EMPLOYMENT TRIBUNALS

Claimant: Ms M Begilnu Phatey

Respondents: (1) MiHomecare Ltd
(2) Mr S Jeffers

Heard at: **London South Employment Tribunal**

On: **16-18 November 2021**

Before: **Employment Judge Ferguson**

Members: **Mr G Anderson**
Mr K Murphy

Representation
Claimant: Mr T Sheppard (counsel)
Respondents: Ms A Smith (counsel)

RESERVED JUDGMENT

It is the unanimous judgment of the Tribunal that:

1. The Respondents victimised the Claimant by disclosing information about her to her subsequent employer on 9 and 17 October 2018.

2. The complaints of direct race discrimination and harassment fail and are dismissed.

3. The determination of remedy is stayed pending the outcome of related proceedings in Watford Employment Tribunal, case no. 3315890/2019 The Claimant must update the Tribunal on those proceedings as soon as a judgment on liability is given and in any event by 31 January 2022.

REASONS

INTRODUCTION

1. By a claim form presented on 30 May 2019, following a period of early conciliation from 5 April to 5 May 2019, the Claimant brought complaints of direct race discrimination, race-related harassment and victimisation against the Respondents.

2. The Claimant was employed by the First Respondent from February 2013 until 31 July 2017. Her employment ended pursuant to a settlement agreement. The Claimant was then employed by another company, Amegreen, from 27 October 2017 until February 2019. The alleged unlawful acts relate to the Second Respondent, who was the People Director (i.e. HR director) of the First Respondent, providing information to Amegreen in October 2018, which the Claimant says constituted a breach of the settlement agreement and resulted in Amegreen dismissing her.

3. In a judgment sent to the parties on 20 July 2020 Employment Judge Khalil decided that the Tribunal has jurisdiction to consider the claim notwithstanding it was presented outside the ordinary time-limits.

4. By agreement, the hearing was limited to liability in respect of the claimed acts of unlawful discrimination only. It was agreed that the Tribunal would not make any findings as to the reason for the Claimant's dismissal from Amegreen. That issue is the subject of a separate claim the Claimant has made in Watford Employment Tribunal against Amegreen which is due to be heard, so we were told, in December 2021. It is the view of this Tribunal that, subject to the agreement of Watford Employment Tribunal, if the Claimant succeeds in both claims the cases should be consolidated for a joint remedy hearing. The parties agreed with this course of action. The Claimant said that a provisional remedy hearing has been listed in March 2022 in Watford.

5. The issues on liability in this case were agreed at a preliminary hearing on 30 June 2020. On the first day of the final hearing the Claimant's counsel raised the fact that the list of issues only identified three protected acts, whereas the Claimant relied on four in her Particulars of Claim. Neither counsel could explain the omission; it appeared to be an oversight. The Respondent objected to the Claimant being able to rely on the fourth alleged protected act, namely her appeal letter of 26 July 2017. We heard argument on the issue and decided, for reasons given orally at the time, that the Claimant should be allowed to rely on all four of the protected acts pleaded.

6. The issues to be determined, therefore, are:

1. Direct race discrimination

1.1. Did R subject C to less favourable treatment? C relies on the following:

1.1.1. In October 2018, R2 disclosed to C's new employer ("Amegreen") that C and R1 had entered a settlement agreement ("the Agreement");

1.1.2. On 9 October 2018, R2 told Amegreen (specifically Mandy Ludlow, MD) by telephone:

1.1.2.1. That he could not put anything in writing as R1 had agreed settlement terms with C;

1.1.2.2. That he would not personally wish anyone to go through a similar situation with C and how she behaved with R1;

1.1.2.3. The unproven allegation that C was not, in R2's opinion, a suitable person to work in the health and social care setting (this allegation is denied)

1.1.3. On 17 October 2018, R2 sent Amegreen an email stating *"unfortunately either personally or as a business we wouldn't be able to confirm anything further in writing other that* (sic) *the reference* [within the Agreement] *due to the terms of a settlement agreement MiHomecare is bound by which has legal penalties and implications to us."*

1.2. If so, was the reason (or principal reason) for that treatment C's race (she identifies as Black African)?

1.3. Who is the appropriate comparator? C relies upon a hypothetical comparator, with the same qualities, characteristics and history as C, but who is not Black African.

2. Harassment on the grounds of race (in the alternative)

2.1. Did R subject C to unwanted conduct? C relies upon the particulars at paragraph 1.1 above.

2.2. If so, was that conduct related to C's race?

2.3. If so, did that conduct have the purpose or effect of violating C's dignity, or creating an intimidating, hostile, degrading, offensive, humiliating environment?

3. Victimisation (race)

3.1. Did C do a protected act? C relies upon:

3.1.1. The 23 November 2016 grievance to R1 regarding unfair treatment, victimisation and indirect discrimination (on the grounds of race);

3.1.2. The December 2016 complaint to R1, that colleagues were treating C differently due to her race;

3.1.3. The 22 May 2017 letter from C's solicitors to R1, alleging that C's termination may be a form of victimisation;

3.1.4. The letter of 26 July 2017 appealing against the first written warning, referring to 3.1.1 and 3.1.2 and alleging that C's dismissal was because of these complaints and constituted unlawful victimisation.

3.2. Did C suffer a detriment? C relies upon those matters at paragraph 1.1 above.

3.3. If she did protected acts and suffered detriments, did R1/R2 inflict those detriments because of those protected acts?

7. We heard evidence from the Claimant and the Second Respondent. We had a bundle of 406 pages.

FACTS

8. The First Respondent is a homecare provider and has around 1,800 employees in the UK. Its employees provide personal care and other services to vulnerable adults in their homes.

9. The Claimant was employed by the First Respondent from 4 February 2013 until 31 July 2017. By late 2016 her job title was Operations Support Manager. She was based at the First Respondent's Thornton Heath branch but would regularly travel to other branches in London and the South East. It was part of her role to train branch managers and ensure regulatory compliance. It is not in dispute that the Claimant had not been subject to any disciplinary process before 2017.

10. From 2015 the First Respondent's Operations Director was AP. The Claimant's uncontested evidence is that she had a difficult relationship with AP. In November 2016 there was a dispute about a payment for overtime that the Claimant had requested. The payment had been authorised by the Regional Manager, but AP disputed it and initially the payment was withheld. This led to the Claimant writing an email of complaint on 23 November 2016. The email states:

> "As discussed on the 22/11/2016, I will be raising a grievance with regards to the unfair treatment, victimisation, breach of my implied terms and conditions, lack of respect, indirect discrimination, travel time, working unsociable hours without payments. I will submit it accordingly and it will clearly outline/ state the grievance in detail including dates and times – documentary evidences will be attached as well.
>
> You are leaving me with no choice but to take this route. I am not surprised that you decided not to approve my overtime (as per email trail) as your clearly stated yesterday. I cannot believe that you will treat me like this.
>
> …
>
> I will again stress that I have no issues of Management requesting that I submit clear evidence outlining tasks carried out. I have a problem with you clearly stating that you will not pay me the overtime agreed by one of your senior managers. Other staffs are being paid overtime,

> incentives, has got pay rise, why when it comes to me you have an issue?
>
> I did not like the fact that you were also comparing me with other Managers or you telling me that you also travel to different places. Where do I stand as staff within MiHomecare – you stated I am more senior to Branch Managers?"

11. Following this letter the Claimant and AP had a meeting in early December 2016. The Claimant's account in her witness statement is as follows:

> "14. After I sent the email to [AP] on 23 November 2016 at page 124, he came back to me a few days later in a much nicer tone. He telephoned me and said he wanted to discuss my email in person. We then met in December 2016 in Thornton Heath. I explained to him that I had found that he had never treated me fairly and that I felt that I had always been treated differently to my white colleagues by him. I said that I felt this was because I am black.
>
> 15. I specifically mentioned to him the treatment of my colleague [AD] who was a Branch Manager. She was asked to move from the Bethnal Green branch to the Hammersmith branch. Her role and her pay increased and she was then earning more than I was. I then asked him why this was. I said that despite having several discussions regarding my pay increase, travelling to different locations and workload, he never came back to me with any answers. He shrugged his shoulders and said, 'I do not know why but I will look into this'.
>
> 16. He did not respond to my statement that I felt my race was an issue for him; he did not though deny there was any basis for my concerns. He just didn't respond."

12. The Respondents have not called AP as a witness or put forward any evidence that calls into question the Claimant's account. We accept that the meeting took place as described by the Claimant.

13. Shortly after this, the disputed overtime payment was made. The Claimant did not pursue her grievance.

14. The Second Respondent commenced employment on 18 April 2017 as People Director for the First Respondent and two sister companies.

15. On or around the same date an incident occurred involving money belonging to a service-user of the Thornton Heath branch. In the weeks beforehand a family member of the service-user had requested the return of cash which was set aside for shopping money. On 18 April 2017 the Claimant returned from annual leave and confirmed to head office that there was £740 of the shopping money left. She was instructed to put it into the First Respondent's account so that it could be returned to the family member. The Claimant's account is that she took the cash out of the safe, with the assistance of another member of staff because the Claimant had forgotten the number to open the safe, and she gave the money to a carer to pay into the bank. It is not in dispute that the carer transferred £740 from her own account to the First Respondent's account.

16. It seems that on or around 10 May 2017 the carer and the Claimant had an argument in which the carer denied that the Claimant had given her any cash and claimed that the Claimant owed her the £740. The Claimant says this was a separate dispute because the Claimant had indicated that she might lend the carer some money to pay for her immigration legal fees, but then refused to do so and the carer was very upset about it. The Claimant emailed a manager, CF, about this on 10 May, giving her account of what had happened and saying that the carer was giving false information.

17. On 13 May the carer provided a statement to CF saying that the Claimant had told her on 18 April that she, the Claimant, owed the First Respondent £800 and the Claimant asked to borrow the money from the carer. The carer agreed, paying £740 into the First Respondent's account and giving £60 in cash to the Claimant, but the Claimant then refused to pay her back.

18. In the meantime, on 11 May 2017, AP telephoned the Claimant and asked her to meet him the following day. They met on 12 May. The Claimant's account of the meeting in her witness statement is as follows:

> "Immediately at the meeting and completely out of the blue, he told me that my employment was being terminated and he handed me an envelope with a settlement agreement. I was totally shocked and horrified. I asked him why and he said everything I needed to see was in the envelope. He told me not to contact any staff member nor any of my contacts at the local authorities we worked with. He took my laptop from me and told me not to go to any of their offices with immediate effect. My immediate reaction was, can I open the envelope? He said, 'no, you can do it at home'. He did though say that he wanted us to end on a good note and there was no 'issue' for terminating my employment. I was shell-shocked and just left to go home immediately."

19. Again, the Respondents have not put forward any evidence to counter the Claimant's account and we accept it is accurate.

20. On 16 May three members of staff provided statements making allegations against the Claimant that she had borrowed money from staff and not paid it back, and that money for the Christmas party had gone missing. It is not clear how these statements came about, but there is a note from CF following one of the statements, "Just got this you will need to add to [AP's] list", so it would appear that AP was collating a list of allegations against the Claimant.

21. The Claimant's evidence is that on 18 May 2017 AP called her, threatening her and coercing her to sign the settlement agreement by 22 May, saying "if you do not sign it, the deal is off and I will report you to the police due to financial allegations that I am made aware of after offering the settlement contract."

22. This call was not mentioned in the Claimant's witness statement, but it is mentioned in her appeal letter of 26 July 2017 and she confirmed in her oral evidence that the account in the appeal letter was correct. In the absence of any evidence to contradict the Claimant's account, we accept that the conversation happened as described.

23. The Claimant did not sign the settlement agreement and instructed solicitors who wrote a letter to AP, dated 22 May 2017, in the following terms:

> "We act for Ms Phatey.
>
> We understand that at a meeting on Friday 12 May 2017 you advised Ms Phatey that her employment with the Company was to be terminated and you handed her a draft Settlement Agreement for her consideration.
>
> We have advised Ms Phatey that her dismissal is unfair as there is no fair reason in law for the dismissal and the company has failed to follow a fair process and dismissal will not be reasonable in all of the circumstances.
>
> …
>
> Further, in an email to you of 23 November 2016 sent at 13.36 Ms Phatey communicated her grievance that she had been subjected to, amongst other complaints, unfair treatment, victimisation, indirect discrimination. She also had a conversation with you In December 2016 when she asked you why you were treating her differently to her other colleagues who were white. She had also communicated her concern that she was being treated less favourably on the grounds of her race to her colleagues. We have advised Ms Phatey that her complaints are protected acts under the Equality Act 2010 and that if, as its *(sic)* appears, the reason for her dismissal now is a consequence of these complaints that this constitutes unlawful race-based victimisation.
>
> Ms Phatey is absent from work now as she is unwell, a direct consequence of your treatment of her. The impact of this treatment on her well-being is material and we strongly recommend that the company takes immediate legal advice to understand its legal obligations to Ms Phatey, to include in respect of her health."

24. During the Claimant's sickness absence, sometime before 26 May 2017, she was notified that the company intended to carry out an investigation into her conduct. We have not heard any evidence or seen any documents about the notification of this investigation, but on 26 May 2017 the Claimant's solicitors wrote to AP saying that the Claimant was prepared to engage in the investigations and asking for details of the allegations and evidence.

25. The Second Respondent told the Tribunal that he knew nothing about the Claimant's communications with AP, the proposed settlement agreement, or the solicitors' letter, until a senior leadership team ("SLT") meeting took place on 12 June 2017 where something was said about the Claimant and he "unravelled" what had happened. He requested the documentation and at this stage he saw a copy of the solicitors' letter of 22 May 2017.

26. The Second Respondent's oral evidence about this was somewhat at odds with his witness statement. His witness statement is drafted in a slightly unusual way, perhaps because he is the only witness called on behalf of the Respondents and does not have direct knowledge of much of the background. He mentions the solicitors' letter in a paragraph which falls under the heading

"Matters that I have become aware of as part of defending these claims". In fact he accepts that he knew of the solicitors' letter in June 2017, long before this claim was commenced.

27. On 22 June 2017 the First Respondent interviewed around 10 members of staff in relation to the allegations against the Claimant regarding loans and missing Christmas money. The Claimant was interviewed about these matters on 23 June. She was also asked about alleged falsification of documents, which followed an allegation from another member of staff made on 20 April 2017.

28. On 30 June 2017 the Claimant was invited to a disciplinary hearing. The letter refers to the borrowing of money only. The Respondent later confirmed to the Claimant that the issue about alleged falsification of documents had been resolved and was not being pursued as part of the disciplinary process.

29. A disciplinary hearing took place on 5 July 2017, chaired by Marc Prior, Business Development Director. The Second Respondent attended as note-taker. The notes of this meeting have not been produced. Neither party could locate a copy.

30. An outcome meeting took place on 17 July 2017, again attended by Mr Prior and the Second Respondent. Again, the notes of this meeting have not been produced. It is not in dispute that the Claimant was informed at the meeting that she was being given a first written warning. The outcome was confirmed by letter dated 19 July from Mr Prior:

> "Following the disciplinary meeting held on 5th July 2017, I considered the matters discussed and mitigating circumstances in detail. You attended an outcome meeting on 17th July 2017, I therefore write to confirm the outcome.
>
> The circumstances giving rise to the issue of this warning were by your own admission you gave a care worker that you didn't know particularly well £740 to pay into the Company bank account which I consider a poor judgement error on your part and in turn has left an unanswered question mark over this payment. We discussed the matter fully at the meeting and, having taken your explanations into account, I have concluded that I will issue you a first written warning."

31. Neither party has given any evidence as to the reasons for the findings made in the disciplinary process. We consider it is implicit in the outcome letter that Mr Prior accepted the Claimant's version of events as to the incident on or around 18 April because the finding is based on the Claimant's own account. It is not clear what was meant by "unanswered question mark over this payment" and the Second Respondent did not give any evidence to explain that phrase. We consider Mr Prior probably meant that the Claimant's actions allowed the carer to claim that she was owed £740. He cannot have believed the carer's version of events because that would obviously have constituted very serious misconduct on the Claimant's part and a much more severe penalty. It is also implicit in the outcome that Mr Prior did not find the Claimant had committed any other financial irregularity or other misconduct.

32. The Claimant appealed against the outcome on 26 July 2017. In the appeal she complained about the earlier attempt to terminate her contract. She reiterated her case in response to all of the allegations against her. Her appeal letter included the following:

> "In my opinion I feel that the management had made up their mind to give me a warning in order to justify why they stated that they need to investigate me after when the settlement offer went wrong. All this I believed is vindictive and has put me through a lot of psychological and emotional stress.
>
> …
>
> Further, in my email to [AP] on the 23 November 2016 sent at 13.36 I communicated my grievance that I had been subjected to, amongst other complaints, unfair treatment, victimisation, indirect discrimination. I also had a conversation with him in December 2016 when I asked you why he was treating me differently to my other colleagues who were white. I had also communicated my concern that I was being treated less favourably on the grounds of my race to my colleagues. I believe that the reason for my dismissal now is a consequence of these complaints and that this constitutes unlawful victimisation."

33. On 31 July 2017 the Second Respondent called the Claimant asking to meet her to discuss a settlement agreement.

34. The Second Respondent's evidence in cross-examination was that this followed a conversation between him and the CEO of the First Respondent, Narinder Singh. Mr Singh had seen the Claimant's appeal letter and told the Second Respondent to meet with the Claimant and "explore parting company". The Second Respondent and Mr Singh discussed that the process had not been handled how it should have been.

35. The meeting between the Claimant and the Second Respondent took place on 3 August 2017. A proposed settlement agreement was discussed. The Second Respondent said in his oral evidence that there was some discussion about the original settlement discussions not having been handled the way they should have been.

36. The Claimant says she also mentioned in this meeting her allegations of race discrimination and that the Second Respondent said the meeting was prompted by her appeal. The Second Respondent disputes that those things were said. We consider it unnecessary to resolve this factual dispute because the Second Respondent accepts that by this stage he knew the Claimant had made prior allegations of race discrimination and victimisation.

37. The settlement agreement was signed by both parties, on 4 and 7 August 2017. It included the following terms:

> "5.4 The Employer agrees to provide the Employee with a reference in the terms agreed in the attached Annex D and when responding to a written or verbal request for a reference from a prospective

> employer, will do so in a manner which is consistent with the agreed reference.
>
> …
>
> 8.2. The Employer and Employee agree that they will keep the existence and terms of this Agreement confidential (with the exception of disclosure to immediate family or relevant professional advisers, provided that those persons agree to keep the information confidential, or where disclosure is required by law)."

38. The agreed reference in Annex D reads:

> "Thank you for your reference request.
>
> I can confirm that Mariama was employed by Mihomecare Limited. ("The Company") from 4th February 2013 until 10th August 2017.
>
> It is not in the Company's policy to give additional information in references. I have not, therefore, completed your reference request form.
>
> Whilst the information contained in this reference is given in good faith, no assurance can be given as to its accuracy and fairness. This reference is therefore only given on the understanding that neither I nor the Company will be liable for any reliance placed upon you by its contents or omissions."

39. The Second Respondent's oral evidence in cross-examination was that AP's employment was terminated in August or September 2017 partly as a result of his poor handling of the earlier process with the Claimant. The Respondents had not put forward any evidence about this and it is not covered in the Second Respondent's witness statement. We are prepared to accept that there were internal concerns about AP's handling of the issue and that his employment was terminated, but we are not in a position to make any more detailed findings.

40. In September 2017 the First Respondent received a reference request for the Claimant from Brook Street Social Care, a recruitment agency. The Second Respondent completed a pro forma reference, ticking the box for "excellent" for each of the performance criteria listed. Answering "Do you have any concerns regarding the applicant's honesty or integrity?" he ticked "No". In response to a further question, "Has this person ever been part of any disciplinary action whilst in your employment?", he also ticked "No".

41. Around the same time the Claimant applied for a job with Amegreen, who sought a reference from the First Respondent. The Second Respondent provided the agreed reference pursuant to the settlement agreement on 24 October 2017 and the Claimant commenced work with Amegreen on 27 October 2017.

42. The Claimant commenced a period of maternity leave from Amegreen in February 2018.

43. While the Claimant was still on maternity leave, in early October 2018, Amegreen sought to find out more about the circumstances of the Claimant's departure from the First Respondent. The Respondents invite us to find that this was prompted by concerns having been raised about the Claimant's conduct. Having not heard any evidence from Amegreen we do not consider it appropriate to make findings as to the reasons why they decided to seek further information. Nor do we consider it necessary for the purposes of determining the issues in this case.

44. On 5 October 2018, Mandy Ludlow, managing director of Amegreen, called the Second Respondent and left a message. She also sent him an email in the following terms:

> "Hi Steve
>
> Further to my voicemail I have just left I would like to have a discussion regarding the lady mentioned below in the reference you have sent.
>
> I specifically would like to confidentially enquire about her reasons for leaving and any disciplinary or conduct issues that you may have encountered during her employment.
>
> I understand that this is outside the scope of your Company policy but would appreciate any information you may have to ensure we are fully aware of any issues that may affect our duty of care to our staff and clients.
>
> Please feel able to contact the landline and ask for myself during working hours or my mobile at any time."

45. The Second Respondent attempted to return Ms Ludlow's call on 8 October 2018 but she was busy. Ms Ludlow then called the Second Respondent on 9 October and they had a conversation. The bundle included a file note, apparently signed by Ms Ludlow, which reads as follows:

> "File Note
>
> Tuesday 9th October 2018
>
> Mandy Ludlow called Steve Jeffers and returned his call from the preceding day.
>
> Steve Jeffers is the People Director for MiHomecare and stated he wanted to speak to me further regarding MP's employment following my email on the 5th October 2018.
>
> He stated that there was a without prejudice agreement in place which prevented him from putting anything in writing however, he would not personally wish anyone to go through a similar situation with MP and how she behaved within MiHomecare.
>
> Steve stated that Company monies went missing but tracks were covered well by individuals concerned. Investigations were undertaken

> and a DBS referral was made re MP but was rejected as it was a corporate issue and did not involve a vulnerable adult.
>
> Steve stated that the without prejudice agreement had been reached before the disciplinary process had reached its conclusion.
>
> Following MP's departure a number of staff have come forward regarding difficult relationships with MP stating bullying, harassment, borrowing of money that had not been repaid and general emotional trauma. This was only disclosed following MP's departure and he has spent the last 3-4 months supporting staff and dealing with their anxieties and worries
>
> To summarise Steve Jeffers said that in his opinion MP was not a suitable person to work in the health and social care setting"

46. In his witness statement the Second Respondent said the note was not a verbatim record of the conversation. He accepted providing "some background details in relation to the investigation that the Claimant was subject to", but said he did not directly reference a settlement agreement. He denied saying he would not wish for anyone to go through similar situation with the Claimant, or saying that the Claimant was not a suitable person to work in the health and social care setting. He accepted saying he would not re-employ the Claimant. He said he was mindful of the settlement agreement. Ms Ludlow had directly referenced Amegreen's duty of care and he strongly believed that he had "an overriding duty of care", and he felt "duty bound to provide some information about the investigation process in the context that service users under the Claimant's care could be at risk and following a direct request from a fellow care provider."

47. During cross-examination about the note the Second Respondent began by saying he "categorically disagreed" with it, but then accepted that much of it was accurate. He accepted that he had, contrary to what was said in his witness statement, mentioned the settlement agreement during the call. He also accepted saying that the settlement agreement prevented him mentioning anything about the Claimant's employment other than agreed reference. He accepted saying something about monies going missing, in the context of the investigation, and about a DBS referral having been made. As to the comment that the settlement agreement had been reached before conclusion of the disciplinary process, the Second Respondent accepted it was "likely" he said that.

48. The Second Respondent accepted during cross-examination that mentioning the settlement agreement was in breach of the confidentiality clause and that the information he disclosed went beyond the agreed reference. He also accepted that what he said would have been damaging to the Claimant. He claimed, however, that he was providing information pursuant to "the Health and Social Care Act". The Respondents have not referred the Tribunal to any legislative provision, in that Act or elsewhere, which imposes a duty on them to disclose information to Amegreen.

49. As to the reference in the file note to issues coming to light after the Claimant left the First Respondent's employment, the Second Respondent said in his

witness statement that this part of the note is accurate, but the Respondents have not produced any documentary evidence of any such issues having arisen. There is only a vague reference in the Second Respondent's statement to him dealing with "financial discrepancies that the Claimant as the Registered Manager would have been responsible for". In the absence of any detailed explanation or any documentary evidence we do not accept that any wrongdoing on the Claimant's part was discovered after the end of her employment.

50. On 16 October 2018 Ms Ludlow's PA emailed the Second Respondent as follows:

> "Further to Mandy's email below and your subsequent telephone conversation with her, we have since received further legal advice and would like to know what information you are able to provide us with, though we appreciate you are bound by the terms of the settlement agreement. If you could kindly give Mandy a call at your earliest convenience it would be greatly appreciated."

51. The Second Respondent replied the following day:

> "Many thanks for your email – unfortunately either personally or as a business we wouldn't be able to confirm anything further in writing other that the reference below due to the terms of a settlement agreement MiHomecare is bound by which has legal penalties and implications to us."

52. The Claimant was subsequently dismissed from Amegreen. Because this hearing was, by agreement, limited to determining the matters in the agreed list of issues, which does not include the reasons for the Claimant's dismissal from Amegreen, it is unnecessary for us to make any further findings about what happened after the alleged acts of discrimination.

THE LAW

53. The Equality Act 2010 ("EQA") provides, so far as relevant:

> **13 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.
>
> (2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.
>
> …
>
> **26 Harassment**
> (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.

27 Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because--

(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act--

(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.

39 Employees and applicants

…

(2) An employer (A) must not discriminate against an employee of A's (B)—

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

…

136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

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

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

54. Race is a protected characteristic.

55. The EQA covers post-employment discrimination, harassment or victimisation where it "arises out of and is closely connected to" the former employment relationship (s.108 EQA and Rowstock Ltd and anor v Jessemey [2014] ICR 550).

56. The Supreme Court in Royal Mail Group Ltd v Efobi 2021 ICR 1263, confirmed that the claimant in a discrimination case bears the initial burden of proving, on the balance of probabilities, facts from which, in the absence of any other

explanation, the employment tribunal could infer an unlawful act of discrimination.

57. It is well established that a difference in status and a difference in treatment are not, without more, a sufficient basis on which a tribunal "could conclude" that the respondent has committed an act of unlawful discrimination (Madarassy v Nomura International plc 2007 ICR 867).

58. In deciding whether or not a prima facie case has been made out, the tribunal should ignore the substance of any explanation proffered by the employer for the treatment, turning to it only once the burden has shifted. This does not mean that at the first stage the tribunal should consider only evidence adduced by the claimant and ignore the respondent's evidence. The tribunal should have regard to all the facts at the first stage to determine what inferences can properly be drawn (Laing v Manchester City Council [2006] ICR 1519, approved by the Court of Appeal in Madarassy).

59. Unreasonable behaviour alone cannot found an inference of discrimination (Bahl v Law Society [2004] IRLR 799). If, however, there is no explanation for the unreasonable treatment the absence of an explanation (as opposed to the unreasonableness of the treatment) might found an inference. But a tribunal should not be "too ready" to infer unlawful discrimination from unreasonable conduct in the absence of evidence of other discriminatory behaviour (Wong v Igen Ltd [2005] ICR 9311).

60. Once the burden of proof has shifted, the employer must show that the protected characteristic did not have a significant, or more than trivial, influence on the unfavourable treatment so as to amount to an effective reason or cause of it (Pnaiser v NHS England and Coventry City Council [2016] IRLR 170).

CONCLUSIONS

61. It is important to note that it is not necessary, and arguably it would be inappropriate, for us to decide whether the Respondents in fact breached the settlement agreement. This is not a claim for breach of contract and the Tribunal would not have jurisdiction to consider such a claim in any event. We must determine, insofar as there is a factual dispute, what the Second Respondent said to Ms Ludlow. We must then consider whether what he said constituted a detriment and whether his conduct was significantly influenced by the Claimant's race or the protected acts. We must also consider whether it amounted to race-related harassment. The Second Respondent's belief as to his obligations under the settlement agreement and any other legal obligations may be relevant to his motivations, but that is a different matter to whether his conduct in fact breached the agreement.

62. The factual allegations relied upon as acts of discrimination are identical in relation to each type of discrimination complained of. We address first the question of whether the alleged acts occurred.

63. As to paragraph 1.1.1 of the list of issues, the Second Respondent accepted in cross-examination that he disclosed to Amegreen that the Claimant and the First Respondent had entered into a settlement agreement during the telephone call on 9 October 2018. The assertion in his witness statement that

he "did not directly reference a Settlement Agreement" during the call was untrue. We are satisfied that his oral evidence, in which he unequivocally conceded that he had mentioned the settlement agreement, was correct. It is consistent with the file note and with the email exchange of 16-17 October 2018 between Ms Ludlow's PA and the Second Respondent which also references the settlement agreement.

64. Paragraph 1.1.2 lists three alleged comments that are contained in the file note of the telephone conversation of 9 October 2018. The first relates to disclosure of the settlement agreement, which we have already accepted. The other two alleged comments are denied by the Second Respondent: that "he would not personally wish anyone to go through a similar situation with C and how she behaved with R1" and that "C was not, in R2's opinion, a suitable person to work in the health and social care setting". We accept that the file note is of little weight on its own. Ms Ludlow was not a witness before us, so we do not even know when or how the note was created. It appears in the bundle because the Claimant obtained it via a subject access request. Having said that, it is clearly not a fabricated note because the Second Respondent accepted that much of it was accurate. It is of course possible that Ms Ludlow exaggerated aspects of what the Second Respondent said in order to justify the termination of the Claimant's employment with Amegreen, so we approach it with appropriate caution.

65. The Second Respondent accepts saying that the settlement agreement prevented him from putting anything in writing. That is consistent with him having said disparaging things about the Claimant during the call. There would be no reason to mention that he was restricted from putting anything in writing unless he was prepared to say more over the telephone. He also accepts saying that "monies went missing" and that a DBS referral had been made. He said it was "likely" that he had said the settlement agreement was reached before the disciplinary process had concluded. He also accepts saying that he would not employ the Claimant again. On the basis of those concessions we are satisfied that the Second Respondent disclosed damaging information about the Claimant on the basis the conversation was "off the record". He gave the impression that there were grounds to suspect the Claimant of serious misconduct that called into question her suitability to work in the sector, and that the settlement agreement had prevented a thorough investigation into her conduct. The alleged words are wholly consistent with the overall tenor of the discussion.

66. It is to the Second Respondent's credit that he made concessions in cross-examination, but he had also sworn to the truth of his witness statement and there were significant inconsistencies between his written and oral evidence. In particular he denied knowledge of the protected acts in his witness statement, and he denied having disclosed the settlement agreement. Both of those denials were untrue. That calls into question the Second Respondent's credibility generally. Taking into account all of the evidence available to us, and notwithstanding the limited weight we are able to give the file note, we find on the balance of probabilities that the alleged comments were said.

67. The final act relied upon is the email from the Second Respondent to Amegreen on 17 October 2018. There is no dispute that it was sent.

Victimisation

68. The Respondents do not dispute that the Claimant did the protected acts relied upon. Nor do they argue that the Second Respondent's conduct did not amount to detrimental treatment of the Claimant. The sole issue in dispute is whether the Second Respondent acted as he did *because of* the protected acts.

69. The initial burden is on the Claimant to show facts from which we could conclude in the absence of an explanation from the Respondents that the Second Respondent did the things we have found proved because of one or more of the protected acts. The Respondents argue that the Claimant has not discharged this initial burden because she has not established "something more". They also argue that the reason for the Second Respondent's conduct was that he believed, whether rightly or wrongly, that he had a legal duty to disclose the matters he did.

70. As to the Second Respondent's beliefs as to his legal obligations, we find that he knew that he was acting in breach of the settlement agreement when he disclosed the things he did during the call on 9 October 2018. He accepted in cross-examination that disclosure of the settlement agreement itself was a breach of the confidentiality clause. Despite being asked about it in re-examination, he did not say that he believed an exception applied because he was acting as "required by law". It is also notable that he was not prepared to put the same comments in writing. Although he mentioned the settlement agreement in the email of 17 October 2018, he refused to say any more about the Claimant. If he did not believe he was legally prohibited from saying what he did during the call he would have repeated the comments in writing. Further, contrary to the Respondents' submission that the call came "out of the blue", the Second Respondent had known since 5 October 2018 that Amegreen were seeking further information that went beyond the agreed reference. He had plenty of time before the 9 October telephone call to refer back to the settlement agreement and decide what stance to take. He could also have sought legal advice if he was unsure as to the effect of the settlement agreement and any conflict with other duties he might have.

71. The Respondents have not established any legal duty on the Second Respondent to disclose anything to Amegreen, and we do not accept that he believed at the time that he had any such duty, otherwise he could have, and would have, provided the same information in writing at the time of providing the original reference on 24 October 2017 or when responding to Ms Ludlow's PA by email on 17 October 2018.

72. We also consider that the information the Second Respondent gave to Ms Ludlow over the telephone was misleading. He knew that the disciplinary process had resulted only in a first written warning for poor judgement. There was no reasonable basis to suggest, as he did by referring to money going missing and a DBS referral, that the Claimant might be guilty of much more serious financial irregularity. The Second Respondent accepted during his evidence that he knew what he was saying to Ms Ludlow would be very damaging to the Claimant's employment.

73. The Second Respondent could easily have avoided Amegreen's enquiries or simply said that he was unable to say more than he had already said in the

original reference. The fact that he made a deliberate decision to disclose information that he knew would be damaging to the Claimant's future employment raises questions about his motives and suggests animosity towards the Claimant.

74. Given that the Second Respondent was the People Director for the First Respondent and he knew of the protected acts, it is entirely plausible that his animosity towards the Claimant arose from her having made serious complaints against the First Respondent and threatened to bring tribunal proceedings. Regardless of the merits of the Claimant's complaints of discrimination, the relationship between the Claimant and the First Respondent generally was extremely poor from the moment AP sought to terminate her employment and put inappropriate pressure on her to sign a settlement agreement. She consistently argued that AP had subjected her to both race discrimination and victimisation. It was a difficult situation that the Second Respondent was tasked by the CEO to resolve. That is sufficient to raise the possibility that the Second Respondent, as People Director, took an unfavourable view of the Claimant and that is why he disclosed the damaging information, knowing that he was breaching the settlement agreement by doing so. We find that is sufficient to shift the burden of proof to the Respondent in respect of victimisation.

75. It is for the Respondent to show that the conduct was not significantly influenced by the protected acts, in the sense that one or more protected act was more than a minor or trivial influence.

76. We are satisfied the Second Respondent had a poor view of the Claimant after she left the First Respondent. In view of the outcome of the disciplinary process, we do not accept that there were any reasonable grounds to suspect any other or more serious misconduct by the Claimant by the time the process had concluded. If the First Respondent had considered there were legitimate grounds to dismiss the Claimant they would surely have done so.

77. The way in which the original settlement agreement was proposed and approached, including the threats made by AP on 18 May 2017, is suggestive of a corporate view that the Claimant had to go. Even if AP failed to discuss the matter with the Second Respondent, it is very unlikely that he would have acted without the authority of the CEO. We place very little weight on the Second Respondent's evidence about AP's employment having been terminated, because this only came out in cross-examination and the Respondents have not produced any evidence to prove that the termination was because of his treatment of the Claimant. In any event, even after the Second Respondent "unravelled" what had happened and became more actively involved, the First Respondent maintained its general approach of attempting to end the Claimant's employment by pursuing the disciplinary allegations and then reviving the settlement discussions.

78. We note that with the exception of the allegation about falsifying documents, made on 20 April 2017 and apparently not taken any further at the time, no concerns about the Claimant's conduct had been documented until after AP's attempt to terminate the Claimant's employment on 12 May 2017. There is also the reference in emails shortly after that date to AP keeping a list, suggesting that he was building a case against the Claimant. Given that none of the

allegations was upheld, i.e. the disciplinary sanction was imposed on the basis of the Claimant's own account, we infer that the disciplinary process was not commenced in good faith, but rather with a view to terminating the Claimant's employment.

79. The Second Respondent accepts knowledge of the first three protected acts via the solicitors' letter of 22 May 2017, which he saw on or around 12 June 2017. He does not accept knowledge of the protected act in the appeal letter and claims that he did not read it. We find it surprising that, having been told by the CEO that there was an appeal and being tasked with negotiating a settlement agreement as a result, the Second Respondent would not read the appeal letter itself. But even if he did not read it, we consider he must have realised it made the same allegations the Claimant had been making previously. He knew there was a real risk of tribunal litigation, and knew that that risk was a significant factor in the need to enter into the settlement agreement.

80. Given that background, and in the absence of any other explanation for the Second Respondent's animosity towards the Claimant, we are satisfied that he had taken against the Claimant largely due to the protected acts.

81. The Respondents rely on the Brook Street reference as evidence that the Second Respondent held no animosity to the Claimant. We do not accept that, and indeed we consider it is supportive of the Claimant's case. The Second Respondent presumably answered the questions in the way he did, including giving arguably untruthful answers, because he knew he was obliged to comply with the settlement agreement. The first time an opportunity arose to give his real opinion "off the record", he took it.

82. The Second Respondent's only real explanation for his damaging comments about the Claimant was that Ms Ludlow had somehow pressured him into making them by reference to a duty of candour. We do not accept this explanation. No such duty has been identified, and for the reasons given above we do not accept that the Second Respondent believed he had any such duty. His comments were deliberately harsh on the Claimant and damaging to her future employment. We also take into account the fact that the Second Respondent was not a wholly credible witness.

83. We find that the Respondents have not discharged the burden of proof and we are satisfied that a significant reason for the detriments was the fact that the Claimant had done one or more protected acts.

Direct discrimination

84. There is nothing in our factual findings or analysis above to suggest that the Second Respondent was motivated by the Claimant's race, in addition to the protected acts. We find that the Claimant has not established the "something more" that would be required to shift the burden of proof, so the complaint of direct discrimination fails.

Harassment

85. Similarly, we do not consider the Claimant has established that the Second Respondent's conduct was related to race. We have found that he had a negative impression of the Claimant, but that was largely because of the protected acts. There is nothing to suggest he was also influenced by her race. The conduct itself was not related to the Claimant's race. This complaint also fails.

Employment Judge Ferguson

Date: 29 November 2021