EMPLOYMENT TRIBUNALS

Claimants		**Respondents**
Mrs C Seraphin (1)	**v**	29 Fleet Street Limited (1)
Miss S Dawes (2)		Dr R Dawood (2)
		Dr A Dawood (3)
		Dawood & Tanner (trading as Temple Dental) (4)
		Darwood IP Limited 5)

Heard at: Central London Employment Tribunal On: 8 November 2021
Before: Employment Judge Norris, sitting alone (via CVP)

Representation:
Claimants – In Person
Respondents – Mr A Griffiths (First and Second Respondents)
Ms G Boorer (Third to Fifth Respondents)

RESERVED JUDGMENT – PRELIMINARY HEARING

1. The Claimants' claims are dismissed against the Fifth Respondent on withdrawal.
2. The Fourth Respondent's application to strike out the complaint of unfair dismissal against it is refused.
3. The Claimants are each required to pay deposits of £50 as a condition of proceeding with each of the following argument(s):
    a. Against each of the First and/or Second Respondents, that their dismissal was because of race (direct race discrimination);
    b. Against the Third Respondent, in deciding not to offer them employment because of race (direct race discrimination).

REASONS

<u>The Claimants and the claims</u>

1. The Claimants worked in a job-sharing arrangement as Dental Nurses for the First Respondent from 2017 until their dismissal, on the face of it for redundancy, on 11 December 2020. Both Claimants brought claims on 17 May 2021, naming all five Respondents (though in a slightly different order). The claims contained the following discernible complaints:

a. Claim 2203405/21 Mrs Seraphin (who says she entered employment with the First Respondent on 18 April 2017): unfair dismissal, race discrimination and "other payments" (said to be a bonus of £833.33) (the Respondents were as set out above save that the Second and Third Respondents were reversed);

b. Claim 2203407/21 Miss Dawes (who says she entered employment with the First Respondent on 6 June 2017): unfair dismissal and race discrimination only (order of Respondents as set out above. I have adopted this order, which was also used by Ms Boorer in her representation and skeleton argument on behalf of the Third to Fifth Respondents, because of the nexus between the First and Second Respondents and the Third and Fourth Respondents).

<u>The Respondents</u>

2. The First Respondent is the dental practice where the Claimants worked and was their employer. It operated, as the name suggests, from 29 Fleet Street, London. I was informed that it has ceased trading as a dental practice, although it remains active as a limited company at Companies House. It is common ground that other medical services continue to be offered at the 29 Fleet Street address.

3. The Second and Third Respondents are brothers and are both practising clinicians. The Second Respondent was and is one of the two directors of the First Respondent and the Claimants described him as their employer. He says in his grounds of resistance that he is a specialist in travel medicine.

4. The Third Respondent is a partner in the Fourth Respondent, the latter being a partnership offering specialist dental services, and describes himself as a dental surgeon. It appears to be common ground that the Third Respondent has practised historically from premises in Wimpole Street. However, it is asserted that after the First Respondent ceased to operate from the 29 Fleet Street premises, it allowed the Fourth Respondent to rent the dental room with effect from January 2021. According to the grounds of resistance, the First Respondent continued to take bookings and payments on the Fourth Respondent's behalf, on a temporary basis, as a result of the Fourth Respondent's technical issues.

5. The Fifth Respondent (incorrectly named as Dawood IP Liminted in the Second Claimant's claim form) is a limited company providing medical devices. The Third Respondent is also a named director of the Fifth Respondent. However, it is argued on his behalf that save for his capacity as officeholder, he has no active involvement in the business, of which I was told his son is also a director.

<u>Hearing</u>

6. Following submission of the ET3s, the Third and Fourth Respondents applied to have those parts of the claims that are brought against them dismissed and for them to be removed as parties, or alternatively for a deposit order to be made as a condition of proceeding against them. The Fifth Respondent similarly applied to be removed from the proceedings. The Third to Fifth Respondents further argued that all references to

conciliation should be removed from the pleadings as they constitute privileged communications.

7. On 27 August 2021, the parties were sent a notice of hearing in the First Claimant's case indicating that EJ Elliott had determined there was to be an open Preliminary Hearing (PH) to determine the Respondents' applications. A further notice of hearing was sent on 14 October 2021 in relation to both claims.

8. It was agreed by all parties at the outset of the PH that the claims should be consolidated and that the PH should go on to deal with both. In terms of written documentation at the PH, we had a 172-page bundle prepared by the solicitors for the Third to Fifth Respondents and a skeleton argument produced by Ms Boorer on their behalf.

9. We went through the heads of complaint and I heard submissions on behalf of all parties in relation to the arguments advanced.

10. The Claimants acknowledged that they had no complaint against the Fifth Respondent, which was accordingly dismissed from the proceedings on withdrawal. It was also confirmed that neither Claimant pursues a complaint of sex discrimination.

11. I also heard from the Claimants as to their means, so that if a deposit order was to be made, I could take those into account.

12. I reserved my decision. Other professional commitments have prevented me from completing it since then, which was conveyed to the parties at the end of November.

<u>Complaints – unfair dismissal</u>

13. The Claimants assert that they were the only dental nurses at the First Respondent, assisting two dentists, Dr Kelly and Dr Gesto. They say that they were invited to a meeting on 4 November 2020 with the Second Respondent and the First Respondent's lawyer Mr Hughes, at which they were told that their roles were at risk of redundancy due to a significant downturn in business. A second meeting took place on 13 November 2020 at which they were informed the First Respondent was considering closing the dental service.

14. At a third meeting on 20 November 2020, the Clinic Manager Mrs Karavadra was also present, and the Claimants were given three weeks' notice of termination of their employment. The Second Respondent told them that this was because of the closure of the department.

15. However, later that day, the Second Claimant says she was contacted by Dr Kelly, who told the Second Claimant that she had spoken to the Third Respondent and he had said the dental department would not be closed, but that its management would pass to him. Dr Kelly said that the Third Respondent had told her he intended to "start afresh with nurses" and asked her to work for him, two days a week. The First Claimant says that Dr Kelly also contacted her in similar vein the following day.

16. The Claimants believe, based on what Dr Kelly and others have told them, that from 14 December 2020, Dr Kelly continued to practice from the clinic but using agency dental nurses, seeing the First Respondent's patients until her resignation in early April 2021. The Claimants believe that the First Respondent's patients were sent emails inviting them to come on board and have treatment at the same practice, now branded as Temple Dental.

17. In addition, Dr Kelly is said to have told the Second Claimant on 11 January 2021 that she was working under the management of the Third Respondent, and Dr Kelly had expressed difficulties working with agency nurses and insufficient materials since the Claimants' dismissal. Dr Kelly prevailed upon the Fourth Respondent's dental manager, Miss Carey, to call the Second Claimant on 14 January 2021 regarding the possibility of re-employment under the new management. Then on 2 February 2021, the Second Claimant received a further call, this time from the Third Respondent, to offer her a new role. The Second Claimant declined this offer.

18. The Claimants believe that their roles were not in fact redundant and that there may have been a TUPE transfer to the Fourth Respondent. Accordingly they claim unfair dismissal. They also believe that assumptions were made about their skillsets and what may have been suitable alternative employment for them. The Second Claimant contends that the Third Respondent only offered to re-engage her to appease Dr Kelly.

19. There was limited discussion about the question of TUPE. Neither the Second nor Third Respondents were present at the PH, and Mr Griffiths and Ms Boorer did not have detailed instructions on the point. The Claimants rely on the fact that on the face of it, little has changed so far as patients are concerned; they continue to see the same practitioners (at least initially seeing Dr Kelly and then Dr Gesto once she returned from maternity leave) at the same premises, using the same booking and payment systems as they did previously.

20. The Claimants also argue that rooms at the Fleet Street Premises were rented out before by the First Respondent and that their services were included as part of the rental fees. They suggest on that basis that it would not have been an additional expense to have rented the room out to the Fourth Respondent with them *in situ*. They contend that their hourly rates are lower than those paid to agency staff, although I considered that this overlooked the fact that agency staff by their nature are not paid unless they are actually required, and that they may not have many of the additional costs associated with employing permanent, full-time staff (even if the two Claimants were job-sharing).

21. The Third and Fourth Respondents also argue in their ET3 that the reason they wished to use agency staff was that they wanted to ascertain whether to continue with the commercial arrangement entered into with the First Respondent. They argue that no fees from patients were received by the Fourth Respondent until April 2021.

Complaints – race discrimination

22. The Claimants describe their race as black Caribbean (First Claimant) or Afro-Caribbean (Second Claimant). They also told me in the PH that they believe the only difference between themselves and the dentists who were retained was race; the dentists are white. Therefore, they said, they could only assume that the reason why the Third Respondent did not want them to continue to work there was the protected characteristic of race. The Claimants could not understand why else he would have retained the dentists but not them. They say neither of them had had any disciplinary issues or complaints about their performance. They point out that the First Respondent did not put them on its website, whereas the senior clinicians, none of whom share their protected characteristic, were all featured.

23. The Claimants said that they had seen the Third Respondent just once or possibly twice before, when they worked for the day at his Wimpole Street practice. They believe the racial makeup of the Third Respondent's practice in Wimpole Street is similarly predominantly white. The First Claimant said she had gone to his practice for continuing professional development purposes and that the Third Respondent had not said hello to her or had any direct communication with her.

24. The Second Claimant also said that she had a "frosty reception" when she went to help out, which she did not think was very professional. There were no staff to be seen who shared her race; the Third Respondent was chatty and polite to everyone, including to other dental nurses, but not to her. I asked when this had been; neither Claimant could give me a date or even a firm year, but both agreed it was before the pandemic. The Second Claimant thought it was around 2018. They did not raise the issue at the time.

25. The Claimants accordingly contend that the Third Respondent suggested that they should be dismissed because of race and that the Second Respondent agreed to this. The First Claimant contends that the Second Respondent was not truthful in saying the practice was not doing well financially and that redundancy was an excuse to conceal the truth. Therefore, they contend, their dismissal by the First Respondent was an act of direct race discrimination.

Complaint – unpaid wages

26. Finally, the First Claimant claims for a contractual bonus for the period April 2019 to April 2020 which she contends was outstanding on the termination of her employment. She says that when she joined the First Respondent, the bonus was discretionary, but that this was changed in an appraisal meeting with previous manager Ms Lithman, who offered her either a larger increase in her hourly rate and a discretionary bonus or a smaller increase in the hourly rate and a guaranteed annual bonus; the First Claimant says she chose the latter. However, she says, Ms Karavandra refused to look into it when they spoke on 14 December 2020, and also repeated that the bonus was discretionary. The Second Claimant confirmed she does not claim any unpaid amounts.

Respondents' position

27. Some of the above detail was not included in the claim forms; there was no mention, for instance, of alleged race discrimination by the Third Respondent towards either Claimant during the day or days they spent in Wimpole Street. There may be an oblique reference in the assertion that the Third Respondent's staff members are "predominantly white". As a standalone complaint, this would potentially be very considerably out of time and the relevance is questionable. Mr Griffiths, for the First and Second Respondents, contended that following clarification of the issues, he would need to take instructions and revert if it was believed an application to amend is required and is made. The Claimants may think about whether they do wish to make an application to amend or whether they rely on this as background if they pursue their race discrimination complaints.

28. Further, Mr Griffiths submitted that the Claimants have shown no facts or matters that could properly lead to an inference of race discrimination by either of his clients. He argued that the complaints of race discrimination are entirely unmeritorious; a "feeling" cannot be sensibly challenged in cross-examination and while the Claimants are understandably aggrieved to have had to leave their employment with the First Respondent, that appears to have given rise to their assumption of discrimination, based on nothing more than a difference in status and a difference in treatment.

29. For the Third and Fourth Respondents, Ms Boorer argued that the only claim being brought against the Fourth Respondent appears to be unfair dismissal, and this would have to be on the basis that the Claimants had transferred to the Fourth Respondent pursuant to the TUPE Regulations, which neither of them argues – indeed, the Second Claimant expressly turned down the job offer made to her after her employment with the First Respondent ended; further, the First and Second Respondents accept liability for unfair dismissal.

30. Ms Boorer conceded however that the argument could not be taken further if the Tribunal concluded that this is a point that can only be determined following the hearing of evidence.

31. So far as the race discrimination complaint against the Third Respondent is concerned, Ms Boorer argues that it is now effectively being asserted by the Claimants that he did not want them to remain employed because of race but, she contends, there is little or no evidence advanced to support that argument. The Claimants say they met him once or twice, three years earlier, with very limited interaction, and there is no reason for the Tribunal to infer from a comment he made to Dr Kelly (assuming, taking the case at its highest, that the Tribunal finds the Third Respondent did say he wanted to "start afresh with new nurses") the "reason why" he said it was race. He offered a job to the Second Claimant following the dismissal. There is nothing that would shift the burden of proof to the Third Respondent.

Law

32. If a Tribunal considers that all or any part of the claim has no reasonable prospect of success, it may strike out that part of the claim under Rule 37 (Employment Tribunals (Constitution and Rules of Procedure) Regulations

2013, Schedule 1). I remind myself that it might be premature to determine prospects of success without hearing evidence[1]. A leading authority on the question of strike out in discrimination cases remains *Anyanwu v South Bank Students' Union*[2], which makes it clear that discrimination cases are often fact-sensitive and should, as a general rule, only be decided after hearing all the evidence. Therefore, I should take for these purposes the Claimant's case (where based on disputed facts) at its highest[3]. If I conclude that any part of the claim cannot succeed on that basis, I may decide to strike out that part.

33. Where a Tribunal considers that any specific allegation or argument in a claim has little reasonable prospect of success, it may make an order requiring a Claimant to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument, having first made reasonable enquiries into their ability to pay the deposit and having regard to such information when setting the amount (Rule 39).

34. When considering the prospects of success, it must be recognised that direct evidence of a decision to discriminate on racial grounds is rare and the reality is often far more nuanced (e.g. *Swiggs v Nagarajan* (Nicolls LJ))[4]:

"*All human beings have preconceptions, beliefs, attitudes and prejudices on many subjects. It is part of our make-up. Moreover, we do not always recognise our own prejudices. Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did. It goes without saying that in order to justify such an inference the tribunal must first make findings of primary fact from which the inference may properly be drawn. …*

Thus, in every case it is necessary to enquire why the complainant received less favourable treatment. This is the crucial question. Was it on grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job? Save in obvious cases, answering the crucial question will call for some consideration of the mental processes of the alleged discriminator. Treatment, favourable or unfavourable, is a consequence which follows from a decision. Direct evidence of a decision to discriminate on racial grounds will seldom be forthcoming. Usually the grounds of the decision will have to be deduced, or inferred, from the surrounding circumstances."

35. Browne Wilkinson LJ remarked in the same case:

"*What is quite clear is that Parliament has, in introducing legislation to*

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[1] See e.g. *Morgan v Royal Mencap Society UK EAT 0272/15*
[2] *[2001] IRLR 305*
[3] *Mechkarov v Citibank NV [2016] ICR 1121*
[4] *[1999] IRLR 572 HL*

outlaw discrimination on grounds of sex or race, expressly required the court to investigate the reasons which have led the alleged discriminator to take the steps which he did. This is not surprising since this was pioneering legislation designed to produce a social, as much as a legal, change. The only yardstick (in the field of direct discrimination) must be the mental state of the alleged discriminator. To dismiss somebody who comes from an ethnic minority is not, per se, unlawful. Only if what lies within the mind of the employer is the race of the employee and it is that factor which provides the reason why the employee is dismissed does one come into the field of race discrimination at all. There is no escape from the difficulties inherent in examining the minds of the parties."

Findings and conclusions

36. I am not prepared to strike out any of the remaining four Respondents at this time. Notwithstanding my conclusions on the prospects of the race discrimination complaints, to which I return below, I consider that the Tribunal will need to hear evidence from the parties as to the reasons for and process used in effecting the Claimants' dismissal.

37. It will be for the First Respondent to show the reason for that dismissal. If the Tribunal concludes that the reason for a pre-transfer dismissal is the transfer or a reason connected with it, but that it was not for an "ETO" (economic, technical or organisational) reason, the transferee – in this case, the Fourth Respondent - may be liable for any remedy found (see regulations 7(1) and 4(3) TUPE. It is to be noted that these regulations apply even if the parties are not themselves aware of their application at the time).

38. If the Tribunal concludes however that the reason was not the transfer or a connected reason, or if it concludes that there was an ETO reason, but that nonetheless the dismissal was unfair, either substantively or procedurally, liability would remain with the First Respondent. The unfair dismissal complaints therefore proceed against the First and Fourth Respondents.

39. Turning to the race discrimination complaints, I explained at the PH that it is not enough to have a difference in status (i.e. the Claimants' race and that of their comparators, the senior clinicians) and a difference in treatment (see for instance *Madarassy v Nomura International PLC*[5]*);* there must be facts from which the Tribunal could conclude, in the absence of any explanation, that the reason for the treatment alleged was race.

40. I also explained that the comparators would have to be in not materially different circumstances to the Claimants, which appeared to be an additional difficulty for them, given that the comparators are qualified dentists whereas the Claimants are dental nurses. They argue that their governing body is the same and they have to follow the same rules; they all have professional titles and have to hold indemnity insurance. Nonetheless, I retain concerns as to whether the comparators are indeed appropriate. They were not doing the same job as the Claimants, who say that they were the only dental nurses in the First Respondent's practice.

[5] [2007] 246 CA

41. There may be material differences in the fact of the different roles (and their associated professional standing) alone, as well as in their status (the Claimants were employed, but as I did not hear evidence, it is unclear whether the dentists were also employees or were self-employed). I expressly make no finding as to whether they were appropriate comparators. The Claimants will, if they proceed with the race discrimination complaints, need to consider whether they still assert that they are, and if not, who an appropriate actual or hypothetical comparator might be.

42. Even if these comparators are appropriate, I consider the Respondents' argument as to prospects to have considerable merit. The Claimants are apparently basing their entire claim for race discrimination on an assumption that because of race, the Third Respondent did not want them to remain with the practice when he took over, and that assumption is itself based on a feeling they say they had – not articulated at the time - when they worked in a different practice of his, for a day or two, three years earlier; and they infer that the Second Respondent (and thus the First Respondent) acquiesced in that discrimination by dismissing them so that the Third Respondent did not have to take them on. This is notwithstanding that the Third Respondent was apparently willing to re-engage the Second Claimant at the behest of Dr Kelly after she raised difficulties in working with the agency nurses who were being engaged following the Claimants' dismissal.

43. It is no exaggeration to say that if the claim proceeds on that basis and without any evidence in support, it is very difficult indeed to see how the burden of proof would shift to the Respondents under section 136 Equality Act 2010. If the burden did shift, it seems to me that the Respondents have some potentially strong arguments to show that the reason why they dismissed the Claimants was redundancy, in that they argue the First Respondent (managed by the Second Respondent) was to (and did) cease operating a dental practice from its premises; and the Fourth Respondent (managed by the Third Respondent) was to (and did) begin operating one, but did not wish to incur the costs of employing permanent dental nurses until it became established. On that basis I did give consideration to striking out these complaints as standing no reasonable prospect of success.

44. Ms Boorer also made the submission that the Tribunal's jurisdiction to hear the race discrimination complaint against the Third Respondent is in question, given that he was never the employer of either Claimant (relying at least in part on the Second Claimant's express rejection of his offer in January 2021). I consider that the evidence as to the putative transfer will need to be heard in full before this question can be determined, and therefore make no findings at this stage, so that the point remains live.

45. Despite my reservations however, I was mindful that the Claimants are litigants in person and may not have appreciated the consequences of the shifting burden of proof or considered prior to the PH whether they have any evidence that might enable Tribunal to conclude that the reason for their dismissal was race.

46. If the Tribunal does have jurisdiction against all three of the First to Third Respondents, I nonetheless conclude that there is little prospect of the race discrimination complaints succeeding. However, in light of the Claimants' means as explained to me during the PH, I have set the amount to be paid at £50 for each complaint by each Claimant, on the basis of the claim as I understand it to be presently pleaded, i.e:

    a. That the reason why the First Respondent dismissed the Claimants was race;
    b. That the Second Respondent succumbed to pressure put on him by the Third Respondent to dismiss the Claimants because of race, and was untruthful as to the real reason, instead falsely claiming that it was redundancy;
    c. That the Third Respondent did not wish the Claimants to remain employed when he took over the practice from the First Respondent and required them to be dismissed because of race.

47. If the Claimants wish to continue with each of these allegations, therefore, they will each be required to pay a total of £150. A deposit order is made under separate cover against each of them. I encourage the Claimants to give careful thought to the fact of the orders and the underlying reasons for making them, and how they might advance evidence (rather than mere assertions) such as would shift the burden of proof to the Respondents.

48. If the Claimants now propose to seek to amend the claim to add further or alternative complaints of race discrimination, they will need to make an application to do so, which Mr Griffiths indicated would likely be opposed by his clients. I make no further order at this time since I consider it would be inappropriate to pre-empt any such application.

49. I have concluded finally that it would be appropriate, once the date for paying the deposits has passed, to list the matters for a further PH (Case Management) to be conducted in private. This will enable the parties to liaise in advance and draw up a full list of issues so that a listing for an appropriate period can be made. Orders are made under separate cover in this regard.

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Employment Judge Norris
Date: 4 January 2022
JUDGMENT AND REASONS SENT TO THE PARTIES ON

4 January 2022

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FOR THE TRIBUNAL OFFICE