THE EMPLOYMENT TRIBUNALS

Claimant: Mr V Udoye

First Respondent: Lead Employer Trust (Northumbria Healthcare NHS Foundation Trust)
Second Respondent: Ms L Richards

REASONS OF THE EMPLOYMENT TRIBUNAL

Held at: Newcastle upon Tyne Hearing Centre by video
On: 10th, 11th, 12th November 2021

Before: Employment Judge Aspden

Members: Ms S Mee
Ms D Winship

Appearances

For the Claimant: Mr Echendu
For the Respondent: Ms Souter, Counsel

JUDGMENT having been sent to the parties 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

The claims

1. The claimant brings complaints under section 120 of the Equality Act 2010 alleging that the first and second respondents subjected him to direct race discrimination, race-related harassment and victimisation. The claims arise out of an application for

employment with the first respondent made by the claimant in 2019. The second respondent was, at all material times, an employee of the first respondent.

2. Specifically, the claimant makes the following complaints:

Complaint 1

2.1. The claimant alleges that, in a meeting on 2 August 2019, Ms Wymer, an employee of the first respondent, subjected the claimant to unwarranted, intrusive and extensive questions. The claimant contends this was race-related harassment within section 26 or direct race discrimination within section 13 of the Equality Act 2010.

2.2. Additionally, the claimant alleges that the second respondent directed Ms Wymer to ask those questions and that, by so doing, the second respondent (and, by extension, the first respondent, which is liable for the actions of the second respondent) subjected the claimant to race-related harassment within section 26 or direct race discrimination within section 13 of the Equality Act 2010.

2.3. The respondents accept that the claimant was asked extensive questions at a meeting on 2 August but do not accept the questions were unwarranted or intrusive. They deny the second respondent directed Ms Wymer to ask the questions. They do not accept the questioning was detrimental or unwanted conduct and deny it had anything to do with race.

Complaint 2

2.4. On 5 August 2019, the second and/or first respondent sent the claimant an email asking him for further information. The claimant contends this was victimisation within section 27 of the Equality Act 2010, being detrimental treatment because he had brought Employment Tribunal proceedings under the Equality Act 2010 against Health Education England and NHS England (Cheshire & Merseyside).

2.5. The respondents accept that Ms Wymer sent the claimant an email asking the claimant for further information on 5 August. They do not accept the email was a detriment. They do not admit the claimant brought proceedings under the Equality Act 2010 against Health Education England and NHS England (Cheshire & Merseyside) and, in any event, deny they had any knowledge of those proceedings at the relevant time. Accordingly, they deny Ms Wymer sent the email because of any proceedings the claimant may have brought previously.

Complaint 3

2.6. On 6 August 2019, the claimant's offer of employment was withdrawn. The claimant contends this was direct race discrimination within section 13 and/or victimisation within section 27 of the Equality Act 2010 (being detrimental treatment because of the Tribunal proceedings referred to above).

2.7. The respondents accept that the second respondent withdrew an offer of employment. They deny this had anything to do with race or any employment proceedings the claimant may have brought previously.

Complaint 4

2.8. On 8 October 2019, the second respondent referred the claimant to the GMC. The claimant contends this was race-related harassment within section 26 or direct race discrimination within section 13 and/or victimisation within section 27 of the Equality Act 2010 (being detrimental treatment because of the Tribunal proceedings referred to above).

2.9. The respondents accept that the second respondent referred the claimant to the GMC. They deny this had anything to do with race or any employment proceedings the claimant may have brought previously.

Evidence and facts

3. We heard evidence from the claimant.

4. From the respondent we heard evidence from Ms Richards who was employed by the respondent as Head of HR. We also heard evidence from Ms Sams who was employed by the respondent as Deputy Head of HR. In that role she reports to Ms Richards.

5. We also took account of the documents that we were referred to in the bundle of documents.

6. We make the following findings of fact.

7. The first respondent which, we refer to as the LET, is commissioned by Health Education England in the North East and North Cumbria to employ all speciality and training doctors in the region for the duration of their training. The LET operates in the same building as Health Education England North East.

8. The claimant graduated from Nnamdi Azikiwe University -Nigeria in 1999 where he was awarded with MBBS. He registered with the Nigerian Medical Council and started his medical practice with Nnamdi Azikiwe Teaching Hospital Nnewi where he worked as a House Officer and thereafter as a General Practitioner in several hospitals. The claimant left Nigeria in 2005 and came to the UK. The claimant worked in various hospitals in the UK from 2005, including for several years as a senior house officer.

9. The claimant wished to practice as a GP and so in 2019 he applied to join the GP training programme. His application was made through, and considered by, Health Education England North East. As part of the application process the claimant completed an application form with details of his past experience and employment history as well as the names of referees. He also had an interview.

10. In his application form the claimant completed a declaration in which he said he'd completed the application fairly and honestly but he understood it would be checked in accordance with GMC good medical practice and that if it was subsequently discovered that any statement was false, misleading or that he'd withheld relevant information his application may be disqualified or his employment terminated and that

that may result in a referral to the GMC. The declaration also acknowledged that having been allocated a training opportunity, any subsequent contract of employment will be subject to satisfactory pre-employment checks and subject to the information provided on his application form and any related documents being correct. It is clear that pre-employment checks would be carried out to review and confirm details of the claimant's application.

11. The claimant's application was successful and by e-mail 25th April 2019 he was offered a training programme to begin on 7th August 2019. The e-mail stated that the offer was conditional upon 'the receipt and verification of all the applicant documentation required as listed in your invitation to interview e-mail.' It also stated 'This letter does not constitute an offer of employment. Your new employer will offer you a contract of employment for the duration of the placement. Any offers are made conditional on any necessary pre-employment checks being carried out successfully. Once pre-employment checks have been completed successfully the employer will confirm new starter details with you.'

12. The claimant accepted the offer of training and was sent an e-mail acknowledging that fact. That e-mail said, again 'This offer is subject to pre-employment checks by your employing organisation.' It said the employing organisation would be supplied with the documents collected from the claimant since interview. It also said that, where necessary, the employing organisation 'may also request additional documentation from you.' It went on to say 'You will be contacted in due course by your employing organisation to inform you of these requirements.' It also said the start date would be confirmed by the employing organisation.

13. On 7th May the claimant was sent another e-mail telling him his details would be passed to the LET who would be his employer throughout the programme. The email said 'The next few months will require a lot of information from you with completion of various forms.' It also said 'Your details will be passed to our lead employer trust. They will employ you throughout the programme. They will be in contact shortly to request a meeting with you whereupon they will also ask you to complete various forms and provide information.'

14. The LET has a pre-employment checks policy which details the checks it carries out when employing a trainee doctor and the purpose of those checks. It begins with an introduction that says:

    'Thorough pre-employment checks are essential to ensure patient safety and also patient confidence in staff that provide services to them. They are also essential to ensure that the Lead Employer Trust complies with Department of Health legislation and the NHS care record service requirements.'

15. It goes on to set out the purpose of the checks and the purpose of the policy. The policy, it says, 'ensures that there is a system in place to complete appropriate pre-employment checks for applicants to the Lead Employer Trust'. It goes on to explain the aims and objectives.

16. The policy document also sets out accountabilities and responsibilities. It says the Head of HR has corporate accountability for the effective operation of the policy and

HR is responsible for ensuring pre-employment checks are completed for all applicants. It says that Human Resources staff involved in the recruitment process must ensure they understand the full requirements of all employment checks standards.

17. The policy goes on to say:

    'LET human resource officers are responsible for ensuring no member of staff, including non-paid staff, start work until satisfactory pre-employment checks have been completed.'

18. The LET carries out pre-employment checks for all doctors in training and is required to do so for the reasons explained in its policy. Its policy incorporates the NHS employer's employment checks standards into practice. The checks cover six key areas: identity checks, right to work, professional registration and qualification, employment history and references, criminal records and work health assessments.

19. In relation to employment history and reference checks, the policy says:

    'This standard outlines the mandatory requirements for seeking references to verify an individual's employment and training history. The LET will obtain appropriate references for all prospective employees covering a minimum period of three years continuous employment and/or educational training and the human resources officer must verify references as satisfactory before an individual is allowed to commence employment.'

20. The policy also has a section covering false declarations and says:

    'The LET considers a false declaration made by a prospective employee during the recruitment process to be misconduct. Misconduct will normally be addressed by a withdrawal of offer.'

21. The policy also refers to referrals to another relevant body, including the GMC, in respect of false declarations.

22. The LET also has a pre-employment checks procedure document which goes into some detail as to practically how it will apply its policy on employment checks, including who is responsible for doing what at various stages. In a section marked 'Background' it says:

    'Within the lead employer trust we are required to conduct pre-employment checks on all specialty trainees in line with six NHS employment checks standards.'

23. The document describes identity checks as 'the most fundamental of all employment checks'. It says that identity checks include checking a person's personal history, including education and qualifications, addresses, electoral register information and employment history. It provides for documents to be collected and checked initially by a human resources assistant (HRA) and for certain matters to be escalated to a human resources officer and in some cases the deputy head of HR. It is clear from paragraph 16 of that procedure that it is not the role of an HR assistant to say whether or not pre-employment checks have been conducted to the satisfaction of the LET.

24. Those various documents demonstrate, and we find, that employee checks are taken extremely seriously by the LET and the second respondent for the reasons stated in those documents.

25. Ms Jefferson was an HR assistant in the LET and in May 2019 she wrote to the claimant. In her correspondence she said to the claimant 'Before you can commence employment you must complete satisfactory pre-employment checks and I would like to remind you that your appointment is subject to satisfactory completion of these checks. Employment checks will include verification of references etc.' She said she would progress the pre-employment checks. She went on to set out the documentation that the claimant needed to provide to the LET including a declaration A form.

26. The declaration form A asks applicants to provide details of matters such as criminal convictions, charges and police cautions and investigations and any dismissal from a previous office. The form contains a space for the individuals to provide further information.

27. The claimant provided the LET with some of the requested documentation and completed model form A declaration which was received by the trust on or around 15th May. In his form A declaration the claimant provided details of a fitness to practice investigation by the GMC.

28. There was a subsequent exchange of e-mails between Ms Jefferson and the claimant as the claimant had not at first provided all of the information requested and also one of his referees had not responded to a request for a reference.

29. One of the claimant's referees was Doctor Ferris. He provided a reference dated 20th May. The reference was on a standard form provided by the LET for this purpose as it sought specific information. In the reference Doctor Ferris said the claimant's start date was unknown. He said he believed the claimant had been interviewed by the police within the last few months over an incident at home. He referred to a referral to the GMC regarding an issue with a GP training programme eligibility and in response to a question about timekeeping he said the claimant 'can be late on occasions.'

30. In accordance with the LET's procedure Ms Jefferson referred the various documents on to Ms Wymer who was a senior HR officer. On 28th May Ms Wymer sent to the claimant an e-mail regarding the GMC investigation relating to his fitness to practice and the police investigation referred to in the reference from Doctor Ferris. On 31st May the claimant replied by e-mail and provided further information in regard to the ongoing GMC investigation in the incidents involving the police.

31. Ms Wymer checked the GMC register and saw that the case was due to be heard at the Medical Practitioners Tribunal Service from 24th June to 2nd July. Ms Wymer told Ms Sams about the matter and in accordance with procedure Ms Sams asked her to refer the form to her which she did.

32. Ms Sams and Ms Wymer discussed the matter and decided to allow the matters being heard at the Medical Practitioners Tribunal to be concluded before making a decision

on successful completion of pre-employment clearances in the employment of the claimant.

33. On 14th June Ms Wymer wrote to the claimant telling him that they would await the outcome of the Medical Practitioners Tribunal. At that time, they thought they would have a decision from the MPTS by July 2019. However the hearing was not completed and the claimant wrote to Ms Wymer on 5th July explaining that the hearing was to continue in January 2020.

34. Ms Sams knew then that they would not have a decision before 7th August which was the proposed start date for the claimant. She decided that the pre-employment checks should be completed in the meantime.

35. On reviewing the claimant's application and references Ms Wymer had noticed some apparent discrepancies: the claimant had given dates of employment at different places which overlapped; Doctor Ferris had not confirmed the claimant's start date in his reference; and the claimant had stated that he had been engaged as a specialty trainee but the LET records showed the claimant was not employed by them (as he would have been if he had been a specialty trainee).

36. Ms Wymer and Ms Sams discussed this. Following that discussion Ms Sams decided to ask the claimant to come in for a meeting to talk about these things. They wanted to speak to him before the 7th August which was to be his start date. They were very busy at the time because they were dealing with the recruitment of a very large number of doctors so they slotted the meeting into the diary for Monday 5th August. Ms Sams was not due to be at work that day and it was decided that Ms Richards, rather than she, would attend the meeting. Ms Wymer was due to attend as she familiar with the documentation.

37. On 1st August Ms Wymer wrote to the claimant asking him to attend the meeting. The e-mail was headed 'Meeting to discuss pre-employment documentation'. It said 'as part of the lead employer trust pre-employment screening we require to meet you in person to discuss your documentation' and set out when the meeting was going to be.

38. The claimant paid an unscheduled visit to the LET offices on 2nd August and asked that the meeting that was planned for 5th August take place that day instead because he was in the area and was not available on 5th August. The 2nd August was a Friday and Ms Richards does not work that day. Ms Wymer rang Ms Richards on her mobile 'phone to say the claimant was there and that he wanted to go ahead with the meeting. She asked Ms Richards what to do and Ms Richards suggested that the meeting go ahead that day and Ms Sams attend in her place. The meeting therefore took place with the claimant, Ms Sams and Ms Wymer. Ms Richards did not, as alleged by the claimant, direct either Ms Wymer or Ms Sams as to the questions they should ask nor provide them with any kind of script to follow.

39. At the meeting Mr Udoye was asked a number of questions relating to his previous work experience outlined on his application. He gave answers. Notes were taken and subsequently typed up. In cross examination the claimant said initially that he did not agree the notes were an accurate record of the questions. However, he was unable to say in what respect they were inaccurate when he was asked. When he was taken

through the questions and answers he either agreed that they did reflect what had been discussed or said that he could not remember what was said.

40. The main conflict of evidence in relation to what was said at this meeting was in relation to the claimant's evidence in his statement that in the meeting he was told he was lying, that he repeatedly asked them to stop, that he asked them repeatedly what relevance the questions were and that he asked them if they were asking the questions because of employment tribunal proceedings he had brought against the HEE. We heard evidence from Ms Sams who was present at that meeting. She accepted that the claimant had said it was a stressful and difficult time for him at the end of the meeting and that is recoded in the note but she does not accept that he made the other comments we have just referred to or made any reference at all to any tribunal proceedings.

41. Looking at the evidence in the round, we prefer the evidence of Ms Sams as to what was said at that meeting. We say that for the following reasons:

    41.1. The near contemporaneous notes of the meeting do not support the claimant's accounts. We acknowledge that the note could in theory have been self-serving, with those who prepared it omitting things they thought might be unhelpful. However, at least some of the points allegedly omitted would not be obviously harmful to the respondent if they had been included; for example, the claimant saying he wanted the meeting to end.
    41.2. When asked on cross examination which parts he did not agree with the claimant could not say which parts of that note he considered were inaccurate. The claimant himself acknowledged when being cross examined that there were a number of things he could not recall about the meeting.
    41.3. We were directed to a document subsequently written by Mr Echendu at a time when one would have expected him to be aware of the claimant's account of what happened in that meeting. In that document Mr Echendu said the respondent was 'probably' already aware of the employment tribunal proceedings. If the claimant had referred to employment tribunal proceedings in this meeting, that would be a surprising choice of phrasing.

42. We find the note of that meeting produced by the first respondent is an accurate reflection of what was said. We find that the claimant did not make any mention of the employment tribunal proceedings in the meeting. There was no evidence he mentioned them at any other time either to Ms Richards, Ms Wymer or any of their colleagues. We find that he did not.

43. As to whether such employment tribunal proceedings existed, the respondents' submission is that there is no evidence of that. We do not agree with Ms Souter on that. There is evidence that those proceedings existed. It is in the form of the claimant's own witness evidence which was not really challenged by Ms Souter. Although she did put it to the claimant that he had not provided any details of the claims he said he had made, she did not put it to him that his evidence was false. We find it more likely than not that the claimant had brought employment tribunal proceedings against the HEE and others as alleged. As for whether the claims were under the Equality Act 2010 we accept that the claimant's witness statement does not actually say that but in paragraph 72 of his witness statement he asks for his statement

to be read alongside details of his claim. It is implicit in his grounds of claim that he saying the employment tribunal proceedings included claims of race discrimination. That was not challenged. We find as a fact that the claimant had brought proceedings as alleged under the Equality Act.

44. It has been suggested in these proceedings that the respondents will have known about the existing tribunal proceedings because the LET shared a building with Health Education England. I think it is fanciful to suggest that by virtue of that connection Ms Richards or anyone else at the LET are likely to have known about the proceedings. We find that they did not. Neither Ms Richards nor anyone else employed by the LET knew about the claimant's proceedings.

45. Going back to the meeting, we find that the questions put to the claimant were as explained by the respondents' witnesses in their evidence.

46. Mr Echendu suggested that the claimant was ambushed in this meeting. We find he was not. He was told that the meeting was to discuss his documentation.

47. At the end of the meeting, Ms Sams told the claimant that the note of the meeting would be reviewed by Ms Richards upon her return to work on the following Monday and that a letter would be issued early the following week.

48. Ms Richards did review that note when she returned to the office. She was concerned then that there was a pattern of dishonesty. She was concerned in particular about the following:

    48.1. The claimant had said in his application he had been employed as a specialty trainee when he had not.
    48.2. The claimant had confirmed in the meeting he had been employed by ID Medical, a locum agency, rather than West Cumberland Hospitals as stated on the application form. That was new information that had not been included in the application.
    48.3. There were inaccuracies in the dates of employment provided on the application form.

49. It is apparent that Ms Richards was of the opinion that the disparities were deliberate rather than accidental and likely to have come about through dishonesty rather than an innocent mistake. In forming that opinion she was influenced by the fact that the MPTS was investigating alleged acts of dishonesty and also by her belief that there was potential for financial gain on the part of the claimant by stating that he had held a specialty trainee post in the past.

50. Ms Richards decided at that point to ask the claimant to get some confirmation from ID Medical of the dates the claimant had worked at the various posts and in what capacity. ID Medical is the locum agency that the claimant had said in his meeting he had been employed by. Ms Richards asked Ms Wymer to make further contact with the claimant about that.

51. Ms Wymer spoke with the claimant on the phone. In that phone call the claimant said he thought the respondent was harassing him and that he was not willing to provide

any further information and would not allow the LET to confirm any details with the locum agency.

52. On 5th August Ms Wymer contacted the claimant by e-mail. She said 'Further to our meeting on Friday I would be grateful if could provide a report from your current employer ID Medical of the shifts including dates and levels of work carried out between November 2014 and August 2019.'

53. The claimant e-mailed Ms Wymer that day acknowledging receipt of the e-mail. He said:

    'I am sorry to tell you I am not prepared to provide such a report and I do not see any length to the issue of the meeting I had with you and your colleague on Friday. I must put you on notice that I see the contents of your e-mail as harassing and must stop. In the light of your e-mail I am no more interested to further any discussion with regarding the training or any offer. Please note that any further e-mail of such a nature will be forwarded to my lawyer.'

54. Ms Richards then decided to withdraw the offer of employment. She confirmed that decision in the letter to the claimant dated 6th August, saying 'Based on the information I have I am withdrawing the offer of employment from the lead employer trust and I believe that your application is misleading and does not reflect a true accurate record of your career history.' In that letter Ms Richardson set out what she said were her reasons for reaching that conclusion, referring to: the fact the claimant had said in his application he'd been employed as a specialty trainee when he had not; the fact that he had confirmed in the meeting that he had been employed by ID Medical, a locum agency, rather than West Cumberland Hospitals as stated on the application form; the fact that the claimant had declined to provide further information from ID Medical; and inaccuracies in the dates of employment provided in the application form.

55. Around this time Ms Richards spoke with a GMC employee liaison officer who is assigned to the LET's region to discuss queries or concerns in relation to any potential doctors in training. Amongst other matters discussed during that conversation, Ms Richards summarised the position in respect of the claimant and asked what she needed to do next as far as the GMC was concerned. The person she spoke to advised her that a referral to the GMC was appropriate. She, therefore, contacted the GMC by letter and notified them of the withdrawal of the claimant's offer of employment. She explained the grounds on which that was done.

56. The GMC subsequently asked for further information, which the LET provided.

57. The GMC investigated and concluded that, although the claimant had provided some inconsistent and inaccurate information, the evidence did not suggest that the claimant had acted dishonestly. The GMC closed the case without further action.

Legal framework

58. It is unlawful for an employer to harass an employee or an applicant for employment: Equality Act 2010 section 40.

59. It is unlawful for an employer to discriminate against or victimise an applicant for employment in the arrangements the employer makes for deciding to whom to offer employment; as to the terms on which the employer offers employment; or by not offering someone employment. It is unlawful for an employer to discriminate against or victimise an employee by dismissing him or her or by subjecting him or her to any other detriment: section 39(1)-(4) of the Equality Act 2010.

60. Conduct which amounts to harassment, as defined in section 26 of the Equality Act, does not constitute a detriment for the purposes of section 39: Equality Act 2010 s212(1). Subject to that provision, for the purposes of section 39, a detriment exists if a reasonable worker (in the position of the Claimant) would or might take the view that the treatment accorded to him or her had, in all the circumstances, been to his or her detriment: Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337. As May LJ put it in De Souza v Automobile Association [1986] ICR 514, 522G, the tribunal must find that, by reason of the act or acts complained of, a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work.

Harassment

61. Under section 26 of the Equality Act 2010, unlawful harassment occurs where the following conditions are satisfied:
    (a) an employer engages in unwanted conduct related to a protected characteristic, which includes race (ie someone's colour, nationality or ethnic or national origins;
    (b) the conduct has the purpose or effect of violating the employee's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the employee.

62. In deciding whether conduct has the effect of violating the employee's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the employee, each of the following must be taken into account—
    (a) the perception of the employee;
    (b) the other circumstances of the case; and
    (c) whether it is reasonable for the conduct to have that effect.

63. Where a Claimant contends that the employer's conduct has had the effect of creating the proscribed environment, they must actually have felt or perceived that their dignity was violated or an intimidating, hostile, degrading, humiliating or offensive environment was created for them: Richmond Pharmacology v Dhaliwal [2009] ICR 724, EAT. A claim of harassment will not be made out if it is not reasonable for the conduct to have the effect of violating the employee's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the employee: Ahmed v Cardinal Hume Academies (29 March 2019, unreported).

Direct discrimination

64. Section 13 of the Equality Act 2010 provides that it is direct discrimination to treat an employee less favourably because of a protected characteristic than it treats or would treat others. Relevant protected characteristics include race.

65. In determining whether there is direct discrimination it is necessary to compare like with like. This is provided for by section 23 of the Act, which says that in a comparison for the purposes of section 13 there must be no material difference between the circumstances relating to each case.

Victimisation

66. Section 27 of the Equality Act 2010 provides as follows:

> 27(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..…'

Burden of proof

67. The burden of proof in relation to allegations of discrimination, harassment and victimisation is dealt with in section 136 of the 2010 Act, which sets out a two-stage process.

68. Firstly, the Tribunal must consider whether there are facts from which the Tribunal could conclude, in the absence of any other explanation, that the respondent has committed an unlawful act of discrimination against the claimant. If the Tribunal could not reach such a conclusion on the facts as found, the claim must fail. This means that the claimant has the burden of proving, on the balance of probabilities, those matters which he or she wishes the tribunal to find as facts from which the inference could properly be drawn (in the absence of any other explanation) that an unlawful act was committed.

69. Where the Tribunal could conclude that the respondent has committed an unlawful act of discrimination against the claimant, it is then for the respondent to prove that it did not commit or, as the case may be, is not to be treated as having committed, that act.

70. The Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142, [2005] IRLR 258 made the following points in relation to the application of the burden of proof:
    70.1. 'It is important to bear in mind in deciding whether the claimant has proved facts from which the Tribunal could conclude that there has been discrimination that it is unusual to find direct evidence of … discrimination: few employers would be prepared to admit such discrimination, even to themselves and in some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in.'
    70.2. In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.
    70.3. It is important to note the word 'could' in the legislation. At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.
    70.4. In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no explanation for those facts.
    70.5. Where the claimant has proved facts from which the Tribunal could conclude that the respondent has treated the claimant less favourably because of a protected characteristic, it is then for the respondent to prove that it did not commit that act or, as the case may be, is not to be treated as having committed that act. To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of the protected characteristic.

71. This approach was endorsed by the Supreme Court in Royal Mail Group Ltd v Efobi [2021] WLR 3863 [2021] UKSC 33. The Supreme Court also endorsed the following passage from the Court of Appeal's judgment in Madarassy v Nomura International plc [2007] EWCA Civ 33; [2007] ICR 867:

    '[The Act] does not expressly or impliedly prevent the tribunal at the first stage from hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the complainant's evidence of discrimination. The respondent may adduce evidence at the first stage to show that the acts which are alleged to be discriminatory never happened; or that, if they did, they were not less favourable treatment of the complainant; or that the comparators chosen by the complainant or the situations with which comparisons are made are not truly like the complainant or the situation of the complainant; or that, even if there has been less favourable treatment of the complainant, it was not on the ground of her sex or pregnancy.'

72. In Efobi, the Supreme Court made it clear, however, that 'the last of the possibilities mentioned in this passage must refer to facts which indicate that, even if there has been less favourable treatment of the complainant, this was not on the ground of [the relevant protected characteristic]. It should not be read as diluting the rule that evidence of the reason for any such less favourable treatment cannot be taken into account at the first stage.'

73. As Mummery LJ stated in Madarassy at para 56: 'The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that … the respondent had committed an unlawful act of discrimination.'

<u>Conclusions</u>

Victimisation

74. We have found that, before the events complained about in these proceedings, the claimant had brought proceedings under the Equality Act 2010 against others. That was a protected act for the purposes of s27 of the Equality Act.

75. However, we found that neither Ms Richards nor Ms Wymeer knew that the claimant had done that protected act. It follows that the reason why Ms Richards and Ms Wymer treated the claimant as they did cannot have been because of that protected act.

76. That being the case all the claims of victimisation must fail ie complaint 2 (about the 5th August email by Ms Wymer), complaint 3 (about withdrawal of the offer by Ms Richards) and complaint 4 (referral to GMC by Ms Richards), insofar as those complaints are complaints of victimisation.

Direct race discrimination and race-related harassment

Complaint 1

77. The first limb of the first complaint is that on 2nd August Ms Wymer subjected the claimant to unwarranted, intrusive and extensive questions. The claimant alleges that, by doing so, the respondent subjected him to direct race discrimination and/or race-related harassment. The second limb of this complaint is that the second respondent directed Ms Wymer to ask these unwarranted, intrusive and extensive questions and that direction was direct race discrimination and/or race-related harassment.

78. We have found that Ms Richards did not, as alleged, direct Ms Wymer as to the questions she should ask.

79. The initial burden of proof is on the claimant. It is for the claimant to prove facts from which we could decide, in the absence of any other explanation, that the respondent subjected him to discrimination and/or harassment as alleged.

80. The documentation sent to the claimant, and the LET's written policies and procedures, stress the need for and importance of pre-employment checks in all cases, including checking and verifying the individual's employment history.

81. We have accepted that there were discrepancies and gaps in the in the information received by the respondent about the claimant's employment history.

82. In support of this complaint, Mr Echendu submitted that, in asking questions of the claimant at the meeting on 2 August, the respondent went beyond what was required or lawful. In this regard, Mr Echendu referred to the fact that Ms Jefferson had

checked the documents he supplied and directed us to paragraph 4 of the procedure which says that 'if documentation is verified from the national recruitment lead or local HR office there is no need for the trainee to attend the LET office.' However, that provision must be read in the context in which it appears. The prior sentence says 'If ID, right to work documentation, professional registration, qualifications, proof of English language skills and any other proof of entry requirements were not presented at the assessment centre, an appointment for the trainee to attend the office must be made to verify documentation. If documentation is verified from the national recruitment lead or a local HR office there is no need for the trainee to attend the LET office.' In other words, the part of the procedure referred to by Mr Echendu is addressing the verification of documentation evidencing matters such as the individual's right to work. That does not mean that the policy did not require any other checks referred to throughout the policies once someone at the local HR office had seen the individual's documents evidencing matters such as the individual's right to work. As noted above, the policy refers not only to obtaining information and documents demonstrating a trainee's employment history but also verifying that information. Furthermore, it is clear from paragraph 16 of the procedure that it is not the role of an HR assistant to say whether or not pre-employment checks have been conducted to the satisfaction of the LET.

83. Mr Echendu also submitted that there was no need to do checks because the claimant had worked before in hospitals extensively. However, the LET's policies are clear and consistent. Regardless of whether the claimant thinks checks are needed for those who have worked in hospitals before, it is clear from the LET's documented policies and procedures that the LET's policy is to carry them out. The checks were not discretionary, they were required by the LET's existing policies and were done for the valid and important reasons set out in the policies.

84. It was also submitted that the respondents should have simply been satisfied with information contained in references alone or should have gone back to referees instead of asking for the claimant to come in for a meeting. We reject that submission. It was perfectly appropriate to ask the claimant to clarify, in the first instance, apparent discrepancies in the information provided. In any event, the referees are not the claimant's employer. We accept that, when carrying out such checks, it is important to get information first-hand from the employer.

85. That being the case, we are satisfied that the respondent acted in accordance with its policies when carrying out the checks, including by asking the claimant the questions that were asked at the meeting on 2 August.

86. The claimant said that some colleagues had told him that they had not been subjected to the same process as the claimant. We were not told, however, who those colleagues were and, importantly, whether there were also discrepancies in the information provided in their applications or gaps in the information supplied by referees as was the case for the claimant. Section s24 of the Equality Act 2010 requires that, in a comparison for the purpose of section 13 of the Equality Act, there must be no material difference between the circumstances of the claimant and their comparator. An appropriate comparator in this case is someone whose application contained apparent discrepancies and whose referee had not been able to confirm dates of service. The claimant has not identified any individual in such comparable

circumstances whose was subjected to less extensive pre-employment checks in comparison with the claimant.

87. Nor, can we infer that a hypothetical comparator who was white or had a different nationality or different ethnic or national origins and who was in the same circumstances as the claimant would have been subjected to less extensive pre-employment checks given that the documentation sent to the claimant, and the LET's written policies and procedures, stress the need for and importance of pre-employment checks in all cases.

88. The claimant has failed to prove facts from which we could decide, in the absence of any other explanation, that the decision to ask further questions at the meeting on 2nd August, the way they were asked, and/or the extent or content of those questions were because of the claimant's race and a comparable employee who was white or of a different ethnic or national origin in equivalent circumstances would not have been required to answer such extensive questions.

89. Therefore, this complaint of direct race discrimination fails.

90. For the same reasons, the complaint of race-related harassment fails as the claimant has failed to prove facts from which we could decide that the decision to ask further questions at the meeting on 2nd August, the way they were asked, and/or the extent or content of those questions were related to race.

Complaint 3

91. It is not in dispute the claimant's offer of employment was withdrawn. The claimant contends this was direct race discrimination within section 13.

92. At this time Ms Richards was of the opinion that the claimant had probably acted dishonestly in completing the application. Mr Echendu submitted on behalf of the claimant that Ms Richards' view was based on a stereotype of black people lacking integrity and being dishonest. We do not accept there is evidence that that was the case. At the time Ms Richards formed her opinion, there had been discrepancies in the pre-employment information provided by the claimant. One of those potentially suggested that the claimant might have been trying to gain financially by providing inaccurate information. In addition, the claimant was facing the MPTS proceedings at the time in which dishonesty was alleged. These were facts which could have led any unbiased employer to suspect dishonesty and that had nothing to do with the claimant's race. We accept the GMC later found there was no case to answer on dishonesty but different individuals and bodies can, reasonably, reach different views of the same evidence. The fact that the GMC found no dishonesty does not lead us to infer that Ms Richards' view of the claimant could have been influenced by stereotypical attitudes towards black people.

93. In any event, making further enquiries to check the claimant's dates of employment and the identity of his employer was an appropriate response which was entirely in line with the respondent's policy to verify information about employment history. It was not appropriate simply to go back to referees as suggested by Mr Echendu,

because, as noted above, they are not the claimant's employer and in any event one said dates of employment were not known.

94. The respondent had tried to get further clarification via the claimant about his employment as a locum by the agency but the claimant had made it clear he was not prepared to co-operate further. We accept the respondent had reached an impasse. It is difficult to see what else the respondent could have done given that the claimant was telling them he was not prepared to communicate about this further.

95. The claimant has not proved facts from which we could decide that the decision to withdraw the offer was in any way related to the claimant's race or that the respondent would not have withdrawn an offer made to a white employee, or an employee with different ethnic or national origins or of a different nationality, who had refused to co-operate with the LET's attempts to conduct the pre-employment checks required by its policy.

96. Therefore, this complaint of direct race discrimination fails.

Complaint 4

97. On 8 October 2019, the second respondent referred the claimant to the GMC. The claimant contends this was race-related harassment within section 26 or direct race discrimination within section 13.

98. That, again, was Ms Richard's decision. She took advice from the GMC first. She was advised to make the referral by her contact at the GMC.

99. As before, there are no facts from which we could decide that the decision to refer the claimant to the GMC was in any way related to the claimant's race or that the respondent would not have referred a white employee (or an employee with different ethnic or national origins of a different nationality the claimant) to the GMC in equivalent circumstances ie if the GMC contact had advised that a referral should be made.

100. Therefore, this complaint of direct race discrimination and race-related harassment fails.

101. All claims of direct race discrimination and race-related harassment therefore fail.

102. That means all the claimant's claims have failed. None of the claims is made out.

EMPLOYMENT JUDGE ASPDEN

REASONS SIGNED BY EMPLOYMENT JUDGE ON 3 February 2022