EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4118430/2018

Held in Glasgow on 20, 21, 22, 23 May and 18 June 2019

Employment Judge **M Robison**
Members **Mr W Muir**
Mr K Thomson

Ms J Adegun — **Claimant**
Represented by
Mr G Cunningham
Counsel

The Mungo Foundation — **Respondent**
Represented by
Mr R Lyons
Consultant

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claim does not succeed and therefore is dismissed.

REASONS

Introduction

1. The claimant lodged a claim with the Employment Tribunal on 24 December 2015 claiming race discrimination, following her dismissal. The respondent entered a response resisting the claim.

2. Following a preliminary hearing which took place on 12 May and 29 June 2016, Employment Judge I McPherson held that the claimant's complaint of harassment was lodged out of time and therefore was dismissed and that the complaint of direct discrimination had no reasonable prospects of success so that head of claim was struck out. Following a successful appeal in respect of the latter, this hearing was set down to consider the complaint of direct discrimination only.

3. At the hearing, evidence was given by way of witness statements. The Tribunal heard first from the claimant. For the respondent, the Tribunal heard from Ms Aileen McBride (now Innes), HR business partner; Ms Caroline Ryan, investigating officer; Ms Gayle Patterson, regional manager and decision-maker; and Ms Una Munro, director of operations, who heard the appeal.

4. The Tribunal was referred by the parties to a number of productions from a joint bundle of productions. These documents are referred to by page number.

Findings in Fact

5. On the basis of the evidence heard and the productions lodged, the Tribunal finds the following relevant facts admitted or proved.

Background

6. The claimant is a black Nigerian national. She is an experienced care/support worker with qualifications in social care.

7. The claimant worked for the respondent as a housing support worker from 2 March 2015 until she was dismissed on 14 August 2015. The claimant did not receive any induction training at the commencement of her employment.

8. The respondent has a disciplinary policy and procedure (pages 69 - 81), a grievance policy and procedure (pages 82 - 88) and an equality and diversity in employment policy (pages 89-94). Aileen Innes, Caroline Ryan, Gayle Patterson and Una Munro had received equality and diversity training; Bruce Duncan (who carried out an initial fact-finding exercise) had not.

9. Initially, the claimant was based at the Stevenson project, working shifts.

10. On 5 April 2015, the claimant was due to provide support for a service user, LD, between 2.15 and 3 pm. LD was at that time in another service user's flat (MK). When assisting LD to return to her own flat, the claimant was involved in an altercation with MK. The claimant shouted at MK. The claimant was assaulted by MK, causing minor injuries.

11. The claimant's colleague, LC, advised the claimant that she should complete an incident report form (pages 103-106, with a typed-up version at pages 107 - 109) and inform the on-call manager, Hugh O'Neil. He advised the claimant to contact the police. Hugh O'Neil attended that same day at the main office of the Stevenson project and completed a debrief form, stated to be "in relation to major or violent incidents" (page 110). That form stated that "MK assaulted JA". The form was signed by Hugh O'Neil and the claimant. It is stated that "copies of this form to be sent to Head Office for attention of PA to Chief Executive". Hugh O'Neil advised that the claimant should not provide support to MK until after the matter had been dealt with.

12. The claimant was interviewed by the police. MK was subsequently charged with assault

13. MK was known to have aggressive tendencies although not known to have previously assaulted a member of staff. The claimant was not made aware of the support plan for MK, which would have been the usual procedure for those caring for service users.

14. On 6 April 2015, Bruce Duncan, the claimant's line manager, contacted Aileen Innes to report the assault on the claimant to HR.

15. Hugh O'Neil's recommendation that the claimant should not work with MK for the time being were not adhered to as the claimant was scheduled to support MK on 6 April 2015, although her schedule was changed once that came to the attention of another manager. The claimant was however again scheduled to support MK on 7 April 201 5. Later that day, she was invited to discuss the incident with Bruce Duncan, who was duty manager, in the presence of Thomas Parker.

16. On 7 April 2015, Bruce Duncan contacted HR to advise that a counter allegation of assault had been made by MK against the claimant. Bruce Duncan advised of MK's propensity to exaggerate. Aileen Innes told Bruce Duncan to conduct a fact-finding exercise to ascertain if further investigation was merited, as required by the care inspectorate and Scottish Social Services Council (SSSC) in cases where such allegations by service users are made against members of staff.

17. By e-mail dated 8 April 2015 (page 111), Bruce Duncan advised Aileen Innes, copying Gayle Paterson, that he had spoken to everyone involved in the incident, and that "there are many varying accounts of what happened... MK changed her story many times....MK said she may have hit her a little bit but she was hitting her - MK was defending herself. Worryingly though MK was saying that JA was shouting at her and grabbing her clothes to put her out....LC... couldn't see what was happening in the hall. LC did say that JA and MK were shouting at each other. LC heard a scuffle in the hall and JA came in with a cut lip... LD was very confused and only confirmed that MK and JA were shouting at each other."

18. Aileen Innes thereafter sought advice, in the usual way, from Una Munro about whether the claimant should be suspended. Una Munro advised to transfer the claimant to a different service rather than suspending her.

19. On 9 April 2015, the claimant was advised by e-mail (page 111a) that she was to be transferred to Firhill. This involved working in a team rather than individual support. The claimant asked for confirmation that she was being investigated, because she had understood that Bruce Duncan had advised at the meeting on 6 April 2015 that she was not being investigated. Bruce Duncan confirmed by e-mail dated 10 April 2015 that she was being investigated because of "further evidence which has come to light". She was advised that she was to attend a meeting on her arrival at Firhill on Monday 13 April, at which she was entitled to be accompanied by a trade union rep or a colleague.

20. By letter dated 10 April 2015, the claimant wrote to the chief executive headed "formal complaint regarding handling of the assault I suffered at work" (page 114 - 116). She stated that "the investigation meeting [with Bruce Duncan and Thomas Parker] appeared to be completely biased towards the suggestion that I was the one that assaulted MK". She stated that "I am under the impression that I am being treated this way because I advised BD and TP that following the assault I suffered in the hands of MK, I feel unsafe working with MK".

21. On 14 April 2015, Aileen Innes asked Caroline Ryan to conduct a full investigation based on Bruce Duncan's initial fact-finding exercise.

22. By letter dated 16 April 2015 (pages 116a - 117), the chief executive, Patricia Donnelly, responded to advise the claimant that the accusation against her would be investigated as quickly as possible.

23. On 20 April 2015, Caroline Ryan attended at the project with the intention of meeting the claimant, who refused to meet with her because she claimed that she had received no prior notification of the interview. Caroline Ryan interviewed LC, MK and LD.

24. On 21 April 2015, Caroline Ryan spoke to Bruce Duncan who advised that MK could exaggerate, was prone to aggression, but he was not aware of her having hit anyone before.

25. On 29 April 201 5, following a formal written invite (page 118/483), Caroline Ryan interviewed the claimant. The claimant took notes (p1 42-1 56). Caroline Ryan thereafter spoke to Hugh O'Neil because the claimant had referred to his involvement during her interview. He told her that he had talked with the claimant on the day of the incident, but he found her to be "anything but calm" as she had insisted.

26. The investigation report was concluded on 7 May 2015 (pages 119-141 b). Caroline Ryan recommended progressing to formal disciplinary "as a consequence of the apparent disregard of professional conduct in relation to her treatment and behaviour towards a service user coupled with an apparent failure to promote SSSC code of practice". She concluded that the claimant had "probably" shouted at MK and that it was "probable" that she "did grab" MK during the altercation.

27. By letter dated 19 May 2015 (pages 164-165), the claimant was requested to attend a disciplinary hearing on 29 May 201 5 to be conducted by Gayle Patterson. The letter stated that "the purpose of the disciplinary hearing is to consider allegations of potential gross misconduct. You should be aware that due to the nature of the allegations and the fact that you currently have a live final written warning, the outcome of the hearing may be a disciplinary sanction up to and including dismissal. Specifically it is alleged that 'you displayed aggressive behaviour towards a service user by shouting at her and grabbing her during an

altercation'. These allegations are in breach of SSSC Codes of Conduct, your employee handbook and the following organisational policies: code of conduct policy; bullying and harassment service users policy". She was advised that she had the right to be accompanied.

28. On 22 May 2015, the claimant wrote an e-mail to the chief executive, copied to Aileen Innes, advising that she would not attend a disciplinary hearing until she had been provided with further information, and in particular documentation requested from Police Scotland (page 166-167).

29. By letter dated 8 June 2015, the claimant was requested to attend a rescheduled disciplinary hearing on 16 June 2015. That letter made no mention of a final written warning (page 172). By letter dated 12 June 2015 (page 175a) Aileen Innes apologised for incorrectly referring to a final written warning. She refused the claimant's request for the disciplinary hearing to be rescheduled pending receipt of further documentation from Police Scotland, stating "we do not dispute that the police were involved in relation to the actions of one of our service users during the incident. As such the documents you are seeking from Police Scotland are not considered to be significant in relation to the allegations made against you".

30. The disciplinary hearing took place on 16 June 201 5. Minutes of the meeting were taken by Kirsteen Hendren (pages 177 -190). The claimant also took notes. Gayle Patterson only asked three of her list of questions in the time available so the hearing had to be reconvened on 4 August 2015. At that meeting, minutes were taken by Claire Lees (209 - 223) which were subsequently typed (pages 1 9 8 - 208). The claimant considered and annotated the minutes of both disciplinary meetings (pages 224 - 248).

31. By letter dated 14 August 201 5, the claimant was advised that the outcome of the disciplinary hearing was that she was dismissed (pages 249 - 252). Gail Patterson stated that, "I am concerned by your comment that you 'wouldn't be too bothered with this as it is a service user with a learning difficulty' and your further comment that if there was no dispute over the service users actions you didn't know why there is cause for concern. You do not appear to accept the

seriousness of the allegations made by the service user and witnesses that you shouted at MK. Further the very fact that the service user has a learning difficulty leaves them vulnerable and requires us as an organisation to take steps to investigate such allegations. From your comments you do not appear to appreciate that regardless of the actions taken by a service user, it is not acceptable for members of staff to shout at the people we support. Furthermore, all witnesses present state you and MK were shouting at each other prior to MK hitting you. All witnesses were consistent with their statement that you did raise your voice toward MK, both during initial discussions with BD and in later investigation meetings with CR".

32. The letter continues, "In relation to the allegation that you grabbed MK, I acknowledge that MK did change her account and that LC and LD did not witness the incident. I noted LC did state that she heard a scuffle and later saw a mark on MK's neck. However, I have also considered your comments that this was not mentioned during initial discussions with BD. It is my finding that there is insufficient evidence to suggest that you grabbed MK".

33. The letter continues later, "I find that your actions are in breach of SSSC codes of practice, in particular section 2.2 (communicating in an appropriate, open, accurate and straightforward way) and 2.4 (being reliable and dependable). I am concerned by your actions particularly in light of your position in that you are employed to work with vulnerable adults, on occasion in a one to one setting and are expected to speak with service users in an appropriate manner. I further draw your attention to section 4 of the TMF code of conduct policy, which outlines our expectations in relation to standards of behaviour and conduct and specifically states that we ask all staff to treat service users with respect and dignity, be friendly police and courteous, communicate clearly and thoughtfully and use tact and tolerance when dealing with others. It is my conclusion that your actions are also in breach of both TMF code of conduct and the bullying and harassment of service user policy".

34. The claimant's employment was terminated with one week's pay in lieu of notice.

35. The claimant's solicitor intimated an appeal on 18 August 2015 (pages 253 - 254). The grounds of appeal were that "the hearing process was fatally flawed'' because: the decision was based on witness statements which were not signed and those witnesses were not present at the disciplinary hearing; that there were major inconsistencies in the accounts given by the various witnesses and no further enquiry was made; no further enquiry was made into the assault on the claimant; the claimant was not made aware that MK had a history of violent behaviour and there was no protocol in place regarding how to deal with incidents of this nature; and that in any event the response was wholly disproportionate.

36. By letter dated 21 August 2015, the claimant's appeal was acknowledged by Una Munro (page 255). The claimant wrote a letter in response dated 29 August 2015, advising that she considered her treatment to be a discriminatory dismissal based on the fact that she was the only Black African involved in this matter whilst others are all White Scottish, and expressing concern that although SSSC had been informed, she had not yet heard from the respondent regarding the next course of action. She concluded, "I once again repeat that I feel I have been seriously discriminated against throughout this process as a result of my race/ethnic background".

37. The appeal hearing took place on 9 September 2015. Una Munro was the chair and she was accompanied by Lorraine Eivers, director of corporate services. Minutes were taken by Kirsteen Hendren (pages 260 - 275). The claimant was asked about her claim that she had been discriminated against, and "any situations of any Scottish white not taken against" (sic). She is noted as having replied "No, this is outwith this and none of my business". When asked "have all staff discriminated against you", she is noted as saying, "If I was such a bad threat and Hugh O'Neill came through to Glasgow, this was a serious situation and Bruce, Hugh and Lindsay are all Scottish white and I am black" (page 273).

38. By letter dated 18 September 2015 (pages 277-281), the claimant was advised that her appeal was not upheld.

39. In the ET1 lodged 24 December 2015, the claimant made reference to a comparator, FH, who was alleged to have shouted at a service user but was not

dismissed. Aileen Innes was not aware of that allegation, because the incident had not been reported to HR. Aileen Innes ascertained in April 2016 that a member of staff (SA) had heard from a service user that FH had shouted at her. In November 2018, she interviewed SA and FH. The incident was not reported by the relevant manager LOC, although it should have been. LOC was subsequently on long term sick leave and resigned.

40. On 1 May 2017, the claimant commenced employment with SAMH (page 453). By letter dated 11 July 2017, the claimant was advised that her contract of employment was terminated. That letter stated, "whilst I am sympathetic to the events that led to your lying on your application form, you did lie deliberately excluding details of your employment by the Mungo Foundation".

Relevant law

41. Section 13(1) of the Equality Act 2010 states that "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". Race is a relevant protected characteristic.

42. Section 23(1) of the Equality Act 2010 states that "On a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case".

43. Section 136(2) of the Equality Act 2010 states that "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".

44. This shifting burden of proof involves a two stage analysis: first the claimant must prove, on the balance of probabilities, facts from which the tribunal could infer discrimination (a prima facie case). If proved, the respondent must prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the protected ground. The Tribunal should take account of the revised Barton Guidance *(Jgen v Wong* 2005 EWCA Civ 142). A difference in status and a difference in treatment are not sufficient; something more, which need not be a

great deal, is required *(Madarassay v Nomura International* 2007 IRLR 246 CA and *Denman v EHRC* 2010 EWCA Civ 1279 CA).

Claimant's submissions

45. Mr Cunningham lodged outline submissions which he supplemented with oral submissions, which are set out in outline here. He set out the relevant statutory provisions and the relevant case law. The focus of his submissions was on the factors which he relied on to argue that the burden of proof had shifted.

46. He relied on the following:

a. Bruce Duncan's comments to the claimant which she noted in her diary (the Tribunal not having heard evidence from him);

b. The respondent's failure to act on the claimant's grievance (the Tribunal not having heard evidence from Patricia Donnelly);

c. The comparator identified by the claimant who was not dismissed, the respondent having initially denied but then confirming, that the matter had not been investigated because it had not been reported by the manager. He argued, relying on *Coudert Brothers v Norman's Bay Ltd* [2004] EWCA 205, that as a matter of public policy the respondent should not be allowed to rely on its own wrongdoing;

d. That the comparators relied on by the respondent support the claimant's case and an inference of discrimination should be drawn from their treatment in comparison with that of the claimant;

e. Statistical evidence provided by the respondent which provides compelling evidence giving rise to an inference of discrimination, specifically in respect of reports of attacks by service users on employees, the claimant being the only employee to have been dismissed; and employees disciplined in the previous three years, the claimant being the only employee dismissed for shouting alone;

f. Evasiveness of the answers to the questionnaire, including failure of respondent to accept the claimant was not given training; failure to

produce support plans for MK; failure to have procedures in place for addressing issues raised by an employee against a service user (failure to provide feedback in breach of their policy); and failure to answer a number of clear questions;

g. The process followed, including the denial that Bruce Duncan was carrying out an investigation; failure to provide adequate notice of the investigation meeting; referencing a final written warning; failure to provide feedback about the investigation into MK when the respondent knew this was causing the claimant considerable concern; and disproportionate sanction of dismissal.

47. Mr Cunningham made submissions on remedy, including a schedule of loss.

Respondent's submissions

48. Mr Lyons made oral submissions after which he passed up a typed version of his speaking notes, which are set out in outline here. He submitted that the claimant's claim has expanded to encompass an elaborate conspiracy theory involving 8 or 9 people in the organisation.

49. Mr Lyons submitted that the claimant had not adduced sufficient evidence to shift the burden of proof. The respondent had no choice but to investigate the incident given SSSC requirements, which had no connection with the claimant's race. Gayle Patterson relied on information contained in Bruce Duncan's e-mail to the effect that MK's evidence was unreliable to determine that there was insufficient evidence to conclude that the assault had taken place. There is no evidence that he persuaded witnesses to change their account or that he contacted the decision-maker after his initial involvement and in any event he had left the respondent on 9 August 2015. Further the claimant made no reference to the racist comment allegedly made by Bruce Duncan until the completion of the ET1 or to the diary entry until 12 April 2016. The first mention of discrimination was on 29 August 2015. While she now claims to have raised her concerns about the comment and about a comparator during the disciplinary process, this is not reflected in her own notes of the investigation meeting and nor does she include these comments in the annotated notes. She does not raise the issue until the

appeal, and then her references are "so vague as to be hopeful speculation". While the claimant now claims that the reference to "bias" in the letter to the CEO is a reference to discrimination, she had never mentioned this before this hearing, and in the letter she sets out why she thinks she was singled out, with no reference to race.

50. Mr Lyons argued that the respondent had satisfied the Tribunal of its explanation for the respondent's conduct, so did not need to consider the comparator, but in any event FH was not a suitable comparator because she had more service; she was not physically violent; because no incident was not reported by LOC to HR. The comparators relied on by the respondent show that the respondent took a consistent approach to dealing with similar matters.

51. If the Tribunal is not with him, he submitted that the Tribunal should look at the "reason why" question first. The respondent's decision to carry out a full investigation followed accounts from LC that the claimant was aggressive and from HON that the claimant was agitated and angry and talking very quickly. That ties in with the way the claimant gave evidence in the Tribunal, and he highlighted her animation and speed of speech, and the fact that she raised her hand to stop his questions. It also suggests the way she would have come across to the respondent at every stage of the disciplinary process.

52. The claimant's submissions are without substance: she was forewarned about the investigation meeting; the complaint by the service user had been investigated by operations, but it was not possible to give her feedback because it was confidential; securing the support plans would not have made any difference given what was known about MK; the reference to the final written warning was an error; the statements were given to the claimant at the first disciplinary and she had them for the second; it was reasonable for the respondent to deal with the grievance as part of the disciplinary process and if she was still not happy she should have lodged a more detailed grievance. Mr Lyons also relied on the evidence of Aileen Innes to counter the submissions of Mr Cunningham that the answers to the questionnaire could be relied on to raise an inference of discrimination.

53. He submitted that the claimant's evidence was contradictory and unreliable, and she explained any inconsistencies by blaming others, such as her lawyers, or suggesting that the minutes were not accurate. The claimant is seeking to stitch together all these concerns, some genuine, some based on misunderstandings, to paint a picture of discrimination when in fact the only picture to see is a responsible employer exploring a serious allegation and deciding on the balance of probabilities that there were sufficient concerns to dismiss.

54. Gayle Patterson's decision was based on the claimant's overall suitability for the post. She was concerned about the claimant's assertion that they should not be too bothered about MK's version of events because she was a service user with learning difficulties; she was concerned about her aggressive attitude and, with that questionable approach to vulnerable residents, that she could not be trusted. Dismissal in these circumstances when the claimant was on probation, at should have been performing at her best, was not disproportionate. The witnesses were clear that shouting at vulnerable people is uniformly considered abuse; a mitigation defence is unlikely to be upheld because shouting, even in the face of provocation, is not acceptable. In any event the claimant was heard to shout several times before she was assaulted, so provocation was not a mitigating factor.

55. Even if the Tribunal accepts that the claimant was less favourably treated than an actual or hypothetical comparator, that is not sufficient and the claimant has failed to show something more. Relying on the case of *Reynolds v CFLIS* 2015 EWCA 439, he submitted that there is no evidence whatsoever that the decision maker's mindset or decision was influenced by discrimination. If the claimant's case was that Gayle Patterson was acting on tainted evidence, then the respondent would not be liable for that.

56. The respondent is a charity which is value driven. To be accused of systemic discrimination from top to bottom is an anathema to them and not deserved, on the basis of a claimant who has pieced together some minor errors with lies to concoct a shockingly untrue allegation.

57. Finally, Mr Lyons made submissions on remedy. Although Mr Lyons made reference to a claim for expenses in the written speaking notes which he passed up, he did not refer to this in oral submissions. Since Mr Cunningham did not have an opportunity to respond to that, the Tribunal assumes that Mr Lyons decided not to make such an application.

Tribunal's discussion and decision

Observations on the witnesses and the evidence

58. We did not find the claimant to be a credible or reliable witness. We came to this conclusion for the reasons that follow.

59. As is clear from the findings in fact, we did not accept a central assertion of the claimant about the comment which Bruce Duncan was alleged to have said. While it may well be that the claimant is used to hearing racist comments as she said in evidence, and that might explain why she did not raise it at the time, she did not then refer to the alleged comment in the investigation interview or during the disciplinary hearing. While she may well have refrained from making the accusation while she was still employed (she said in evidence that she did not want anyone to be "crucified"), we heard that Bruce Duncan had in any event left the organisation by 9 August 2015. But crucially, by the time of the appeal, she had nothing to lose. We consider that it is not credible that she would not mention it in the appeal, when the issue of discrimination was raised. It was this fact that convinced us that this was quite simply a lie.

60. While she might herself now rely on the fact that she had raised it during the disciplinary process, but that it was not noted by the respondent's minute takers, we note that she herself took notes of the meetings, and that she had annotated the minutes of the disciplinary hearings. We consider that had this been raised at any time during the disciplinary process, given, as she said, that it was the "foundation" of her claim, she would have noted it and she would have relied on those notes.

61. Further, we did not accept that she had inserted the comment in her diary at or around that time. It was clearly inserted afterwards, but that of course could have

been at any time. Had she even inserted it at any time up to and including the appeal, we consider that she would have relied on it. We also thought that it was rather odd to insert a comment of that nature in a work schedule diary. We concluded that she had added it to support her claim that she had been treated less favourably because of her race.

62. We also noted that she had failed to inform SAMH about her employment with the respondent. While Mr Cunningham sought to "explain away" her failure to advise SAMH of her position because of concerns about confidentiality, we did not accept that explained the failure at the time, which those at SAMH who looked into the matter concluded was a lie.

63. We conclude from these two issues alone that the claimant was prepared to lie to support her claim and in her own interests. With regard to the remainder of her evidence, we were of the view that much of it was fabricated. Wherever there were inconsistencies, including for example in the notes, she explained these by blaming others, including her previous lawyers. We did not accept her claim that statements she made during the disciplinary process had, deliberately or otherwise, not been noted in minutes, not least because these were not reflected in her own notes or the annotations which she made to the respondent's notes. For example, although the claimant claimed in evidence that she had mentioned the comparator during the appeal process, claiming that the absence of the reference to the issue was the result of inaccurate notes, we considered this to be another example of the claimant making up claims which she thought would bolster her case. In fact, it was irrelevant that she had not referred to a comparator during the dismissal process, since this would not preclude her from pursuing a claim of race discrimination, or from subsequently relying on a relevant comparator. We took the view that the claimant had in places lied, exaggerated and embellished her evidence with a view to bolstering her case.

64. It did appear, as Mr Lyons submitted, that the focus of the claimant's case shifted during oral evidence from an argument about unconscious racism to an argument about deliberate actions based on race by a large number of employees. We do not discount the fact that an organisation may be institutionally racist, and the fact that a claimant lies in evidence will not of itself preclude such a finding, however

we were of the view that in this case her attempts to prove or assert direct evidence of discrimination were unnecessary and did not strengthen her claim.

65. With regard to the respondent's witnesses, we found them to be credible, and in large part, reliable, although we did detect that they were somewhat defensive of the respondent's policies which led them to overstate the position in some regards. In particular, we were of the view that the respondent's witnesses overstated the circumstances in which "shouting" per se was to be viewed as gross misconduct, and the limited extent to which mitigating circumstances would be taken into account. This was not least because it is not included in the list of examples of gross misconduct, and because the claimant was not in fact dismissed for gross misconduct but rather dismissed for misconduct, with notice.

66. Given our view of the claimant's credibility, wherever there was a dispute on the facts, we preferred the evidence of the respondent's witnesses.

67. Although we have found that there was no mention of discrimination or comparators throughout the disciplinary process (until the appeal) (and we did not accept that the reference to "bias" in the letter to the CEO was intended to be a complaint about race discrimination), we accept that there would not require to have been in order for us to have made a finding of discrimination. As discussed below, we accept that the claimant would have experienced racism in the past and therefore may well have had her suspicions raised by the way that the respondent conducted itself. Mr Lyons criticised the claimant for "stitching together" her various concerns to create a picture when there was no evidence of any racial motivation in respect of these actions. But this is precisely what the burden of proof provisions entitle her to do, and there is no need for the claimant to prove any direct evidence of racism, or rather actions because of race, in order to succeed in shifting the burden of proof.

68. As discussed below, although we did accept that the evidence adduced would otherwise have been sufficient to shift the burden of proof (had we not found that there was no less favourable treatment), we have accepted that the evidence relied on by the respondent supports their explanation that the claimant's race had nothing to do with their approach or decisions in this case.

69. As will also be clear from the findings in fact, we did not consider it necessary for our decision to make detailed findings in fact regarding the incident which took place on 5 April, beyond the essential relevant findings made.

70. We should also say that we were of the view that Mr Cunningham covered the necessary ground in a comprehensive, committed and professional way and there could be no criticism of his approach to the presentation of this case.

Direct discrimination

71. In this case, the claimant claims only direct discrimination because of race.

72. We are well aware of the difficulties for a claimant of proving discrimination, especially when any discrimination may be unconscious. Indeed, the burden of proof provisions recognise that there are particular difficulties for claimants proving discrimination, such that the burden of proof on the claimant may be said to be "lightened". It is clear however from *Hewage v Grampian Health Board [2012] IRLR 870,* and as confirmed in recent case law, that the claimant does in the first instance require to prove facts from which discrimination could be inferred.

73. This was not a case where the reason for any less favourable treatment could be said to be self-evidently race. Where the act complained of is not in itself discriminatory but where it is argued that it is rendered so by a discriminatory motivation, ie by the mental processes (whether conscious or unconscious) which led the alleged discriminator to do the act, it is for the Tribunal to draw appropriate inferences from the surrounding circumstances and from the conduct of the alleged discriminator *(Amnesty Internationnal vAmhed* 2009 IRLR 884 EAT).

74. Here, the claimant asserts less favourable treatment, relying on an actual comparator. In this case, there was a great deal of focus on the treatment of comparators.

75. As discussed above, we did not consider it relevant that the comparator which the claimant relied on was not identified until the lodging of the ET1. However, we came to the view that none of the comparators relied on, either by the claimant or

by the respondent, could be said to be actual comparators, whose circumstances, as required by section 23, were not materially different from those of the claimant.

76. The claimant relied on FH as an actual comparator. But we did not accept that FH was in the same material circumstances as the claimant. In particular, we heard that the alleged "shouting" incident in that case had not been reported to HR by the relevant manager. The relevant manager was not involved in the claimant's case, so could not be said to have acted in one way with one member of staff and another for the claimant. HR were not aware of the incident until the claimant raised it. We consider this to be a material difference and concluded that the reason FH was not dismissed for "shouting" not least because the respondent was not aware of it.

77. The respondent lodged a good deal of documentary evidence, supported by some oral evidence, seeking to show that they treat all employees accused of misconduct, specifically "shouting" consistently. However we were of the view that in relation to each of the so-called "comparators" referred to by the respondent that there were material differences which meant that they were not properly actual comparators for the purposes of the requisite section 23 comparison. We did not therefore rely on these actual comparators when coming to our conclusions in this case.

78. The respondent in fact relied on how these "comparators" as evidence of taking a consistent approach to employees accused of shouting at service users. Aileen Innes in her witness statement accepted that the circumstances were not exactly the same. Her evidence however was that their approach to shouting is uniform, that it is considered abuse and therefore not tolerated. She accepted that any mitigating circumstances would be considered, but her evidence was that the default position was dismissal.

79. When considering then whether the claimant had been "less favourably" treated, because of race, this is a case where we would require to consider how a hypothetical comparator would be treated in the same or similar circumstances, and whether the reason for the less favourable treatment was the claimant's race.

80. However, as Lord Nicholls explained in *Shamoon v Chief Constable of the RUC* 2003 IRLR 285 HL, it is not necessary to adopt a two-step approach to answer what is a single question, which is did the claimant, on the proscribed ground (here because of race) receive less favourable treatment than others. This is particularly the case where the identity of the relevant comparator is in dispute (as here) (and where consideration is being given to how a hypothetical comparator would be treated). In such circumstances, it may be that the less favourable treatment issues cannot be resolved without at the same time deciding the reason why issue. Lord Nicholls stated that in such cases it will be legitimate for Tribunals to concentrate primarily on the reason why the claimant was treated as she was, and postponing the less favourable treatment issue until after they have decided why the treatment was afforded.

81. Here we must focus on the reasoning of the decision-maker, Gayle Patterson. We relied on the content of the dismissal letter, extracts of which are set out above. We relied in particular on the following statement: "I am concerned by your comment that you 'wouldn't be too bothered with this as it is a service user with a learning difficulty' and your further comment that if there was no dispute over the service users actions you didn't know why there is cause for concern. You do not appear to accept the seriousness of the allegations made by the service user and witnesses that you shouted at MK. Further the very fact that the service user has a learning difficulty leaves them vulnerable and requires us as an organisation to take steps to investigate such allegations. From your comments you do not appear to appreciate that regardless of the actions taken by a service user, it is not acceptable for members of staff to shout at the people we support. Furthermore, all witnesses present state you and MK were shouting at each other prior to MK hitting you. All witnesses were consistent with their statement that you did raise your voice toward MK, both during initial discussions with BD and in later investigation meetings with OR".

82. Ms Patterson said in her witness statement that she had "made a clear finding that [the claimant] had shouted at the service user, was concerned at her lack of empathy for our vulnerable clients and felt that as she was in her probationary period dismissal was entirely merited in the circumstances".

83. She also stated "during the first hearing. ..the claimant recorded her own minutes and took these away. She would hold her finger up to stop us, write down these notes and then we could continue the process. As a result we only got to question 3 of my list of questions....! found the claimant to be at times abrupt. By way of example, she referred to Kirsteen who was there to take minutes at "she". When Aileen asked her to address the panel by name she was addressed as Aileen McBride, her full title, from then on but in a manner that was clearly meant to make a point".

84. In cross-examination, she further stressed her concerns regarding the claimant's attitude. She said that she was "not just dismissed for shouting at the service user, but for aggression and shouting in the investigation" and she said that she too had witnessed aggression in the disciplinary hearing. She said that the claimant had exhibited a mixture of rudeness and aggression during the hearing. She gave examples of pushing past her, of talking over her, of the claimant rolling her eyes, and calling people he/she. She said that had she been there by herself she would have been intimidated. She was concerned about the claimant's values. She was concerned about how she had performed with service users in the first two months of her employment when she should be performing at her best. She thus confirmed therefore that she was also dismissed for behaviour which she displayed during the disciplinary process.

85. It was clear to us not only from the letter of dismissal, but also from Ms Patterson's witness statement and her oral evidence, that she was concerned about the claimant's attitude not only to the disciplinary process in general but also in relation to service users in particular. We came to the view that while the claimant was dismissed for "shouting" as is clear from the letter, Gayle Patterson took account of the attitude she displayed in the disciplinary hearing and also how she conducted herself in that disciplinary hearing. We accept that she had concluded that given that she was in her probationary period, actions such as shouting and displaying attitudes as such she did during the disciplinary hearing led her to conclude that the claimant was not suitable to continue in her role going forward.

86. Although Mr Cunningham suggested that the only reason relied on for dismissal of the claimant was because she was shouting, while this may well have been a

matter to rely on in an unfair dismissal claim, this is a claim of race discrimination. We took the view that it was appropriate to take account of all of the reasons advanced in evidence when determining the reason why the claimant was treated as she was.

87. Having made conclusions about the reason why the claimant was dismissed based on the evidence heard, we took the view that a hypothetical white comparator in the same material circumstances as the claimant would also have been dismissed. We thus came to the view then that the claimant had not proved less favourable treatment.

88. Mr Cunningham quite properly relied on the burden of proof provisions in this case. However, in *Laing v Manchester City Council* 2006 IRLR 748 EAT Elias P stated at [75] that "if [the Tribunal] are satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious racial discrimination, then that is an end of the matter. It is not improper for a tribunal to say, in effect, 'there is a nice question as to whether or not the burden has shifted, but we are satisfied that even if it has, the employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race'".

89. Further, in *Hewage v Grampian Health Board* [2012] IRLR 870 SC, Lord Hope stated at [32] that "it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they having nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or another".

90. This is exactly where we find ourselves in this case. We were able to make clear positive findings about the respondent's explanation for the treatment, and even though we may well have been persuaded that the burden of proof had shifted in this case, the respondent has in any event shown, on the balance of probabilities, why they acted as they did, giving a fully adequate explanation for their actions, and we conclude that it had nothing to do with the claimant's race.

91. With regard to the burden of proof, there were a number of factors which would otherwise lead us to conclude that the burden had shifted. These included in particular the failure of the respondent to further investigate the assault on her, and the failure of the respondent to act on the claimant's grievance. We heard in evidence that the respondent had investigated the assault against the claimant separately from the alleged assault by the claimant, which was investigated by HR, whereas an assault on a member of staff was investigated by the operations team. We heard from Gayle Patterson that the matter would have been raised in a Monday morning meeting (although she was on holiday at the time of this incident). At that meeting, we heard that the incident report would be considered and the matter reviewed, and that decisions would have been made about what actions were to be taken in regard to additional precautions, risk assessments or amendments to support plans, although service users would not themselves be investigated.

92. We assume that happened in this case, but we heard no more than that. Crucially, this was never communicated to the claimant and the chief executive made no reference to that in her response to the claimant's letter of complaint. The claimant was not advised that the matter which she complained about would be investigated separately, and nor was she advised that the matter would be treated as a grievance. The claimant's grievance was effectively ignored.

93. When she raised her concerns during the investigation and disciplinary hearing about the assault on her by the service user, she was essentially told that such matters were irrelevant. She was not told that the matter was being investigated through different channels. We did not accept Mr Lyon's submission that it was not possible to tell her about it for reasons of confidentiality as suggested by Gayle Patterson in evidence. It is not surprising that the claimant was suspicious about her treatment when for example she was told during the investigation that the debriefing report on the assault on her "didn't matter" or that she became very frustrated when, as she saw it, the respondent did not take account of the fact that the assault on her could be viewed as an explanation for her behaviour or at least mitigation.

94. There were other factors which we accept would have raised a suspicion in the mind of the claimant, including for example the mistaken reference to the final written warning and the fact that she was ultimately dismissed with notice. Errors such as these, given the claimant's concerns about the failure of the respondent to investigate her grievance, were likely to compound the claimant's suspicions.

95. We should add that, although Mr Cunningham also relied on the responses, and lack of responses, to the questionnaire to support his argument that the burden of proof had shifted, we did not accept that those responses were sufficiently compelling to raise any inferences, and in any event we accepted the explanations given by Aileen Innes in response.

96. Thus, even if we accept that the burden of proof had shifted in this case, this is one of those cases where the respondent has in any event proved, on the balance of probabilities, the reason for the claimant's treatment. On the facts, we concluded that the respondent's actions were not motivated, consciously or unconsciously, by race. We concluded that the respondent had proved the explanation for their treatment, and that it had nothing to do with race.

97. Although the respondent had intimated an intention to rely on a section 109(4) defence this was not relied on by Mr Lyons and therefore there is no need to deal with it.

98. The claimant's complaint of direct discrimination therefore does not succeed and the claim is dismissed.

Employment Judge: Muriel Robison
Date of Judgment: 09 July 2019
Entered in register: 10 July 2019
and copied to parties