating, at the 25th floor.

13.2 Mr Crositoru shouted at the Claimant when he declined to do so.

13.3 Mr Crositoru complained about the Claimant to Mr Smyth.

13.4 Mr Smyth instructed Mr Jackson to dismiss the Claimant.

14. The Claimant contends that the person who usually operates the lift, Ms Petroliena (surname unknown) is Romanian, and that she would not have been treated in the same way.

Other Matters

15. It was agreed that this hearing would be to determine liability only; and that a separate Remedy Hearing would be required if the Claimant was successful wholly or partly in his claim. The Claimant, as in the Tribunal's experience is not uncommon with Claimants who are acting without legal representation, had not given details in his witness statement or in the bundle of documents for the Tribunal to explain his schedule of loss and provide evidence in support of it.

16. The Tribunal was informed that Ms Barry was not representing the second Respondent and that they are now in voluntary liquidation.

The Relevant Law

17. Direct race discrimination involves less favourable treatment because of race, taking section 13 Equality Act 2010 ("EQA") when taken in conjunction with section 39.

18. It has been recognised that it is difficult to find direct evidence of unlawful discrimination and Tribunals are required to consider the burden of proof provisions contained in section 136 Equality Act ("EqA").

19. Guidance has been given in the case of *Igen Limited v Wong and others (2005) IRLR 259 CA* and in many other cases as to how the burden of proof provisions are to be considered. *Igen* sets out a staged process for the Tribunal to adopt in dealing with the burden of proof. The Tribunal has read and adopt the guidelines set out in *Igen v Wong*.

20. At the first stage, it is for the Claimant to prove, on the balance of probabilities, facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed an act of discrimination against the Claimant which is unlawful. Failure to comply with any provision of any relevant code of practice is a matter from which inferences may be drawn.

21. Further guidance has been given in many other cases, including that of *Madarassy v Nomura International plc (2007) IRLR 246 CA* as to what may be sufficient in order to shift the burden of proof.

22. A Claimant may seek to show that he or she was less favourably treated than an actual, or a hypothetical comparator. Section 23 EqA provides that on a comparison of cases for the purposes of section 13, there must be no material difference between the circumstances relating to each case.

23. Where a Claimant has proved facts so as to cause the burden of proof to shift to the Respondent, it is for the Respondent to prove that they did not commit, or as the case may be, are not to be treated as having committed, that act. To discharge that burden it is necessary for the Respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of race. A Tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the Tribunal will need to examine carefully explanations for failure to deal with a relevant code of practice.

24. Tribunals have also been encouraged, particularly in cases where a hypothetical comparator is being considered, to consider the question why the Claimant was treated in the way he or she was- whether or not the treatment was on the prohibited ground.

25. The Tribunal must consider, where it considers it relevant, the provisions of the Equality and Human Rights Commission's code of practice on employment.

The Evidence

26. On behalf of the Claimant the Tribunal heard evidence from the Claimant himself; and from Mr Fabian Etemewei, who worked for the first Respondent between February to April 2019 at the same site as the Claimant.

27. On behalf of the Respondent the Tribunal heard evidence from Mr Michael Smyth, site manager for the first Respondent; and Mr Norris Jackson, site supervisor for the first Respondent.

Findings of Fact

28. The Tribunal does not set out every detail provided to us, nor make findings on every detail on which the parties were not agreed. We have, however, considered all the evidence provided to us and we have borne it all in mind.

29. The Claimant, Mr Tolulope Olanrewaju ("Ola"), describes himself as being black and of Nigerian origins.

30. The Claimant worked for the first Respondent from 26 November 2018 until 27 February 2020.

31. Throughout the time the Claimant worked for the first Respondent he was working at the same building construction site known as the Newfoundland Project at Canary Wharf. The building construction consisted of the construction of a multi storey development, 63 stories high, we were informed, in the Canary Wharf area of East London.

32. During the time the Claimant worked for the first Respondent the workforce on site consisted of about 500 – 600 different trades people and operatives, of which about 50 – 55 were working for the first Respondent.

33. In view of the concession made on behalf of both Respondents it is unnecessary to determine whether or not the Claimant was an employee of the first Respondent, it is

sufficient to record that they came within the extended definition of employment within the meaning of section 83 Equality Act 2010.

34. The first Respondent was described as a construction and infrastructure support services group providing logistics, waste management and other ancillary services to the construction and infrastructure sectors.

35. The second Respondent was described as a payroll company providing outsource payroll services allowing workers of every pay type to be processed: whether directly employed, umbrella company model, self-employed individuals and those engaged pursuant to the Construction Industry Scheme regime ("CIS"). CIS applies to any organisation that adheres to the definition set out in section 59 Finance Act 2004 or receives payments that are made under a construction contract, which is a contract relating to construction operations that is not an employment contract or contract of services. (These were descriptions given in the first Respondent's amended grounds of resistance).

36. At the outset of the Claimant's employment or engagement with the first Respondent he worked as a hoist driver. A hoist driver operated the hoist that was located outside the building being constructed to take individuals and materials up and down the building. Individuals would make appointments to book a time to go up and down the building in the hoist and the Claimant (and other hoist drivers) would operate the hoists.

37. Later on, in the construction of the building, internal lifts were constructed and made operational. Some of those lifts were to take people up and down the building; some were to take materials up and down. Four of the lifts were designated as goods and materials lifts; and two as passenger lifts.

38. The Claimant was one of about 50 – 55 labourers working for the first Respondent.

39. The site manager for the first Respondent's workforce on the site was Mr Michael Smyth. Mr Smith is white and is an employee of the first Respondent.

40. There were two supervisors who were managed by Mr Smyth, one of whom was Mr Norris Jackson. Mr Jackson is black and of similar Nigerian ethnic origins as the Claimant.

41. The client for whom the first Respondent was supplying their part of the workforce was Canary Wharf Contractors Limited. They were responsible for the construction of this site and other construction sites within Canary Wharf.

42. Among the managers from Canary Wharf Construction Limited was Mr Cosmin Crositoru. Mr Crositoru is white and is of Romanian ethnic origins.

43. Mr Smyth had the power to terminate the employment or engagement of any of the first Respondent's workforce on the Newfoundland Project site. Mr Jackson from time to time conveyed Mr Smyth's decisions to the individuals concerned, but he did not make any decision to terminate without seeking Mr Smyth's authorisation.

44. Despite Mr Smyth's power to dismiss any of the first Respondent's workforce working on the site, he has never received any equal opportunities training and had no knowledge of what the equal opportunities policy was. This was in contradiction to the first Respondent's grounds of response, in which they stated that Mr Smyth was an employee of the Respondent, that they had an equality policy, and that diversity training was provided. Yet, in answer to questions from the judge, Mr Smyth replied that he assumed that there was an equality policy and that he had never had any training on equal opportunities (although he had been an employee of the first Respondent for about ten or eleven years).

45. Mr Smyth's ignorance of his employer's equal opportunities policy specifically, and of equal opportunities generally was surprising to the Tribunal, as the first Respondent appears to be an organisation of a reasonable size. We use the word "appears" because the first Respondent failed to complete box 2.7, which the Respondent is asked how many the organisation employs in Great Britain. Mr Smyth did, however, inform the Tribunal that he had been a site manager on a number of sites for the first Respondent and they had many sites across the country for which they supplied a workforce.

46. Although there are various aspects of the relevant facts on which the parties are agreed, there are also disputes on the facts particularly the following:

46.1 Whether, prior to the incident that gave rise to the Claimant having his employment or engagement terminated (we use the term employment loosely for the reasons set out further above) his behaviour had been unsatisfactory, aggressive and arrogant throughout (as asserted by the first Respondent); or whether there had been no significant issues prior to the incident in question (as was the Claimant's evidence).

46.2 Whether Mr Jackson had been dismissed by Mr Smyth and then reinstated at the instruction of Mr Errol Amon, who works for Canary Wharf Contractors Limited and is black.

46.3 Whether black labourers were more likely to be dismissed by Mr Smyth than those who are white.

46.4 The details of the incident on 27 February 2020. The disputes included whether only the lift operator could operate the lifts; whether the lift could only stop on designated floors; whether managers were able to override a direction that the particular lift should only stop on particular designated floors; whether the Claimant shouted at Mr Crositoru, or whether Mr Crositoru shouted at the Claimant; and whether the Claimant grabbed Mr Crositoru's hand.

47. As regards the first area of dispute the Tribunal finds that, up to 27 February 2020, there were no significant issues with the Claimant's conduct or performance and found the Respondent's evidence to be unsatisfactory on this issue, including for the following reasons.

48. The Tribunal found Mr Smyth's evidence particularly unsatisfactory. In paragraph five of his witness statement Mr Smyth referred to many occasions when he stated the

Claimant had been aggressive and arrogant. He also referred to reports of the Claimant not turning up for work. This latter point was flatly contradicted by Mr Jackson, who stated in his oral evidence that there had never been a problem with the Claimant's attendance or time keeping. Mr Jackson, as the Claimant's supervisor with more day to day contact with the Claimant appeared to the Tribunal to be more likely to be correct about this; and we found Mr Jackson generally to be a more convincing witness than Mr Smyth.

49. In paragraph five of Mr Smyth's witness statement the impression was given that the Claimant's conduct was aggressive and arrogant throughout his employment with the Respondent, whereas in his oral evidence Mr Smyth stated that there had been no problems with the Claimant until from around January 2020 up to his dismissal, when he started working as a lift operator (after he was no longer required as a hoist operator).

50. Although Mr Smyth stated on numerous occasions that Mr Jackson had asked if he would refrain from terminating the Claimant's assignment or could be given a further chance, this evidence appear to us to be inconsistent with how the Tribunal had described to them by Mr Jackson a "yellow card" system.

51. The yellow card system described to the Tribunal by Mr Jackson was of yellow cards being given for unsatisfactory behaviour and three yellow cards would lead to termination. Mr Jackson notified the Tribunal that the Claimant had never been issued with any yellow cards.

52. Mr Smyth's evidence also appeared to be inconsistent with what was described by him of there being a zero tolerance for aggressive behaviour on site. If so, this inconsistent with the Claimant having not even been given any yellow cards, or been dismissed sooner, if he was aggressive at various different times, as alleged by Mr Smyth.

53. Mr Jackson also contradicted Mr Smyth's oral evidence at the Tribunal about the Claimant's behaviour only being an issue in the last two months that he worked for the Respondent, by saying that the Claimant was from time to time rude to him (Mr Jackson) and disobeyed orders including from the time that he was working as a hoist operator.

54. The Tribunal finds, therefore, that any problems in the Claimant's conduct were relatively minor and less than those stated in the first Respondent's evidence. We accept, however, that from time to time Mr Jackson needed to remonstrate with the Claimant and "smooth over" disagreements on the site.

55. It was also the case, as explained by Mr Smyth, that working as a lift operator could be difficult. Whereas, on the hoist operation system, prior appointments needed to be made, no prior appointments were needed for the lifts and people would go to the lifts and want to get to their destinations quickly and be impatient. Mr Smyth explained that being a lift operator was a difficult job and that he would take complaints about lift operators with a "pinch of salt".

56. Between February to April 2019 Mr Fabian Etemewei worked for the first Respondent as a labourer, on the same Newfoundland project site as the Claimant. He and the Claimant became friends, having met at work and Mr Etemewei gave evidence on the Claimant's behalf.

57. The circumstances of the termination of Mr Etemewei's employment or engagement with the first Respondent are less a matter of dispute than an issue of how much the Tribunal should make of it. Neither Mr Smyth nor Mr Jackson could remember the circumstances of Mr Etemewei's termination. This is understandable in that he worked for the first Respondent for a relatively short time and his witness statement was provided for these proceedings on 11 October 2021, approximately 18 months after he was dismissed.

58. The Tribunal found Mr Etemewei to be a reasonably credible witness. His evidence about the circumstances of his dismissal was unchallenged, as explained above, and appeared to the Tribunal to be plausible and credible.

59. What happened was that a hoover that had gone missing was held to be his responsibility (Mr Etemewei stated that he had in fact returned the hoover, nevertheless the Tribunal can readily understand that a missing hover in a building over 60 storeys high would be most annoying). When he challenged this, Mr Etemewei was told that he had been aggressive. He was dismissed by Mr Smyth as a result of the incident.

60. Mr Etemewei stated in his witness statement that Mr Smyth had sacked Norris Jackson who was reinstated by a Canary Wharf manager, called Errol (Errol Amon) (who we have referred to above). When cross-examined on this, his evidence was that he had heard this from another labourer on the site, after he (Mr Etemewei) had been dismissed.

61. Both Mr Smyth and Mr Jackson denied when examined in chief that Mr Jackson had been dismissed by Mr Smyth and reinstated. This evidence appeared to the Tribunal to be disingenuous in that Mr Jackson, during cross-examination, accepted that there had been an incident of him taking a step-ladder as a result of which he was sent home by Mr Smyth; although Mr Jackson disputed that he had been dismissed or that Errol Amon had told Mr Smyth that he wanted him (Mr Jackson) back on site and that he had in fact been dismissed by Mr Smyth. This shows that the rumour Mr Etemewei had heard from his former colleague was not a complete fabrication, even if it may have been incorrect.

62. A major area of dispute is whether there was a disparity of treatment between how likely a black labourer working for the first Respondent was more likely to be terminated by Mr Smyth as a result of any complaint about their conduct or performance than a white worker.

63. This dispute is a difficult one for the Tribunal to resolve because of the lack of satisfactory evidence produced by the first Respondent. Unlike in many race discrimination complaints, this Respondent provided no statistics to the Tribunal on how many of the first Respondent's workforce at the Newfoundland site at the time were black and how many were white; how many had their employment or engagement terminated and what their colour or ethnicities were. All we had from Mr Smyth was a sentence in his witness statement that when issue arose with a contractor they would often simply terminate the arrangement; and him saying in answer to a question when examined in chief, that he also had terminated non-white workers; but no details given as to how many of the people he had terminated were black and how many were white, nor of the circumstances of termination.

64. As regards the Claimant's evidence about disparity in how black and white labourers were treated by Mr Smyth, the Claimant's ET1 claim form detail made no reference to Mr

Etemewei or other black employees being dismissed by the first Respondent, and this only emerged in Mr Etemewei's witness statement. In the course of being cross-examined, when it was put to the Claimant that his termination was because of his behaviour and nothing to do with his race, the Claimant stated that other black people had been terminated before for minor things and also referred to a Bulgarian lift driver who had been rude to Mr Jackson and dismissed by him and then reinstated by Mr Smyth. This was denied by Mr Jackson.

65. It is difficult, therefore, for the Tribunal to make a finding of fact on whether there was generally more likelihood of Mr Smyth to terminate a black employee than a white employee for similar conduct issues. The evidence prepared and provided to us is too unsatisfactory and incomplete to do so.

66. All the Tribunal considers itself able to record is that Mr Etemewei, who is black, appears to have had his engagement terminated for reasons that appear to be relatively minor; and that aggressive behaviour was the reason given in both cases. We deal with the issue of the Claimant's termination later below.

67. From about January 2020, after the internal lifts for the building had been completed and operational the need for hoist drivers ceased. The Claimant, and other hoist drivers, started working as lift drivers. The Claimant was a relief lift driver.

68. On 27 February 2020 the Claimant was operating passenger lift number 4 as the relief driver for Ms Petroliena, who was off work that day. Ms Petroliena is of Romanian origins. So far as the Employment Tribunal was made aware (and this was Mr Jackson's evidence) Ms Petroliena had not been in any incidents that might give rise to the first Respondent terminating her employment or engagement.

69. In order to ensure that passengers can go as quickly as possible to the floor they wished to stop on, the four passenger lifts were designated to stop on only some of the floors of the building. Passenger lift four, the lift the Claimant was operating, had a sign outside it stating that the lift only stopped on levels 1, 10, 21 (the number 20 having been crossed out and 21 substituted), 30, 40, 50 and 58.

70. Each of the passenger lifts could stop on any floor, but the lift operator was not expected to do so, in order that lift passengers could get to and from their destinations quickly.

71. In dispute is whether the lift driver was forbidden to stop at any other floor than the designated ones for that lift (as the Claimant says); or, if a manager from the client company wished to stop at a different floor, the lift operator was expected to stop the lift on that floor.

72. Also, in dispute between the parties was whether stopping at any other than the designated floors was a major health and safety risk, which would have led to him being disciplined. The Claimant's evidence that it was, the Tribunal finds, exaggerated. The Respondent's witnesses' evidence that stopping at different floors was not a health and safety risk but was there to ensure speedier progress up and down the floors of the building was more convincing. How aware the Claimant was of this rule was unclear to

the Tribunal, having in mind that he was a relief lift operator, operating the lift that day because of Ms Petroliena's absence. Although Mr Jackson stated in his witness statement that the lift operators were informed that the rule that they must stop the lift at any floor when told to do so by a manager or supervisor, the Claimant was not cross-examined on this and neither did he cross-examine Mr Jackson on it.

73. The Claimant was operating passenger for lift in which Mr Cosmin Crositoru, a manager working for the first Respondent's client, Canary Wharf Contractors Limited, wanted to get out on level 25. He was going to a meeting on that floor. He asked the Claimant to stop the lift on level 25. Floor 25 was not one of the designated floors for that lift to stop. The Claimant refused to stop on that floor. In dispute is whether, in addition to not being designated to stop at floor 25, the lift doors for that floor were faulty (as the Claimant says); or there was nothing wrong with the doors (as Mr Smyth and Mr Jackson say).

74. On the balance of probabilities, the Tribunal finds that the lift could have stopped on floor 25. The Claimant's evidence appeared to be confused. In his claim form he stated that the managers request was for him to stop the lift on floor 25, although in his witness statement, he stated that it was floor 20. In cross examination he agreed that it was floor 25. The picture in the bundle of documents showed floor number 20 having been crossed out and floor 21 put in its place, which suggests that floor 20, not 25 was out of action. Yet, in Mr Croituru's email to Mr Smyth, to which we refer in more detail further below, Mr Smyth, when complaining at the Claimant refusing to let him stop on floor 25 and being told by him that the doors were faulty, did not state that, in fact, there was no problem with the lift stopping on that floor, but merely that the Claimant had not told him of this at the outset.

75. Also in dispute between the parties is whether the Claimant simply put his hand over the button to prevent Mr Crositoru pressing for floor 25 and there was no physical contact between the two (as the Claimant says); or whether the Claimant grabbed Mr Crositoru's hand to stop him pressing the button, as was stated in an email from Mr Crositoru to Mr Smyth (to which we refer further below).

76. On the balance of probabilities, the Tribunal finds that the Claimant probably did grab Mr Croitoru's hand. In answer to a question from one of the Tribunal's lay members the Claimant stated that he had never previously had any problem with Mr Croitoru before. It appears unlikely, therefore, that it would be something Mr Croitoru made up. It may be that the difference between the two accounts is more one of perception than a major disagreement as to what happened. To the Claimant it may have been that he was simply using his hand to hold it by the buttons for the floors to prevent Mr Crosituru pressing floor 25; and to Mr Croituru, he was acting aggressively by making contact when he (Mr Croituru) was needing to get quickly to a meeting.

77. Also, in dispute is whether the Claimant was shouting at Mr Crositoru (as Mr Crositoru said in his email to Mr Smyth); or whether it was Mr Crositoru that shouted at the Claimant. There may well have been a heated verbal exchange at which each shouted at each other. At any rate, Mr Crositoru was not called to give evidence; and the evidence of Mr Jackson and Mr Smyth is second-hand.

78. Mr Crositoru spoke to Mr Smyth to complain about the Claimant's behaviour. They had a discussion. Mr Smyth's evidence on their discussion was another aspect of his evidence that was unsatisfactory to the Tribunal.

79. When cross examined by the Claimant as to why he had not asked the Claimant about the incident, Mr Smyth stated that he had pleaded with Mr Croituru to not "red card" the Claimant. He explained that the effect of receiving a red card was that he would be unable to work on any other site in Canary Wharf managed by Canary Wharf Contractors Limited. The impression given by him was that he was doing the Claimant a favour. This was thoroughly unconvincing to the Tribunal.

80. In response, it appears, to the Claimant issuing this claim to the Employment Tribunal, Mr Croituru sent an email to Mr Smyth on 17 March 2020. The wording of the email describes the initiative for dismissing the Claimant coming from Mr Smyth, not Mr Croituru, although Mr Croiture agreed with Mr Smyth's decision. Mr Croituru gave his account on what happened to Mr Smyth. Mr Smyth told him that this was not the first time "he had done it and you would take the actions accordingly". He went on to say that, from his point of view that was a correct action as CWCL doesn't tolerate aggression on its sites (spelling mistakes corrected). No mention was made of Mr Smyth managing to persuade him not to red card the Claimant.

81. Mr Smyth made an agreement with Mr Crositoru that the Claimant would be terminated that day. Mr Smyth allowed him to work, and be paid for, the remainder of that day, before telling him that Mr Croituru had not changed his decision. Mr Smyth made no mention of having persuaded Mr Croituru not to red card him, so that he would be able to get a job on another site managed by Canary Wharf Construction Limited. Even, therefore, if Mr Smyth did persuade Mr Croituru away from an original intention to red card the Claimant, which we doubt, this was of no use to the Claimant, because he did not tell him of what he had done.

82. Mr Smyth, therefore, made the decision to dismiss the Claimant without having had any communication with him to ascertain the Claimant's account of what had taken place.

83. Mr Smyth told Mr Jackson to inform the Claimant of his decision.

84. Mr Jackson informed the Claimant of Mr Smyth's decision and the Claimant gave his account of events to Mr Jackson. In dispute (although the Tribunal does not consider the dispute to be of any importance is whether Mr Jackson simply told the Claimant to go to see Mr Smyth (as Mr Jackson says); or whether he did see Mr Smyth and tell the Claimant that he had refused to change his decision (as the Claimant says). The Claimant also spoke to Mr Smyth. Mr Smyth notified the Claimant that there was nothing he could do and walked away from the Claimant. In the course of this brief exchange or words the Claimant did not state that he believed his dismissal to be an act of race discrimination. His explanation for this, which was perfectly plausible to the Tribunal, was that he did not get the chance to do so because Mr Smyth had walked away after confirming his decision.

85. Of note is the absence of much in the way of written records of the incident and decision in question. All that was provided to us was an undated, unsigned short description of Mr Smyth's decision to dismiss the Claimant in explanation for it. Also

provided was an email dated 17 March 2020 from Mr Crositoru to Mr Smyth which was dated 17 March 2020; and appears to have been prepared because of the Claimant having issued these proceedings, rather than any contemporaneous communication to Mr Smyth.

Closing Submissions

86. Both parties gave oral submissions.

87. Ms Barry's submissions on behalf of the first Respondent included the following points:

87.1 Submissions as to the relevant legislation and case law.

87.2 The focus of this case was on whether the dismissal of the Claimant was an act of direct race discrimination. The other three allegations all related to Mr Crositoru, who worked for Canary Wharf Contractors, not the Respondent.

87.3 The reason for the Claimant's dismissal was his aggressive conduct towards the Respondent's client. If they wanted someone off the site, they could require it.

87.4 Although Mr Crositoru did not appear as a witness his account appeared to be credible, if there had been no previous problems between him and the Claimant and there was nothing in his account to give cause for concern (these submissions were in answer to questions from the Judge as to whether, as the Claimant was dismissed by Mr Smyth without getting his account or explanation for the events, whether what happened was relevant). The Judge explored with Ms Barry's responsibilities of Mr Smyth, for example if Mr Crositoru had said that he did not want the Claimant on the site because he is black. Mr Barry's response that the facts did matter a bit and that Mr Croituru's account in his email was credible.

87.5 Reminding the Tribunal that this is not an unfair dismissal case and unreasonable behaviour does not equate to racially discriminatory behaviour.

87.6 There was no evidence that race was a factor and the burden of proof should not shift to the Respondent to disprove it. If it did, the Respondent had satisfied the reverse burden of proof. In answer to the judge's question as to whether, if the Tribunal did decide that the burden of proof shifted to the Respondent to show that the Claimant's dismissal was not an act of race discrimination, the Respondent's explanation was that they treated all the workforce, black and white, badly in respect of being dismissed, she agreed that this was their case.

87.7 It was the client, not the Respondent who wanted the Claimant out. Mr Etemewei's evidence should be treated with a large dose of salt, as a disgruntled employee and he was wrong about Mr Jackson having been dismissed, which taints his evidence. Others had been dismissed who were not black.

88. The Claimant's submissions included the following points.

88.1 The first Respondent put the blame on the second Respondent, who pay us, and he did not withdraw his case against them.

88.2 There was no physical contact or aggression, as had been suggested for the incident in the lift and the evidence was fabricated. All the managers were aware that the lifts should not stop at level 25 and if he had stopped there with the faulty doors he would have failed to comply with health and safety law and could have been sacked for that.

88.3 He had never been given any yellow card and, if he truly had assaulted Mr Crositoru, he would have been given a red card.

88.4 Black people in addition to him had also been sacked.

88.5 It was obvious that Michael Smyth had never had any equality training and the Respondent had failed to give the name of any white person who had been sacked.

88.6 Norris Jackson had been sacked by Michael Smyth and restored by Errol, a black man.

88.7 The Respondent's evidence was inconsistent. Michael (Smyth) had said that when I was a hoist driver, they had no issues with me. Norris (Jackson) said that on several occasions he had reported me to Michael he was driving the hoist. This was not true.

88.8 He was dismissed because he was black, and this had happened to several black persons from Michael Smyth.

Conclusions

89. The second Respondent was not involved in the Claimant's dismissal. It appears to be merely a company set up to pay the Claimant (and others) in return for their work performed for the first Respondent; and appears to be a device seeking to obtain Construction Industry Scheme status; and to avoid the Claimant having employment protection with the first Respondent. Nor, so far as the Tribunal is aware, was there any connection between Mr Crositoru and the second Respondent.

90. The proceedings against the second Respondent are, therefore, dismissed.

91. The first three allegations of race discrimination are, likewise, dismissed. Mr Crositoru was neither an employee nor worker, nor independent contractor working for the first Respondent, but working for the client company for whom the first Respondent was providing services. The first Respondent had no involvement at all in what actually happened in the lift between the Claimant and Mr Crositoru. On no sensible analysis can the first Respondent have committed race discrimination for what the Claimant alleges Mr

Crositoru said or did to him in the lift. These complaints fail and are dismissed.

92. The focus of the race discrimination case is, as submitted by Ms Barry, on the Claimant's dismissal. We have given consideration to whether the Claimant, on the balance of probabilities, has proved facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the first Respondent has committed an act of discrimination against the Claimant which is unlawful.

93. The Tribunal concludes that the Claimant has proved such facts including because:

93.1 The individual who dismissed the Claimant, Mr Smyth, has never had any training on equal opportunities, nor did he have any knowledge of whether the first Respondent had such a policy or what, if it did it contained. The failure on the Respondents part to provide any such training to Mr Smyth runs contrary to, for example, Chapter 18.18 and 18.19 of the Equality and Human Rights Commissions Code of Practice on Employment. Nor was the Tribunal provided with any evidence that the Respondent monitors all dismissals by reference to protected characteristics, or ensure that any dismissal is made on the advice of the human resources department, as advised in chapters 18.28, 19.10 and appendix 2 of the Code (although we bear in mind that the first Respondent did not consider the Claimant to be an employee, but an independent contractor).

93.2 The Tribunal appreciates that this is not an unfair dismissal case. Nevertheless, Mr Smyth dismissed the Claimant without first obtaining any explanation from him of what had happened. In this respect he treated him badly. It was also in contradiction to his evidence when cross-examined that "Ola's" was quite difficult and could cause arguments and that he would speak to both sides and wanted to retain the workforce. Although we appreciate that unreasonable behaviour does not equate to racially discriminatory behaviour, neither should we assume that the first Respondent habitually treats its workforce badly, particularly when Mr Smyth claimed to be reluctant to dismiss. The Tribunal recognises, nonetheless, that a complaint from a client manager is different from a complaint between two members of his own workforce, or others at the workforce on the site who were not his client.

93.3 We give less weight to Mr Etemewei's evidence in view of his allegations only coming to the first Respondent's knowledge on exchange of witness statements a considerable time after the incident in question. Nevertheless, we give it some weight as we found Mr Etemewei to give a plausible and convincing account of what had happened to him. He was dismissed on what, on his account, was a minor incident. His evidence was that dismissing him because of so called aggression was racial stereotyping of him. We accept, at least, that both he and the Claimant are black and were dismissed for aggressive behaviour, which could indicate a pre-disposition, conscious or unconscious, to readily perceive black individuals as aggressive.

93.4 Although, of itself, the Tribunal might not consider the burden of proof to shift because of this, we were troubled by some of the inconsistencies and contradictions in Mr Smyth's written and oral evidence and his omission to give the details of the incident between him and Mr Jackson when he sent Mr

Jackson off the site.

93.5 We also appreciate, and have in mind, that one of Mr Smyth's two deputies is black and that the Claimant did transfer from being a hoist operator to being a lift operator when the need for hoist operators ended.

94. In this case, the Tribunal is considering what treatment a hypothetical comparator would have received as, so far as the Tribunal is aware, the Claimant's named comparator, Ms Petroliena, did not have a similar dispute with Mr Croituru to the Claimant's dispute. Would she, if she had been the one in the lift and the same incident occurred, have been treated more favourably by Mr Smyth than the Claimant was?

95. The first Respondent has failed to convince the Tribunal that the Claimant's dismissal was in no sense whatsoever because of his race; and conclude that the Claimant's colour probably had a significant influence on the outcome, although by no means the only or even the main influence.

96. For the Tribunal to be satisfied that a white employee would have been equally likely to be dismissed as the Claimant had the same events happened, the Tribunal required some cogent evidence at least that this would have been the case. All we had was a sentence in Mr Smyth's witness statement that when issues like that with the Claimant arose with a contractor they would often simply terminate the arrangement; and a bald answer from Mr Smyth to a question put in examination in chief as to whether he had terminated non black employees, that he had. No details were given by him as to how many white members of the workforce he had terminated in comparison to black, or what they had done in order to be dismissed. The little evidence we had pointed towards two black members of the workforce being treated badly in how they were dismissed, both on grounds stated to be of aggressive behaviour, and no details of the circumstances of any of the white members of the workforce having been dismissed in similar circumstances. The first Respondent has failed to convince the Tribunal of its explanation, that it treated white and black members of the workforce equally badly in similar circumstances.

97. Additionally, the absence of any knowledge on Mr Smyth's part of the Respondent's equal opportunities policy, any training on equal opportunities, or any monitoring by the Respondent's human resources department of Mr Smyth's dismissals of members of the workforce he managed (Mr Smyth did state that he Respondent had a human resources department) troubles the Tribunal. Nor do the unsatisfactory aspects of Mr Smyth's evidence to which we have referred in our findings of fact re-assure the Tribunal.

98. Nor does the Tribunal consider that Mr Smyth did try to "fight the Claimant's corner" as claimed that by him. If Mr Smyth had been told by Mr Croituru that he was going to issue the Claimant with a "red card", so that he would be unable to work on any other of the first Respondent's sites, and persuaded him not to issue a red card, we would have expected Mr Smyth to tell the Claimant this. The obvious thing for him to have done in such circumstances would have been to have said to him something to the effect that although Mr Croituru insisted that the Claimant be dismissed, he had persuaded him not to red card him; and, therefore, he would be able to obtain work on any other site managed by Canary Wharf Construction Limited. If he had succeeded in helping the Claimant in this way, it was of no use to the Claimant as he did not tell him what he had done. His failure to do this suggests that he would, or might, have tried harder for a white

employee.

99. The Claimant's complaint that his dismissal was an act of direct race discrimination, therefore, succeeds.

Nest steps

100. As the Claimant has not provided evidence to support the schedule of loss he supplied, he needs to provide evidence in support of it. We make case management orders below for this.

101. In the Claimant's witness statement we would expect him to set out, for the times for which he is claiming compensation, what steps he has taken to find alterative work, what work he has obtained, how much he has received by way of pay, what benefits he received (if any), what effects having had his work terminated by the Respondent had on him, and any other evidence relevant to seeking to satisfy the Tribunal to uphold his schedule of loss. We would also expect him to supply the first Respondent with copies of the documents relevant to his schedule of loss.

102. On the first Respondent's part, we make case management orders to permit them, if they so wish, to file a counter-schedule of loss and any evidence in support of their case on remedy.

103. We hope that the parties will seek to settle remedy. We make the following preliminary remarks in the hope that they may assist. We stress that these are preliminary views only; and may well change if a remedy hearing is required.

104. A Claimant's schedule of loss will usually involve a claim for loss of earnings, and for injury to feelings. We note that the Claimant's schedule of loss did not set out any award for injury to feelings and are aware that he is not a lawyer and acting in person.

105. In assessing compensation, a Tribunal would seek to put an employee in the position they would have been absent the unlawful discrimination. In the case of *Chagger v Abbey National PLC (2010) IRLR 47 CA*, it was held that, in assessing compensation for discriminatory dismissal, it is necessary to ask what would have occurred had there been no unlawful discrimination. If there were a chance that dismissal would have occurred in any event, even if there had been no discrimination, that must be factored into the calculation of loss. In *Way v Crouch (2005) IRLR EAT,* it was held that an award of compensation could be reduced for contributory conduct.

106. It may be, therefore, that the Claimant's loss of earnings would be reduced, if the Tribunal were to decide that the Claimant would, or might have been, dismissed if there had been no racial discrimination involved in his dismissal, or that he contributed to his dismissal.

107. As regards dismissal or termination of the Claimant's work for the first Respondent is a reasonably serious form of discrimination, which might lead to compensation in the region of the top point of the bottom band of injury to feelings, or bottom of the middle band set out in the guidance given in the case of *Vento v Chief Constable of West*

Yorkshire Police (No 2) (2003) IRLR 102 CA; and which needs to be increased in line with inflation, the uplift set out in the case of *De Souza v Vinci Construction (UK) Ltd (2017) IRLR 844 CA* and guidance given by the President of the Employment Tribunals, together with the Interest on Awards in Discrimination Cases Regulations 1996.

108. We hope that the above may assist the parties to settle remedy. If the parties are unable to do so a remedy hearing will take place, remotely, by Cloud Video Platform, **on 14 February 2022**, listed for one day, commencing at 10.00 am.

ORDERS

Made pursuant to the Employment Tribunals Rules of Procedure 2013

Evidence to be supplied by the Claimant for remedy hearing

109. By not later than **21 days** from the date this judgment is sent to the parties, the Claimant shall serve on the first Respondent an updated schedule of loss, his witness statement in support of his remedy claim and all documents relevant to his remedy claim.

Evidence to be supplied by the first Respondent for the remedy hearing.

110. By not later than **42 days** from the date this judgment is sent to the parties, the first Respondent may, if so advised, serve on the Claimant a counter schedule of loss, all relevant documents for the remedy hearing, and any witness statement on which they may seek to rely.

111. By not later than **56 days** from the date this judgment is sent to the parties, the Respondent shall prepare a remedy bundle of documents, to contain all relevant documents which either side wishes to have included, and provide a copy of the remedy bundle, fully indexed and paginated, to the Claimant. The Respondent shall email a copy of the bundle to the Tribunal not later than **7 days** before the remedy hearing.

Employment Judge Goodrich
Date: 22 November 2021