



EMPLOYMENT TRIBUNALS

Claimant: Mr D Malu Malu

Respondent: Matalan Retail Limited

Heard at: Manchester

On: 7, 8, 9 September 2021
and 14 January 2022

Before: Employment Judge Dunlop
Mr J Flynn
Mrs S Khan

REPRESENTATION:

Claimant: In person

Respondent: Mr P Gilroy QC

JUDGMENT having been sent to the parties on 18 January 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The claimant, Mr Malu Malu, works as a security guard. This case is concerned his work at the respondent's Bolton store. The claimant was not employed by the respondent, he was employed by Cordant Security Ltd ("Cordant"), who were contracted to provide security for the respondent's stores. That business has since gone into administration and it was not a respondent to the claim, although several of the respondent's witnesses were former Cordant employees.

2. Mr Malu Malu has brought a number of claims of direct discrimination on grounds of race, harassment on grounds of race and victimisation, as more fully set out under the heading "Issues" below.

The Hearing

3. This hearing took place as a hybrid hearing over three days in September 2021. The non-legal members attended remotely and everyone else attended in person. Unfortunately, it was not possible to complete the hearing in the time available and the case was adjourned part-heard, resuming for one day in January 2022. The case went part-heard partly due to technological difficulties, in that there was only one working microphone in the Tribunal room, which meant that the non-legal members could not hear the proceedings. This meant that we had to adjourn the start of the hearing until 2pm on the first day, although most of this time was productively used by the panel reading the bundle and witness statements.

4. The panel had regard to an agreed bundle of documents totaling around 240 pages, and accepted some additional documents which Mr Malu Malu wished us to consider, designated as C1 and C2. We read the documents which were identified in the witness statements and those documents which the parties took us to in cross examination. The respondent had prepared an additional correspondence bundle, which Mr Gilroy relied on in relation to one issue. We read the documents relevant to that issue.

5. Mr Malu Malu wished us to watch some CCTV footage, and also wanted to question the respondent's witnesses about it. Mr Gilroy contended that the CCTV footage was not relevant to the issues we had to determine, but maintained a neutral position as to whether it should be admitted. Having regard to the fact that the CCTV footage was very short, and that Mr Malu Malu was a litigant in person and strongly wished us to view it, we decided to admit this evidence. We viewed the recordings ourselves during an adjournment and, again, with the parties during the hearing.

6. Mr Malu Malu gave evidence on his own behalf during the afternoon of day 1 and throughout day 2. We heard from the respondent's witnesses on day 3 and 4, they were:

- 6.1 Gary Edwards, formerly Senior Operations Manager for Cordant;
- 6.2 Lee Edson, formerly Deputy National Account Manager for Cordant;
- 6.3 Jane Cihlar, formerly Northern Regional HR Advisor for Cordant;
- 6.4 James Neale, formerly an Operations Manager for Cordant;
- 6.5 Peter Powney; Assistant Store Manager at Matalan Bolton; and
- 6.6 Ben Waddicar; Store Manager at Matalan Bolton

7. Both parties took the opportunity of the delay before the final day of the hearing to write summaries of their closing arguments, for which we were grateful. We heard oral submissions from both parties and were then able to adjourn and deliberate, before giving our decision on the afternoon of the final day. Following that decision, Mr Gilroy made a costs application on behalf of the respondent. After hearing from Mr Malu Malu and adjourning to consider the submissions made, the Tribunal also gave Judgment on the costs application and explained its reasons orally to the parties.

The Issues

8. Following a significant amount of case management, the claims had been clarified as follows by Employment Judge Holmes at a case management hearing on 18 November 2020.

A.Direct Race Discrimination.

The claimant claims that he was subjected to direct race discrimination by the respondent's Assistant Store Manager, Peter Powney, by :

- a) On 5, 8, 19, December 2019, and 2, 5 and 19 January 2020, contacting the Claimant on the phone;
- b) On 8 December 2019, 19 December 2019, 2 January 2020, 5 January 2020, and 19 January 2020, the Respondent bullied and harassed the Claimant at work by making sounds like a sheep: "baaaaaaaaaa", continuously laughing and by repeating the claimant's African accent.
- c) On the 29 January 2020, as the claimant returned to work after a grievance meeting, approaching the claimant and asking about the grievance hearing, and then subjecting the claimant to further similar bullying and harassment on the day until the end of the shift at 8.00 pm. by making made noises like a sheep: "baaaaaaaaaa" to annoy the claimant.
- d) On 30 January 2020 calling the claimant "man of the jungle" and making further noises like a sheep: "baaaaaaaaaa".
- e) On or about 2 February 2020, sending, or causing to be sent, an email to the claimant's employer, Cordant Security, asking for the removal of the claimant from the Bolton store, falsely alleging that the claimant had stolen, or was preparing to steal, goods from the respondent's Bolton store.

In all these instances the claimant relies upon a hypothetical comparator

B.Harassment.

In the alternative, the claimant claims that the acts set out at paragraphs (a) to (e) above constitute acts of harassment on the grounds of his race.

C.Victimisation.

In the alternative the claimant claims that the acts set out at paragraphs (c) to (e) above constitute acts of victimisation, on the grounds that :

- i) The claimant had done a protected act on or about 9 January 2020 in raising a grievance with the respondent and/or his employer Cordant Security in which he alleged that Peter Powney had racially discriminated against him; or that
- ii) Peter Powney believed that the claimant done such a protected act.

9. At the start of the hearing, both the parties confirmed that this list continued to properly reflect the claims that the panel were required to determine.

10. I observed that it was a relatively simplistic list of claims, and queried whether it would be helpful to expand it into a list of issues which reflected the legal tests to be applied in each cause of action in a more conventional way. Mr Gilroy's response to this proposal was that the respondent's defence of the claim was a factual

defence, and that if this Tribunal found that the matters which Mr Malu Malu alleged had indeed taken place as he described, then the respondent recognised the inevitable consequence would be that the claims would succeed. On that basis, we proceeded without further analysis of the issues.

Findings of Fact

11. Mr Malu Malu is from the Democratic Republic of Congo. He is black, and he has a pronounced accent. He came to the UK as an adult and lived within a religious community, he has studied English, Psychology and Counselling. Alongside his studies, in around 2009, Mr Malu Malu began to undertake security work. This resulted in him working as a contractor for various high street retailers, which became his full-time occupation. At all material times, he was employed by Cordant (or predecessor businesses). When we refer below to Mr Malu Malu “working for” the respondent, we mean that he was working at one of their stores, having been assigned there by Cordant.

12. The Tribunal Panel appreciate that such work is difficult, and potentially dangerous. We have no doubt that Mr Malu Malu has suffered verbal abuse from time to time in this role and that it is sadly likely, given his skin colour and accent, that some of that abuse will have related to his race.

13. The claimant had worked for Matalan for a period in around 2010 (Openshaw) and again in 2016 (Liverpool). He alleges that there were incidents of racial abuse during those assignments. However, they did not involve any of the same individuals as were involved in the matters giving rise to this case, and we make no findings about them.

14. In 2019 Mr Malu Malu was again informed he would be working for the respondent, this time in Stockport. Mr Powney also worked at Stockport at that time. It is agreed that Mr Malu Malu asked to be relocated and that James Neale, Mr Malu Malu’s manager at Cordant, assisted him in securing relocation from Stockport to Bolton. Mr Malu Malu asserts that the reason for this was due to problems with Mr Powney. Mr Powney and Mr Neale disagree. They say that Mr Malu Malu wanted to move for his own reasons, related to his family who lived in Bolton and the need to keep his income above a certain level for visa requirements. The respondent’s version fits more closely with documents in the bundle (particularly an email from the claimant dated 29 August 2019 at 105, and in comments the Mr Malu Malu is recorded as having made in a later grievance hearing, at page 121) and we consider it is more likely to be correct. We accept Mr Powney’s evidence that there was little contact between Mr Malu Malu and Mr Powney at Stockport, and that when Mr Malu Malu transferred to Bolton neither had any preconceptions of the other.

15. Mr Malu Malu asserts that he was given no formal induction when he started work at Bolton. He says, as a result of this, that for many weeks he did not know where the toilet facilities were and had to leave the premises to use toilet facilities in the homes of nearby residents (presumably residents who were known to him, although his evidence on this point was unclear). The respondent says that this evidence is not credible and should be rejected. Even if there was no formal induction, any reasonable adult would simply ask another member of staff where the

toilet facilities were. We agree. This was one of a number of assertions by Mr Malu Malu that we simply found too difficult to believe.

16. Mr Malu Malu and Mr Powney agree that the Bolton store was a particular target for shop lifters and that they worked hard together to combat this, including physically chasing shoplifters away and recovering goods. Mr Powney grew to respect Mr Malu Malu and the contribution he made to the store. Their relationship was mutually strong and supportive. In Mr Powney's words they "had each other's backs". Mr Malu Malu agreed with this, at least in relation to shoplifters. An example of this closeness, not disputed by Mr Malu Malu, is that Mr Powney (who is a car enthusiast) helped him when he was experiencing mechanical problems with his car.

17. Mr Malu Malu confided in Mr Powney that he had a young child who was often ill. Mr Powney was happy to allow Mr Malu Malu to work flexibly by arriving late, leaving early or taking extended breaks in which he could travel home. This was on the proviso that Mr Malu Malu would make up the hours he was due to work, and remained contactable in case he was needed at the store. Mr Powney and Mr Malu Malu had each other's mobile numbers and contracted each other directly in relation to these arrangements.

18. That may not have been officially the appropriate channel of communication given that Mr Malu Malu was a contract worker. However, we also consider it unremarkable that in practice a manager in a store might establish communication with a contract security guard outside the official channels. Used respectively and appropriately, such a channel of communication could be in the interests of all parties allowing arrangements to be made and changed with more flexibility than the somewhat cumbersome process of making minor adjustments to the bookings through Cordant as an intermediary. It particularly suited Mr Malu Malu, given his personal circumstances and his need for flexibility around breaks etc.

19. Phone records in the bundle give some indication of the dates and frequency of phone contact between Mr Malu Malu and Mr Powney. There is no evidence to suggest an excessive number of calls. Further, where the text of messages is visible, this seems to be entirely professional and appropriate, and supports Mr Powney's evidence as to the purpose and nature of the communications.

20. On 8 December, according to the List of Issues, Mr Malu Malu says that Mr Powney approached him and mocked his accent, by making 'baaa' noises and imitating him. We will return to this allegation, and make findings about whether or not it happened, later in this Judgment.

21. On 19 December Mr Malu Malu again contends that Mr Powney approached him and mocked his accent, by making 'baaa' noises and imitating him. Again, we will return to this below.

22. At some point before Christmas 2020 Matalan held a Christmas party for employees at the Bolton store. Mr Powney and Mr Waddicar made arrangements for Mr Malu Malu and the store cleaner (who was also an agency worker) to attend this party, even although their attendance was not funded or expected by Matalan itself. We understand this was funded by the store management out of their own pockets.

Mr Powney also presented Mr Malu Malu with a bottle of champagne in recognition of his contribution to tackling stock losses in the store.

23. On 2 January and 5 January 2020 Mr Malu Malu again contends that Mr Powney approached him and mocked his accent, by making 'baaa' noises and imitating him. Again, we will return to this below.

24. On 4-6 January there was an exchange of emails between Mr Powney and Mr Neale about Mr Malu Malu's rota and the times he was meant to attend work. Mr Neale commented to Mr Powney "*I think he [Me Malu Malu] is trying it on with you.*" During cross-examination, Mr Malu Malu appeared to suggest that his relationship with Mr Powney had previously been good, and that this was the trigger was a change in the relationship, and the start of the poor treatment.

25. That evidence contradicts the specific dates given above, where Mr Malu Malu had asserted that he had suffered racial abuse, specifically mimicry of his accent. The conflict appears to go deeper than a simple matter of dates (which the Tribunal understands can get confused, even where an apparently clear allegation has been made of conduct occurring on a specific date). Mr Malu Malu's statement suggested his relationship with Mr Powney was bad throughout his time at Bolton, due to "bad memories" from their time at Stockport. In cross examination, however, his evidence was different. He agreed that the relationship was positive up until it "turned" at the time of these emails.

26. On 8 January 2020 Mr Malu Malu raised a written grievance with the Cordant HR team. The grievance was sent by email and is headed "Bullying, Harassment and Ignorance from Managers." The content of the grievance, relates entirely to rota arrangements and, specifically, that Ms Malu Malu was having to ring "more than 100 times" to have his rota put on the Cordant online portal. He asserted that Matalan managers were also putting forward the same complaints. He explained how this was causing both him and Matalan difficulties, as there were discrepancies between the hours shown on his rota and the hours that Matalan were expecting him to work. Understandably, this caused anxiety and uncertainty. We accept that these were issues that had arisen, and were particularly problematic over the Christmas and New Year period. Despite the title, however, we consider that it is somewhat strained to describe the frustrations Mr Malu Malu was experiencing as "bullying" or "harassment" and, most importantly, the grievance contains no complaint at all about Mr Powney (or anyone else at Matalan).

27. The bundle contains a 1:2:1 supervision report recording a visit from Mr Malu Malu's manager at Cordant, James Neale, to Matalan Bolton on 15 January 2020. This supervision report also contains no record of Mr Malu Malu making any complaint of the racial bullying which, on his case, Mr Powney had suddenly begun to subject him to. Mr Malu Malu explains this by alleging that the 1:2:1 supervision never took place, and that Mr Neale fabricated the report. There was no meeting and therefore, he says, there was no opportunity to report the racial abuse.

28. Mr Neale denied fabricating or tampering with the notes and asserted that the meeting did take place as recorded. It would not have been an easy matter to tamper with the notes – Mr Neale explained that in part they are automatically generated. They also appear to be signed by Mr Malu Malu. Whilst the Tribunal lacks the

expertise to assess whether that signature is genuine or not, the fact that he would have been required to forge this signature demonstrates the level of wrongdoing that is being alleged against Mr Neale.

29. We accept Mr Neale's evidence that he did attend the 1:2:1 and that, as recorded by the notes, Mr Malu Malu did not raise any issues of racial abuse with him. We also accept his evidence that Mr Malu Malu had ready access to him by telephone, and could have raised this issue at any time, but did not.

30. On 19 January 2020 Mr Malu Malu again contends that Mr Powney approached him and mocked his accent, by making 'baaa' noises and imitating him. We will return to this below.

31. Cordant held a grievance meeting with Mr Malu Malu on 29 January 2020 in central Manchester. In attendance were Gary Edwards, Senior Operations Manager, and Jane Cihlar, of HR, both of whom gave evidence to the Tribunal. Ms Cihlar prepared notes of the meeting. Those notes indicate that the discussion focused on the rota and communication issues raised by Mr Malu Malu in his grievance. There is no suggestion of any complaint against Mr Powney or anyone else at Matalan.

32. In the course of this litigation, Mr Malu Malu has produced a document entitled "List of Issues for the Grievance Hearing on the 29th January 2020". It is typed, and copy appears at page 171 of the bundle. There are six numbered points on this document, under the general heading of Bullying and Harassment. The first and second relate to issues in the Stockport store dating from 2019. The third is as follows:

"Phone calls and text messages from Peter powney Matalan Assistant store Manager and chanting in sore when talking to me, which makes me feel racially abused by him."

Although brief, the accusation summarised here corresponds closely to the subject of Mr Malu Malu's claim to the Tribunal. Items 4, 5 and 6 are less relevant, but include a request to be moved to another store, away from Mr Powney and Mr Neale.

33. This document was disclosed during the course of the litigation. It was the respondent's position that it had never been produced during the grievance hearing, or at any point prior to the disclosure exercise. The respondent's solicitor asked the claimant for further information related to the document, and eventually the Tribunal directed that the claimant provide such information. The information provided was vague, Mr Malu Malu said that the document had been produced at an internet café (so he was therefore unable to disclose an electronic copy which could be expected to show the document properties, including the date of creation). Mr Malu Malu appeared to say that he had left the document in the grievance hearing, and that Cordant managers had refused to take it. It was never emailed to Cordant, despite his grievances having been raised by email.

34. Mr Gilroy cross-examined Mr Malu Malu in some detail on the creation of this document and its use in the meeting. Some of Mr Malu Malu's evidence on this point strained credibility and made little sense. Other elements, which might have made sense, were inconsistent. We heard no explanation for why Mr Malu Malu would

travel a long way into Manchester to use an internet café when he was well-used to sending typed emails from his own home. It was suggested at one point that he had gone to the café twice, as there had been an earlier draft. He later told us that the earlier draft may have been saved to a USB stick, but that that USB stick was unavailable, because he had lots of them. After that, he told us he had only three but might have given the critical one away. He also varied between saying that he had not been permitted to hand the document over in the grievance meeting, to that he had simply felt too intimidated to do so. Another version, as above, was that he had had the document in the meeting but Mr Edwards had refused to take it. This was expanded in his witness statement, which stated that he had been reading from the document in clear sight of Mr Edwards. During cross examination he said that he had been unable to read it out due to the way in which Mr Edwards conducted the meeting.

35. We are satisfied that this document was not produced contemporaneously, as alleged by Mr Malu Malu. Instead, recognising that his case would be stronger if he had complained about racial harassment prior to the events of 30/31 January (which we discuss below), Mr Malu Malu created the document at a later date, for the purposes of the litigation. In that sense, it is a fabricated document. Following on from that, we accept the evidence of Mr Edwards and Ms Cihlar that the grievance concerned rota issues and that no question of racial harassment was raised. We also find that the claimant was not truthful when he gave evidence about this meeting, for example when he stated in his witness statement:

“He [Gary Edwards] asked me if I believed that the bullying and harassment had something to do with my race. I replied yes, but he did not explore the issue any further...” (paragraph 18)

36. Mr Malu Malu returned to the Bolton store after the grievance meeting. He says that Mr Powney asked him how the grievance meeting had gone. Mr Powney denied this as he says he was unaware of the meeting. Mr Malu Malu says that after this, Mr Powney repeated the “baaa” noise. We will return to this, and make findings, below.

37. Mr Malu Malu alleged that on, the next day, 30 January, Mr Neale came to the store. He overheard Mr Powney talking to Mr Neale and, in particular, the comment “man of the jungle” which he believed was directed at him. Mr Malu Malu says both men then laughed and Mr Neale subsequently ignored him, beyond that, he heard nothing more of the conversation or any context for the comment. Mr Powney denies making the comment. Mr Neale denies ever hearing such a comment and denies being in the Bolton store at all on that day. Mr Neale’s evidence is that he was in Wavertree for the whole day doing interviews.

38. On 1 February Mr Powney was approached by two members of staff who had reported that they had noticed some men’s shirts “tucked away” in a section of the ladieswear department. Later, they had noticed that the shirts had been placed in a Matalan bag. The shirts were placed in an area near where Mr Malu Malu was often positioned and Mr Powney asked if he knew about them. Mr Malu Malu said that he did, and offered an explanation that he had ‘deterred’ a shoplifter from taking them. Mr Powney was not satisfied with this explanation and reviewed CCTV footage from that day and the day before. Mr Powney was satisfied that the footage showed Mr Malu Malu on 31 January removing the shirts from the menswear section and

placing them in the womenswear section. Footage from 1 February showed (to Mr Powney's satisfaction at least) Mr Malu Malu placing the shirts in the bag.

39. Mr Powney discussed the footage, and the matter generally, with Mr Waddicar, the store manager. They decided that the matter needed to be referred to Cordant, and duly did so. Mr Powney was asked to put the matter in writing to allow Cordant to investigate. He was informed that Mr Malu Malu would be stood down from his duties to enable this investigation to occur. Mr Powney duly emailed Cordant (copying various managers) on 2 February. A very brief email at 12.05 was followed up with a more detailed email at 12.30, setting out the details of what is believed to have occurred, including the comment "*This type of behavior you would expect from a potential thief not a guard.*" The sending of this email is the final act of alleged race discrimination/harassment/victimisation that Mr Malu Malu complains of in this case. A later email from Dawn Williams, Retail Profit Protection Manager for Matalan, requests the Cordant remove Mr Malu Malu from the account and this was actioned by Cordant on the same day.

40. Cordant conducted an investigation into the incident. Mr Malu Malu was interviewed on 7 February 2020. During the interview, he did not dispute that the person shown in the CCTV footage was him. Rather, he asserted that there was an innocent explanation for his actions. Statements were obtained, via Matalan, from the two employees who had initially reported the issue and from Mr Powney.

41. One of the many difficulties with Mr Malu Malu's evidence was the position he took on the CCTV footage in this case. Sometimes he put forward explanations for the actions shown, for example by giving an account that he was applying security tags to items. At other times, particularly in cross examination, he implied that the man in the footage was not him at all. Ultimately, we do not need to determine whether Mr Malu Malu was acting in an improper way, or even whether it is him in the CCTV footage. However, this is simply one more example of the ways in which his evidence often seemed to be internally contradictory and inconsistent.

42. Subsequently, Mr Edwards produced a grievance outcome which was sent to Mr Malu Malu. Unfortunately, that document was misdated, but we are satisfied that it was sent by post in mid-February.

43. By letter dated 17 February 2020 Mr Malu Malu resigned from his employment with Cordant. On the same date, he submitted a further grievance. This grievance did expressly allege that Mr Powney had mocked and mimicked his accent.

44. By letter dated 19 February 2020 (which appears to have crossed with Mr Malu Malu's letter) Cordant invited Mr Malu Malu to a disciplinary hearing concerning the allegation that he had moved and concealed the shirts.

45. Ms Cihlar wrote to Mr Malu Malu on 24 February to "reach out" and check if resignation was the route he wanted to go down. She pointed out that the disciplinary hearing would be conducted by an independent manager and Mr Malu Malu would have the opportunity to put forward his position. After some further correspondence, Mr Malu Malu maintained his resignation and the meeting did not go ahead. He commenced these proceedings shortly afterwards.

Relevant Legal Principles

Section 13 – Direct discrimination

46. Section 13 EqA provides:

- (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.

Section 26 - Harassment

47. Section 26 of the EqA provides (as relevant) as follows:

(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.

Section 27 – Victimisation

48. Section 27 of the EqA provides:

(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.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

49. We were not referred to and legal authorities by either party, and did not find it necessary to consider any case law in our determination of the claim.

Submissions

50. Mr Malu Malu produced written submissions. In them, he stated he had been carefully listened to by the Tribunal. He outlined his personal history as an immigrant and the difficulties he has faced, explaining that this led to a reluctance to make accusations of race discrimination. He criticised the way the respondent had conducted the case.

51. The Judge explained to Mr Malu Malu that the case turned on whether the Tribunal believed him or Mr Powney as to whether the alleged acts of discrimination had taken place. The Judge encouraged Mr Malu Malu to put forward any points as to why he should be believed and/or as to why Mr Powney should not be believed. Mr Malu Malu said that he was content to leave the matter for the Tribunal to decide.

52. Mr Gilroy also produced written submissions and expanded on this in oral argument. His theme was that the claimant's evidence could not be believed. He pointed to the extent of the conspiracy that it would be necessary for the Tribunal to find in order to support a finding that the accusations against Mr Malu Malu in relation to the shirts had been made up. Related to this, he noted that Mr Malu Malu's case was not simply that Mr Powney was lying about his own conduct, but that Mr Neale was lying about conduct he was supposed to have witnessed (and about the 1:2:1 visit) and that Mr Edwards and Ms Cihlar were lying about what happened in the grievance meeting. He reminded the Tribunal that these latter witnesses were independent, being former Cordant employees who had never been employed by Matalan. He made a number of further points about Mr Malu Malu's credibility, both in general and in relation to specific allegations. He acknowledged, as we have stated above, that if the claimant's evidence was believed, findings of discrimination would necessarily follow.

Discussion and conclusions

53. This is a case which turns on credibility. We were asked to determine five matters which were said to have taken place as set out at points (a)-(e) in the List of Issues. All five are claimed to be acts of direct race discrimination or alternatively harassment on grounds of race. The final three are said to be acts of victimisation, it being asserted that the claimant had done a protected act by raising a grievance on 8 January 2020.

54. Three of the matters complained of, matters (b), (c) and (d), are instances of overt racial harassment said to have been perpetrated by Mr Powney towards Mr Malu Malu. Mr Malu Malu says these things happened, Mr Powney says they did not happen. There is no middle ground.

55. Allegation (a) relates to Mr Powney persistently contacting Mr Malu Malu by phone. The facts there are more nuanced than in allegations (b)-(d). There was some contact by phone, it is recorded in the documents, but the purpose of it and the tone are disputed.

56. Allegation (e) relates to an email sent on 2 February to Mr Malu Malu's employer, Cordant Security, falsely alleging that he had stolen or was preparing to steal goods from the store. There were actually several emails sent on that day, in particular one from Mr Powney using the store account outlining suspicious activity that is described as being "more like that of a potential thief than a security guard",

and one from Dawn Williams asking that Mr Malu Malu be removed from the Matalan contract.

57. In contrast to allegations (b)-(d) there is nothing overtly racist in allegations (a) and (d). Of course, if we find that Mr Malu Malu was subjected to a detriment, and that he was thereby treated less favourably than a comparator of a different race would have been treated in the same circumstances, his claim of direct discrimination in respect of those allegations would succeed.

58. The abuse detailed in allegations (b)-(d) comprised of Mr Powney, on various dates, making “baaaa” noises and mimicking Mr Malu Malu’s accent, and on one occasion calling Mr Malu Malu a “man of the jungle”. It is the unanimous conclusion of the Tribunal that that did not happen. The predominant reason for this conclusion, sadly, is that we are satisfied that Mr Malu Malu has lied in his evidence on several other matters. In contrast, we could find no reason to doubt Mr Powney’s evidence, which appeared to stand up well to cross examination by Mr Malu Malu and to questioning from the Tribunal. Weighing up the accounts of the two principal witnesses we prefer the account of Mr Powney and find that those events did not happen.

59. For the purposes of this Judgment, the Tribunal has identified three particularly clear and important examples of where it could not be satisfied with Mr Malu Malu’s evidence. However, as may be inferred from our findings of fact, there were a number of other areas in which Mr Malu Malu’s evidence was, at the very least, inconsistent or difficult to accept. The examples are:

59.1 Our finding, for the reasons set out above, that the document at 171 was created retrospectively for the purposes of this litigation and that Mr Malu Malu then gave numerous conflicting and frankly nonsensical accounts around the creation of that document.

59.2 The second example leads on from the first. It is the conflicting accounts given by Mr Malu Malu as to whether he raised the matters set out in that document during the grievance hearing with Mr Edwards and Ms Cihlar or whether he was prevented from doing so by Mr Edwards’ domineering manner. At least one of those contradictory accounts must be false, and we are satisfied that they all are, and we accept the evidence of Mr Edwards and Ms Cihlar as to the conduct of that meeting.

59.3 The third example is Mr Malu Malu’s claim that a 1:2:1 meeting with Mr Neale had not taken place despite Mr Neale’s verbal and documented evidence of that meeting. We consider it fanciful that Mr Neill, who is a relatively peripheral figure in this case, had fabricated documents, including forging a signature, on this minor point.

60. Overall, Mr Malu Malu’s evidence was littered with other examples of contradictory statements and assertions which strain credibility. We take full account of the fact that coming to the Tribunal as a litigant in person is a very difficult thing and that it is all the more so for someone like Mr Malu Malu, who is an immigrant

and, so far as we can see, appears to have had no help or support from others in bringing his case. We also take account of the fact that perceptions may legitimately vary, and that memory may not always be reliable. When the Tribunal rejects someone's evidence, that does not automatically equate with a finding that they have lied about that evidence.

61. Unfortunately, however, we are forced to reach the conclusion that Mr Malu Malu has lied about these things. We are satisfied that in constructing his written evidence and his answers under cross examination his primary consideration was whether what he was saying would help his case, rather than whether it was truthful.

62. In contrast, there was nothing which emerged from the evidence of the respondent's witnesses which gave us cause to doubt their credibility. We found each of them gave evidence in a straightforward and consistent way. We were particularly persuaded by Mr Powney's evidence of the good relationship he had had with Mr Malu Malu and the way in which the two of them had "had each other's backs" in a difficult store environment. It is notable that at least to some extent this was actually backed up by Mr Malu Malu, even in circumstances where he was making these very serious allegations.

63. In relation to allegations (b)-(d) we fully accept Mr Powney's account that these simply did not happen. We are led to conclude that Mr Malu Malu has chosen to make these false claims in formal legal proceedings, including in his evidence on oath.

64. In relation to allegation (a), it is a matter of documentary record that there were phone calls and text messages between Mr Powney and Mr Malu Malu. We reject Mr Malu Malu's suggestion that Mr Powney communicated with him in a way which was anything other than respectful and appropriate in the circumstances of this case. Mr Malu Malu was not subjected to any detriment and he was not treated unfavourably due to his race. Mr Powney's actions in making calls and sending messages did not meet the definition of harassment as set out in s.26.

65. Turning then to allegation (d), we accept that the events of 31 January and 1 February genuinely and legitimately caused the respondent's Bolton store managers to doubt Mr Malu Malu's integrity and suitability to continue in his role. It is not necessary for us to go further than that and to draw any conclusions as to what Mr Malu Malu was actually doing and whether, by his actions, he did or did not intend to facilitate theft from the store. It is enough to say that we can confidently reject the proposition that the allegation was "trumped up" or that he was being framed, whether as a result of his race, his grievance or anything else.

66. In any event, we are satisfied that this was not a false allegation as claimed. It was an accurate report of evidence gathered by the respondent and observations made of conduct which was strongly suggestive of dishonest conduct.

67. Sending an email of this nature and then requesting Mr Malu Malu's removal from the contract is certainly a detriment, but there is a clear and obvious explanation for that conduct which has absolutely nothing to do with Mr Malu Malu's race. The respondent had reasonable grounds for suspecting that he was involved in potential theft, and we are satisfied that that was the sole reason for the email sent to

Cordant. We are satisfied that any security guard whose conduct was doubted in the same circumstances would also have been reported to Cordant in the same way, regardless of their race, colour or nationality.

68. For those reasons the claimant's claims of direct discrimination and harassment fail.

69. Turning briefly to the victimisation claim, we find that the grievance sent on 8 January was not a protected act as Mr Malu Malu did not do anything in that grievance by reference to the Equality Act 2010. In layman's terms, the grievance did not include any complaint of race discrimination.

70. For completeness, we also find that he did not make a complaint of race discrimination at the grievance hearing on 29 January, and that Mr Powney at no point believed that he had made such a complaint or anticipated that he was going to do so.

71. Finally, regarding the detriments that are alleged to have resulted from the protected act, we have found either that they did not happen, or that (in the case of the email sent to Cordant) that the fact that Mr Malu Malu had raised a grievance played no part whatsoever in the decision to report him to Cordant.

72. The victimisation claim therefore also fails.

73. For those reasons, we dismissed Mr Malu Malu's claim in its entirety.

74. The panel recorded in its oral decision, and repeats in these written reasons, the following comments for the benefit of the respondent's witnesses: we are aware that the litigation process can be difficult for respondent witnesses as well as for claimants. An allegation of race discrimination is a serious matter and the respondent's witnesses, rightly, gave every impression of being anxious and concerned about the allegations that had been made against them. This particularly applied to Mr Powney, who was the subject of the main allegations in the case. We consider that during their dealings with Mr Malu Malu and in the evidence they gave Mr Powney and the other witnesses conducted themselves in a way which was professional and to their credit. They end this case with no stain on their characters or reputations.

Costs Order

75. Following the pronouncement of the Tribunal's oral decision, the respondent made an application for costs.

76. The application was made under Rules 76(1)(a)(b) of the Employment Tribunal Rules of Procedure 2013. The basis of it was that by bringing a claim which relied on matters which the Tribunal had found Mr Malu Malu to have lied about, and by giving evidence which the Tribunal had found to be untruthful, Mr Malu Malu conducted proceedings in an abusive and unreasonable manner. The respondent sought to recover the sum of £16,000.00, which were told represented Mr Gilroy's fees for the hearings, including the preparation of written submissions. It did not seek to recover its in-house legal costs in conducting the litigation.

77. We gave both parties an opportunity to make submissions on the application, and also questioned Mr Malu Malu as to his means to meet any costs order. Mr Gilroy did not seek to challenge any of the answers Mr Malu Malu gave as to his limited means.

78. We were satisfied that Mr Malu Malu acted unreasonably in bringing these proceedings and in how he conducted them. Any other conclusion would be incompatible with the judgment that we have already reached; we will not rehearse the matters set out above.

79. That finding opens the possibility of a costs order within the rules. In such circumstances, the Tribunal “may” make an order, it is not required to do so. However, we are satisfied, as a matter of principle that it is appropriate to do so in this case. The claimant’s claim, based on falsehoods, has caused trouble and expense to the respondent and, no doubt, anxiety to the witnesses.

80. We then turned our attention to the amount of the award. The respondent’s request for £16,000 is relatively modest in the context of the overall costs that they will have incurred. This has been a four-day hearing which has taken several months of preparation, including extensive correspondence. However, we also recognise that to award that full sum would represent an enormous burden on Mr Malu Malu, and on his dependent family.

81. As to Mr Malu Malu’s means, we record that he is working full-time earning somewhere over £9 per hour, so he does have some income. We note that he is supporting a family and he has the usual expenses that come along with that, added to that the fact that his wife is unable to work due to visa requirements, and that he is also paying off a level of debt as he has explained to us.

82. Taking all those matters into account we need to reach a figure that sends a signal that bringing a case such as this and conducting it in the manner it has been conducted is a very serious matter, whilst balancing that against Mr Malu Malu’s ability to pay. We decided that it was appropriate to require Mr Malu Malu to pay 10% of the amount the respondent has sought, and so we made a costs order in the amount of £1,600.

Employment Judge Dunlop

Date: 2 February 2022

JUDGMENT AND REASONS SENT TO THE PARTIES ON

11 February 2022

FOR THE TRIBUNAL OFFICE

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