EMPLOYMENT TRIBUNALS

Claimant: Mr A Jutrenzka

Respondent: Chinnocks Wharf Management Co Ltd

Heard at: East London Hearing Centre

On: 25, 26 and 27 January 2022
Reserved decision (in chambers) 7 March 2022

Before: Employment Judge Elgot

Members: Ms V Nikolaidou
Ms J Isherwood

Representation

Claimant: In person

Respondent: Mr G Lomas (Tribunal Advocate)

The Tribunal having reserved its decision now gives unanimous judgment as follows:-

JUDGMENT

It is the unanimous judgment of the Employment Tribunal that the claims of direct race discrimination, harassment and victimisation do not succeed and are DISMISSED.

REASONS

1. The Claimant makes a claim of race discrimination which was lodged at the Employment Tribunal on 16 July 2019. His wrongful dismissal claim (failure to pay notice pay) was withdrawn because payment has been made and that claim was dismissed on 11 November 2019. On that date the Claimant attended a case management preliminary hearing before Employment Judge Massarella. The Case

Management Summary and Orders sent to the parties on 18 January 2020 are at pages 25-30 of the agreed bundle.

2. EJ Massarella assisted the Claimant in identifying his three complaints which are of direct race discrimination under section 13 Equality Act 2010, harassment related to his protected characteristic of race under section 26 of the 2010 Act and victimisation as defined in section 27. The Claimant confirmed that he is British of Polish parentage and he relies upon his Polish national origin as his relevant protected characteristic.

3. At paragraph 4 on page 26 Employment Judge Massarella makes it clear that in his determination the broader identity ‘Eastern European’ could not be relied upon as the Claimant’s protected characteristic of race. This means, as we find below, that certain of his allegations of discriminatory treatment fail for that reason.

4. Mr Lomas, on behalf of the Respondent, helpfully sets out in his written closing submissions the statutory definition of all three claims and we agree with his statement of the relevant law. There is no need to reiterate that analysis in these Reasons save to say that we are satisfied that at several intervals during the course of this three-day hearing the Employment Judge explained to the un-represented Claimant which elements of the statutory definitions he should study and remind himself of. He was also guided in relation to the crucial components of the statutory test for direct discrimination, harassment and victimisation and advised that he should ask questions about these matters during the cross examination of the Respondent’s witnesses. We are satisfied that the Claimant had the benefit of similar guidance from Employment Judge Massarella when the List of Issues at pages 26-27 was formulated and agreed.

5. It was, for example, explained on several occasions in these proceedings that the Claimant must in relation to his direct discrimination claim show the Tribunal evidence that he was treated unfairly *because of* his protected characteristic of race (Polish national origin). We discussed with him the need to satisfy his burden of proof i.e. that he must show primary facts in both the written and oral evidence from which we could decide (without any other explanation from the Respondent) that he had been discriminated against. The relevant section of the 2010 Act is section 136 and again we accept and adopt the analysis of this test in Mr Lomas’s submissions. We explained to the Claimant that he must establish facts which meet the basic legal tests applicable to each of the three types of discrimination he complains about under the 2010 Act.

6. It would not be unfair to say that the Claimant was sometimes resistant to accepting these explanations and was determined to vociferously pursue his own wider concerns. Hence, we have set out below a list of the matters which he persistently wished to pursue but which are not relevant to his claims and are not in the List of Issues.

7. The Respondent is a small private non-commercial limited company incorporated with the sole purpose of the property management of the residential flats at Chinnocks Wharf, Limehouse. At the relevant time there were four Directors of the company-Mr John Sharp, Ms Roanna Doe and Ms Lesley Miller each gave evidence on behalf of the Respondent. There is a fourth Director, Mr Steven Whyman who had little or no contact with the Claimant and he did not appear as a witness. It is accepted

by the Claimant that the directors with whom he had most regular contact were Mr Sharp and Ms Doe. The Respondent was the employer of the Claimant who was employed as the Building Manager at a salary of £35,000 per annum between 3 December 2018 until he was dismissed on 8 March 2019 (just over three months).

8. The Directors of the Respondent are all owners and occupiers from time to time of the flats at Chinnocks Wharf.

9. The Claimant was working in a building where each of the Directors had their home for at least part of the year. This made it particularly important that the parties had a safe, co-operative and courteous relationship working together to carry out the work for which the Claimant was appointed including oversight of some larger projects such as internal redecoration/tiling and roof repairs. The flats had not previously been managed by a designated Building Manager but had relied on a concierge plus the active participation of the Directors who whilst having considerable experience of managing the building were not experts and increasingly found themselves short of time, expertise and resources to do as much as they had been doing – hence the recruitment of the Claimant.

10. The Respondent had a managing agent for the property during the period that the Claimant was employed named Rendall and Rittner Ltd(R&R) which was ordered to undertake third party disclosure. That company is not a party to these proceedings but we are satisfied that R&R acted as the Respondent's agent; its office was then at Portsoken House EC3. We heard from three R&R staff- Mr Sam Acton, Assistant Property Manager, Mr David Whittle, Senior Property Manager and Team Leader and Ms Catherine Orezzi, Human Resources (HR)Director. Mr Acton and Mr Whittle were, as the employer's agents, the Claimant's line managers and were authorised to give him instructions. The letter of appointment at page 39 confirms this arrangement. R&R staff handled all HR and employee relations matters which affected the Claimant's employment. The Claimant confirmed that he had regular direct contact with Messrs Acton and Whittle. We are satisfied that he had not met or spoken to Ms Orezzi until 7 March 2019.

11. The Claimant gave evidence on his own behalf and the other two witnesses (there were eight in total) for the Respondent were Ms Beata Kieskiewicz who is a cleaner at Chinnocks Wharf and cleans for Mr Sharp, and Mr Richard Boother (who gave evidence via CVP). He is a chartered surveyor who was appointed by the Respondent to manage the upgrade of security and TV installations at Chinnocks Wharf and he attended a meeting on 17 January 2019 at which both the Claimant and Mr Sharp attended. Ms Kieskiewicz was assisted to give her evidence by an interpreter in Polish.

12. In accordance with the usual practice of the Tribunal we read only those documents in the 250 page agreed bundle to which our attention was drawn by the parties, the representatives and the witnesses.

13. <u>List of Issues</u>

13.1 The parties, with the assistance of EJ Massarella, drew up an agreed List of Issues on 11 November 2019 which is at pages 26-27 of the bundle. It sets out comprehensively in sub-paragraphs 9.1 to 9.9 the acts of less

favourable treatment (direct discrimination) or alternatively unwanted conduct (harassment) which the Claimant alleges. At points 10.1 to 10.4 it describes the ‘protected acts’ upon which the Claimant relies. A protected act under section 27 of the 2010 Act is when an employee makes a claim or complaint of discrimination under the Equality Act and/or helps someone else to make a claim (not relevant in this case) and/or makes an allegation that the employer or someone else has breached the 2010 Act and/or does something else ‘in connection’ with the Equality Act. We are certain that this was explained to the Claimant. Sub-paragraphs 11.1–11.4 list the detriments to which the Claimant says he has been subjected because he did one or more of the protected acts.

13.2 The List of Issues is a list of the questions the tribunal at the full hearing will have to decide and it defines the matters (relevant to the claims) about which the parties disagree so that they and the tribunal know what they are arguing about. Once the List of Issues has been agreed between the parties the Tribunal will treat it as the basis of the claims and response and not vary it by unilaterally extending or narrowing the issues unless there is an application to do so or it is in the interests of justice.

13.3 In fact, the Claimant *was* permitted to extend the List of Issues and add sub-paragraphs 9.10-9.11. together with sub-paragraphs 10.5-10.6 and an additional detriment at 11.5. The reasons for permitting these ‘Additional Complaints’ set out on page 36 of the bundle are explained by an Employment Judge in a letter dated 13 December 2019 at page 33 of the bundle. The extra questions for the Tribunal are therefore set out at page 36 of the bundle which we have read together with pages 26-27 as forming a comprehensive and final List of Issues.

13.4 We are satisfied that the ‘grievance’ referred to on page 36 is the grievance raised orally by the Claimant to Ms Orezzi on 7 March 2019 against David Whittle and then set out in writing in the Claimant’s email dated 8 March 2019 at pages 206-208.

13.5 We are certain that it is appropriate, fair and in the interests of justice to work through the content and chronology of the extended List of Issues as a structure to assist us in determining the issues in this case. We cannot agree with the Claimant that he had a reasonable expectation that he would be permitted to ‘fill in’ extra complaints and issues during the course of the Hearing. He was directed by us that he could not follow this course of action. He made no application to amend his Claim.

13.6 There was a second preliminary hearing on 28 July 2020 when the parties were able to discuss the progress of the case with an Employment Judge. The Claimant did not apply to amend or expand the List of Issues on that occasion.

14. <u>The Contract of Employment</u>

14.1 The Claimant was employed for a little over three months. He understands that he thus does not qualify for the right not to be unfairly

dismissed which requires a two-year period of qualifying employment. He is angry and distressed about his dismissal. The List of Issues includes his dismissal as alleged less favourable treatment, unwanted conduct amounting to harassment and as a detriment.

14.2 The Claimant was dismissed during his six month probation period. The signed Contract of Employment is at pages 41-58 of the bundle. The probation period is explained at page 43 and makes it clear that '*during and/or at the end of your probationary period you may be asked to attend employment reviews to discuss your overall work performance. Absence, timekeeping and general attitude may also be taken into account'* 9 Our emphasis) This clause is relevant to the Claimant's contention that he was forced to attend '*bogus*' or *'contrived'* performance reviews or indeed that he was asked to attend any performance review at all – see 9.8 and 11.3 in the List of Issues. We find that there is a clear contractual right for the Respondent as his employer to ask him to attend and participate in such meetings.

15. Issues not determined by the Tribunal

As stated above, there were a number of matters which the Claimant sought to pursue at the hearing, particularly in his cross-examination of the Respondent's witnesses, which were not wholly relevant to the claims and issues in this case and they are as follows:-

15.1 He had a poor working and personal relationship with Mr Sharp almost from the outset of his employment. The Claimant expresses repeatedly in the most vituperative language his conviction that Mr Sharp is an unprofessional and incompetent director and employer, a bully, an unscrupulous liar, a '*nasty person and a serial bully'* and an entirely unpleasant personality for a number of reasons. His written submissions are almost entirely focussed on his dislike of Mr Sharp and his resentment of the alleged 'bullying' he says he has endured. His summary at paragraph 25 is '*John Sharp may or may not be inherently racist and prejudiced against East Europeans. However he did have malicious intentions towards me especially after I formally complained against him'.* It is of course not the question of general malice but the alleged racism and racial prejudice which we must explore in these tribunal proceedings because those are the pleaded claims.

15.2 The Claimant was reminded by us several times that the relevant legal test requires him to show facts from which we could conclude that Mr Sharp, acting for the Respondent, directly discriminated against him because of his Polish origin and/or harassed him as defined by section 26 of the 2010 Act in a way related to his protected characteristic of race and/or victimised him by subjecting him to the detriments set out in the List of Issues because he did the protected acts set out in the List. Allegations of 'bullying' and 'malice' do not, in and of themselves, no matter how bitterly felt, amount to race discrimination.

15.3 The Claimant demonstrated a fixed view that the failure of the Respondent to properly deal with what he calls his two 'grievances' and in particular to issue a 'grievance outcome letter' following a meeting between himself, Mr Whittle, Mr Acton and Ms Miller on 4 February 2019 amounts to race discrimination. We find that no such outcome letter was sent to him following that meeting and indeed Mr Acton's email summary addressed to the other Directors at page 146A of the bundle describing what had occurred was not copied to the Claimant. However, it must be pointed out that this omission/ failure does not appear in the final and agreed List of Issues either as an alleged act of less favourable treatment or as unwanted conduct or as a detriment.

15.4 The Claimant raised two employee complaints. First, he wrote to R&R on 21 January 2019 cc to Ms Miller in an email which appears at pages 115-116 of the bundle stating his complaint about his treatment by Mr Sharp in a private meeting which had occurred between them on 18 January 2019 at which Mr Sharp by his own admission had lost his temper. We find that this earlier complaint by the Claimant although it complains at length about Mr Sharp's habits and personality makes no mention of any allegations of direct race discrimination, harassment related to race or of victimisation. Similar emails at pages 117 and 121 have no such content. Messrs Acton and Whittle tried to deal with the problem informally and met with the Claimant in the Yurt coffee shop on 25th January 2019 but that was an unsuccessful strategy. Paragraph 11 of Mr Whittle's witness statement says that '*the Claimant did not inform me of any incidents of racial discrimination/harassment by John during December 2018/January 2019 which he is now claiming'.* Accordingly, a more formal meeting was convened at which Ms Miller agreed to attend on 4 February 2019.

15.5 It was a two-part meeting in advance of which the Claimant made it clear to Messrs Whittle and Acton, as can be seen at page 145 of the bundle that he had no intention of apologising or 'backing down' at all. At the beginning of the meeting Mr Sharp took part and apologised for the way in which he had spoken to the Claimant but not the content of what he had said (page 143 is a contemporaneous note which records this position and the final paragraph summarises Mr Sharp's position); his apology was accepted and the Claimant gave him a conciliatory gift of a bottle of wine. The second part of the meeting was a performance review of the Claimant's work because by that date there were already concerns (for example see pages 82-83) about his work performance and 'general attitude' which the Respondent was contractually entitled to query and discuss (see paragraph 14.2 above). It resulted in the formulation of some 'points for Tony to work on' which are at page 146A. We have no doubt that those points were conveyed verbally to the Claimant.

15.6 The Claimant has no claim for unfair dismissal; even if there were errors in the Respondent's conduct of this first complaint and no 'grievance outcome letter' was sent we do not intend to determine the matter in this judgment and reasons because it is not alleged to be any form of race discrimination and we are unable to make findings of fact about matters

which are not in the List of Issues. This was pointed out to the Claimant and the relevant explanations were repeated.

15.7 The second complaint was made by the Claimant on the morning of 7 March 2019 when he attended without an appointment at the office of Ms Orezzi and spoke to her about his allegations of mis-treatment by Mr Whittle over the preceding two days. She asked him to put those complaints in writing. The Claimant asked (page 203) for extra time to draft his complaint by the next day. He sent her a carefully drafted email dated 8 March 2019 at 10:17 which is at pages 206-207 of the bundle; it makes no mention of any allegation of any type of race discrimination aby Mr Whittle specifically and/or the Respondent generally.

15.8 We are satisfied that the concerns which the Claimant raises in that email were discussed at the meeting already fixed to be held later that day at 4.15 pm between the Claimant, Mr Whittle and an R&R junior Human Resources Advisor Ms Shirleen Migwi who was not a decision maker. That is the meeting at which the Clamant was dismissed. It had originally been scheduled, at the insistence of the Respondent's Directors, to deal with their significant dissatisfaction with the Claimant's performance, attitude and capability. The Directors had expressed the wish immediately prior to the meeting (see for example pages 197-200 of the bundle in an email headed 'CWMC reasons for preferring dismissal at this stage') to see the Claimant dismissed during his probationary period. Mr Whittle wrote at page 197 '*the client directors are feeling increasingly uncomfortable with his continued presence in the building (their home) and insisting that we act quickly to remove him whether that be temporarily in the first place or permanently'.*

15.9 There <u>was</u> a written outcome of that part of the 8 March 2019 meeting which related to the Claimant's complaint about Mr Whittle. As part of his sometimes-intemperate abuse of the Respondent's witnesses the Claimant, who had met Ms Orezzi only once on the preceding morning of 7 March 2019, accuses her of being corrupt and dishonest on the basis that she deliberately had no intention of investigating his 8 March 2019 grievance and '*colluded*' with Mr Whittle to ensure that no investigation of it would take place. This is an inaccurate assessment of what happened.

15.10 The content of the Claimant's 8 March complaint was in fact discussed at the probation review meeting later that day and was not *'ignored'*. The dismissal letter records an outcome at page 217 '*the examples you gave [of David Whittle's actions] were not unreasonable expectations on the company or the client's part. I also note that the client complaint which you referred to [i.e. Claimant's first grievance of 21 January 2019] had been resolved informally with your agreement in January 2019 and therefore no further action was necessary*'. In other words, there is evidence that both of the Claimant's complaints were reviewed and discussed with Mr Whittle on 8 March 2019 and there is no evidence that he and Ms Orezzi colluded '*unlawfully'* to prevent any such investigation.

We found Mr Whittle to be a consistent, coherent and credible witness who expressed his desire on 8 March 2019, see paragraphs 23 and 25 of his witness statement, to act with integrity independent of his client (the Respondent) if necessary. He said that he approached the meeting with an 'open mind' about dismissing the Claimant and might have been willing to oppose his client's pre-determined wish to dismiss not least because of the cost of re- advertising the role and re-appointing another candidate. He did not oppose any investigation of the complaint against him and indeed he checked with HR that he was still considered to be an appropriate person to conduct the meeting. We find paragraph 26 of his witness statement to be accurate and true.

16. Finally, we made it clear to the Claimant that it is not relevant to any of the claims and issues in this case to consider the evidence which he repeatedly wished to raise about the relative competency and efficiency with which he acted as Building Manager at Chinnocks Wharf as compared to his predecessors or to the Directors themselves in dealing with various building issues. We occasionally had to curtail his attempted cross examination of witnesses on such questions as the best and most timely way to fix roof leaks. We similarly indicated that we will make no findings of fact about the success or otherwise of the Claimant's relationships with other residents living at Chinnocks Wharf or the opinion which they had or have about his performance in his role (see paragraph 41 of his witness statement). The Claimant is understandably anxious to vindicate his position in relation to these matters of performance and capability and his relationship with other residents but they are not matters relevant to his claims of race discrimination and we have no jurisdiction to decide whether he was unfairly dismissed.

17. Alleged acts of direct race discrimination, alternatively unwanted conduct amounting to harassment.

17.1 There are eleven such acts identified in the List of Issues at pages 26-27 and page 36 of the bundle which Mr Lomas's submission helpfully sets out in bullet points at his paragraph 2. The first seven allegations relate to Mr Sharp:-

17.2 **Allegations 1 and 2** are that Mr Sharp said to the Claimant '*I don't want East Europeans working on the roof, they can't be trusted'.* The Claimant refers to this '*deliberate discriminatory remark to me'* at paragraph 19 of his witness statement. Mr Sharp entirely denies making this statement and the relevant paragraphs of his witness statement are 30-33. He repeated his denial under cross-examination.

17.3 Mr Sharp is also said to have commented in the Claimant's presence that '*these Polish builders are everywhere'.* There is no mention of this comment in the Claimant's witness statement and he did not ask Mr Sharp any questions in cross-examination about these alleged remarks. Again, Mr Sharp is adamant that he said no such thing.

17.4 **Allegations 3, 4, 5 and 6** are that Mr Sharp gave a quite loud '*disapproving sigh'* when he heard the Claimant speaking to a delivery

man in Polish in one of the reception areas. Mr Sharp describes this allegation as '*completely fictitious'* in paragraph 35 of his witness statement and allegation 3 was not put to Mr Sharp in cross examination. The Claimant did not question Mr Sharp about it when he had the opportunity to do so during that part of the Hearing.

17.5 **In Allegation 4** which is also categorically denied by Mr Sharp the Claimant says that after he had identified a new part time cleaner for the common parts of the block Mr Sharp rejected his suggestion saying that he did not want a Romanian. In his oral evidence he said that he denies the allegation '*completely*' and points out that he himself employs a Polish cleaner privately in his own flat. Ms Kieskiewicz gave evidence that she has been treated only with kindness and respect by Mr Sharp since 2009 when she began working for him; he has assisted and supported her with personal and work problems and recommended her as a cleaner to others. This is background evidence which convinces us that it is more likely than not that Mr Sharp is unlikely to have rejected out of hand the employment of a Romanian, Eastern European or Polish person in circumstances which were offensive to the Claimant and which the Claimant would perceive as discrimination, harassment or victimisation.

17.6 **Allegation 5** Similarly, Mr Sharp also states that during the period between 19 – 22 February 2019 when five-yearly electrical checks were being done, (i.e. after the Claimant had lodged his first grievance on 21 January 2019 and discussed it at the meetings of 25th January and 4 February 2019) he most certainly did <u>not</u> remark to the Claimant, when lights were not functioning, *'it's not good enough, you lot are all the same'* which the Claimant took to be a reference to Polish workers and his Polish origins. The relevant paragraphs of Mr Sharp's sworn witness evidence are 38-39. The Claimant again did not ask Mr Sharp any questions about this incident when he had the opportunity to cross-examine him. Importantly, the Claimant did not lodge any further written grievance or complaint about this allegedly racist remark in the period after 22 February 2019. There is no reference to it in any of his correspondence with the Directors of the Respondent or with any employee of R&R. It is not referred to in the 8 March 2019 grievance.

17.7 **Allegation 6** is that several times during the course of January and February 2019 Mr Sharp referred to the Claimant as '*Mr Whatever your name is'*. This is denied by Mr Sharp in his witness statement and the Claimant put no questions to him about this issue when cross-examining him despite being encouraged by us to focus on asking questions about the specific incidents listed at paragraphs 9.1 -9.11. Under cross-examination himself the Claimant agreed that Mr Sharp mostly called him 'Tony' but that when Mr Sharp apparently could not pronounce his Polish surname correctly he referred to him as *'Mr Whatever your name is*'. The Claimant conceded that he never complained about this alleged less favourable treatment/unwanted conduct even verbally to Mr Acton or anyone else at the time. We prefer the evidence of Mr Sharp and conclude that this phrase describing the Claimant was not used.

18. In such circumstances of a complete factual dispute where there is no third-party witness to tell us what actually happened between the parties the Tribunal must look not only at the comparative credibility of the evidence given by the two conflicting witnesses but also at the surrounding circumstances and background facts including the available contemporaneous correspondence and other documentation. We are satisfied both that Mr Sharp did not say these words nor engage in this conduct and that there is no evidence of less favourable treatment or unwanted conduct amounting to harassment because of, or related to, the Claimant's protected characteristic of race deriving from his Polish national origins.

18.1 First, the Claimant does not identify as Romanian and Employment Judge Massarella has decided that East or Eastern European cannot be relied upon as a national origin because it encompasses multiple ethnicities. Allegations 1 and 4, even if such words were said, cannot therefore be discriminatory acts connected with the Claimant's protected characteristic of race deriving from his Polish national origin.

18.2 Secondly, we find that Mr Sharp, Mr Whittle and Ms Orezzi did not know with certainty that the Claimant had Polish national origins. The Claimant was unable to give a clear answer under cross examination as to whether the three R&R managers knew he was of specifically Polish origin. We find that this is not obvious from his surname which could have its origin in a number of different nationalities and ethnicities; indeed the Claimant himself often abbreviates his name to 'Tony Zenka'. Mr Whittle and Ms Orezzi said they did not identify Mr Jutrzenka as having a Polish name or any Polish accent or speech pattern but commented on his Mancunian accent and identified him as having been brought up in the North of England. It is not possible to engage in less favourable treatment or alternatively impose unwanted conduct because of or related to a protected characteristic of race which the alleged discriminators do not know about.

18.3 Importantly, we examined the contemporaneous documents and correspondence in this case i.e. what was written at the time of the alleged unlawful discrimination. We have described above the two formal written complaints raised by Mr Jutrzenka on 21 January and 8 March 2019 which are at pages 115-116 and 206-7.

18.4 Ms Orezzi is clear that in her initial short conversation with the Claimant on the morning of 7 March 2019 when he arrived to meet her without an appointment he did not complain of race discrimination and/or harassment related to race or victimisation. We accept her evidence as genuine and credible. We are satisfied that the 8 March 2019 grievance which the Claimant was given additional time, at his own request, to complete so that he might ensure that he gave a full account, does not contain any such allegations or concerns.

18.5 An employee who feels the injury caused by discrimination will usually commit his complaints to writing at the time of the less favourable or

detrimental treatment but the Claimant failed to act contemporaneously. His complaints of race discrimination and harassment come later notably when he lodges his ET1 Claim and this makes his evidence less credible when compared with the conflicting accounts of the Respondent's witnesses.

18.6 The Claimant is certain that he raised several concerns verbally with his line manager, Mr Acton, telling him that Mr Sharp was acting towards him in an unacceptable and provocative way including insults and unwanted conduct connected to his Polish origins and/or Eastern European connection. He says that Mr Acton's only response, which Mr Acton also denies, was to reply that Mr Sharp could be 'difficult to deal with' sometimes and that, in effect, the Claimant must learn to work with him co-operatively. We find that the Claimant's verbal complaints to Sam Acton were about what he perceived to be general bullying and unpleasant behaviour; he really disliked Mr Sharp. In his witness statement at paragraph 27 the Claimant only says that he complained of Mr Sharp's '*hostility'* and '*rude dismissive attitude'*; he does not refer to racist remarks or attitude. In his oral evidence the Claimant says that he told his line manager that Mr Sharp was '*moody*' '*brusque'* and '*difficult',* and wrote excessively long over-complicated and critical emails, would not leave him alone to get on with his job without controlling behaviour and interference.

18.7 Mr Acton is absolutely sure in his written and oral evidence that he was not verbally notified by the Claimant of any complaints of race discrimination or harassment by Mr Sharp or anyone else. We repeat again that the Claimant made no contemporaneous notes and wrote no emails or other correspondence to confirm these complaints in writing at the time. He did not refer to any such matters at the informal meeting which he had at the Yurt café with Messrs Whittle and Acton on 25th January 2019 or at the first grievance/performance review meeting on 4 February 2019 when Mr Sharp was in attendance for the first part. The note at page 146A records no such issues being discussed.

18.8 We accept Mr Acton's evidence as being true and accurate and accept his assurances that if he had heard of such serious and deeply held grievances about racist behaviour from the Claimant he would have acted promptly at the time to investigate and resolve any such matters and indeed would have escalated the matter to his boss, Mr Whittle which he did not.

18.9 The Claimant states for the first time at paragraph 32 of his <u>submissions</u> that at the meeting of 8 March 2019 he '*stated very clearly to David Whittle and the HR manager Shirleen Migwi that I had been complaining to Sam Acton for about 6 weeks regarding the continued harassment and racist slurs against me. I stated very clearly at this meeting that because I was of Polish heritage, John Sharp was making derrogatory (*sic*) comments about East European people in my presence to cause me*

offence and make me uncomfortable.' Mr Whittle is absolutely certain that none of these statements were in fact made to him on 8 March 2019.

18.10 There are regrettably no notes of the meeting now available. However, we prefer the coherent and credible evidence of Mr Whittle over that evidence now given late by the Claimant. The information given by the Claimant in his closing submission is new. He makes no such assertions in his sworn evidence contained in his witness statement at paragraph 40. We find that he did not make any such statements during the course of the 8 March meeting not least because, as we find above, he made no complaints at all to Mr Acton of race discrimination or harassment relating to his race or victimisation during the short course of his employment.

18.11 In fact, it is noteworthy that paragraph 40 of the Claimant's witness statement says very little at all about what occurred at the 8 March meeting. The Claimant did not in cross examination put it to Mr Whittle that the statements he refers to at paragraph 32 of his submissions were made. We reiterate that the 8 March 2019 email from the Claimant to Ms Orezzi which was discussed at what he calls the '*bogus and contrived probation meeting conducted by Whittle and Migwi'* did not contain any allegations of racist treatment of him by any member of the Respondent company or any employee of R&R.

19. **Allegation 7**

19.1 This allegation can be dealt with briefly. The Claimant says that at a private meeting he had with Mr Sharp on 18 January 2019 Mr Sharp said '*it's just you and me and these four walls'* and threatened him with the loss of his job. The Claimant describes this in his witness statement as '*menacing'* behaviour. First, we are unable to conclude that this phrase, which Mr Sharp admits using, is in any way connected to the Claimant's Polish national origins. The Claimant himself uses it in his own evidence only as an example of yet more general bullying and intimidation by Mr Sharp. Accordingly, the paragraph 9.7 allegation in the List of Issues cannot consist of less favourable treatment or unwanted conduct amounting to race discrimination or harassment.

19.2 In fact, we find that the private meeting was called by Mr Sharp as a result of his concerns about the Claimant's unacceptable behaviour at a meeting the day before on 17 January 2019 in the presence of third party contractors, Securafit. Mr Boother, the Respondent's third-party witness who chaired the meeting, gave evidence by video that he considered the Claimant's conduct to be volatile and inappropriate on that occasion '*very interfering and constantly interrupted…raised his voice with John Sharp…got so agitated'*. This misconduct by the Claimant was one of the factors causing the Respondent to have doubts and concerns about his performance which eventually led the Directors to seek his dismissal via R&R's auspices.

The evidence of Mr Boother is consistent with our observations of the Claimant's demeanour and speech during this Hearing.

19.3 Mr Sharp sought to have a private conversation with the Claimant the following day to try and understand what the problems were and how they might be resolved. We are satisfied that he stressed the confidentiality of this discussion at the beginning of the meeting, when he says he was calm and collected and before he lost his temper, by using the phraseology quoted in allegation 7 and that his words were not intended to intimidate or threaten the Claimant by reference to his protected characteristic of race. It is unnecessary for us to make any finding as to whether he also said '*if it happens again you are finished',* although he robustly denies any such non-racist threat.

19.4 Mr Sharp did provide a contemporaneous and detailed account of both the meetings on 17 and 18 January 2019 in his email of 27 January 2019 at pages 140-144 of the bundle. In part of that email he explains and apologises for his outburst at the end of the meeting when he felt he was making little progress in communicating his criticisms of some of the Claimant's work and attitude - '*I apologise for how I said what I said- however I am not willing to apologise for what I said'*(page 143). The existence of these written notes supports his oral evidence and the evidence given in his witness statement.

20. **Allegations 8,9,10 and 11**

20.1 These allegations (paragraphs 9.8 -9.11 in the List of Issues) all refer to the same chain of events and we have already made some findings of fact above which relate to this period of two days.

Our findings are as follows:-

20.2 The Respondent by early March 2019 was extremely perturbed and concerned about the Claimant's performance and conduct as Building Manager in the block of flats where the Directors of CWMC mostly resided. For example, there is an email on page 177 dated 5 March 2019 sent by Ms Doe to Messrs Whittle and Acton summarising Mr Whyman's views of the Claimant's unsuitability. Those concerns were communicated to Mr Whittle and are consolidated in an email sent to him by Ms Doe on 7 March 2019 at pages 197-200 of the bundle. It is clear from that email that the Directors' preference is for dismissal within the probation period. This was the reason for scheduling the meeting on the afternoon of 8 March 2019 at which Mr Whittle was to be the decision maker. It was not a perverse or oppressive reason given that, for example, the Claimant had, in the view of the Directors and R&R (and Mr Boother) acted inappropriately and aggressively in meetings on at least two occasions on 17 and 25 January 2019. There was no reason for arranging this meeting which had any link to the Claimant's Polish national origin. There is a contractual right for the Respondent to require the Claimant to attend

probation review meetings as we record in paragraph 14 above. Allegation 8 is not proven.

20.3 We are equally satisfied that the Claimant was dismissed on 8 March 2019 for reasons relating to his performance and capability and in relation to episodes of incompetent and intemperate conduct. The dismissal was not direct race discrimination or harassment.

In addition, the Claimant lost his temper and swore at the 8 March meeting itself; his angry threatening conduct was such that Mr Whittle arranged for a security person to attend outside the office. Mr Whittle's rational and focussed oral evidence, which we believe, was as follows;-

> '*I was aware of all the concerns and had calls and meetings with the Board. The meeting of 8 March was the final conclusion to the preceding three months… I had all the reasoning from the client and plenty of reasons to dismiss. I entirely deny that I dismissed him because of what he said about me [in the 8 March grievance], that would be ludicrous...at the meeting itself he demonstrated all the behaviours which the Board and Sam[Acton] had told me about'.*

Mr Whittle also re-iterated that at the 8 March meeting there was '*no suggestion from him or anybody that any behaviour towards him was based on racial origin…I was not aware he was of Polish origin…the first time we were aware that racism was involved was when we got the ET1…we did discuss bullying but racist behaviour by anyone was not mentioned.'*

Mr Lomas's submission at paragraph 31 reminds us that paragraph 40 of the Claimant's own witness statement dealing with the content of the 8 March meeting does not mention the Claimant's belief that he was dismissed because of, or related to, his Polish national origin.

20.4 **Allegation 10.** We find that the complaint raised by the Claimant at first orally with Ms Orezzi and then in writing at pages 206-207 makes no reference to less favourable treatment or unwanted conduct linked to race. The Claimant in his email headed 'Complaint against David Whittle' is aggrieved by two matters:-

i) He says that he was sent two emails by Mr Whittle 'out of hours' at 5.44 pm and 7:54 pm in the evening on 6 March 2019. These emails are at pages 194 and 193 of the bundle.

ii) He complains that Mr Whittle asked him not to attend work on Thursday 7 March and Friday 8 March 2019 but instead to take two days' paid leave in order to obtain legal advice.

The Claimant states at page 207 in his email to Ms Orezzi that this is '*completely inappropriate and deliberately wrong. And I wonder*

what his true motives were?' he goes on to allege that he has been the subject of a disciplinary suspension. We find this not to be the case in law.

The Claimant alleges '*David is effectively insisting I do not attend work…this is WRONG, deliberate, disrespectful to me, inappropriate and very unprofessional'.*

The email continues in the same tone and sets out a '*few questions that I would like answered by David and if you have time and in agreement (sic) I would like a further meeting with yourself Catherine to discuss'*. The Claimant does not ask for a formal investigation. He does not make reference to any alleged acts of discriminatory behaviour by Mr Whittle or anyone else.

20.5 We find allegation 10 to be unproven. Mr Whittle caused the Claimant some slight inconvenience and stress by sending late evening emails but this was not an act of less favourable treatment or unwanted conduct related to the protected characteristic of race and it was not victimisation. Mr Whittle simply wanted to give the Claimant information and instructions promptly. The Claimant was under no obligation to answer out of hours although he did do so, without complaint about the timing, not least because the chain of correspondence was begun as a result of his reaction to an email at page 201 sent during working hours at 12:42pm on 6 March and enclosing a requirement to attend a probation review meeting with Mr Whittle at Portsoken House on the afternoon of 8 March 2019.

20.6 The Claimant almost immediately replied (page 195) saying that he would not be attending and intended to seek legal advice. He concludes '*once I have received suitable legal advice |I will inform you and then this review meeting can be re-scheduled'*.

20.7 This was a refusal to comply with a reasonable management instruction to attend a probation review but nonetheless Mr Whittle suggested that the Claimant should take two days off work, paid in full, in order to consult lawyers. The Claimant refused to take up this opportunity and came to work anyway. Again, we reiterate that we find that he was not subjected to any kind of disciplinary suspension in these circumstances and his apprehension that this was the case is mis-informed.

20.8 We find that this offer of paid time off for the purposes of obtaining legal advice was not less favourable treatment or unwanted conduct amounting to harassment. Mr Whittle acted appropriately and sympathetically in offering the Claimant time to prepare for the probation review.

20.9 We also accept Mr Whittle's evidence that after discussion with R&R's HR and Legal personnel he was reassured that he was acting with due probity in conducting that review. Indeed, he told us that he believed that the two complaints against him were best discussed, explained and

hopefully resolved with the Claimant during the meeting of 8 March. This is not an unreasonable view and it is certainly not a discriminatory decision.

20.10 Under cross-examination the Claimant conceded that he did not think out of hours emails were sent to him because he was of Polish origin.

21. **Allegation 11**

We have made findings of fact above in paragraphs 15.9 and 15.10 which address our conclusion that this allegation at paragraph 9.11 of the List of Issues is unproven as an act of race discrimination. The Respondent did properly investigate the Claimant's complaints against Mr Whittle in proportion to the seriousness of the conduct alleged and there was no 'collusion' between Ms Orezzi, Mr Whittle and Ms Migwi to prevent an investigation. Ms Orezzi was not cross-examined at all by the Claimant in relation to this allegation.

Ms Orezzi gave the Claimant time to put his detailed complaint in writing after their meeting on 7 March 2019.The matters were discussed at the 8 March probation review meeting as recorded in the dismissal letter at pages 217-218 of the bundle which records, '*I note the concerns raised in your email of 8th March which we discussed briefly at your meeting. We did not consider the points you highlighted to be sufficient mitigation in response to our concerns'.*

Conclusion: In all the circumstances of this case and by reference to our findings of fact set out above we conclude unanimously that the claims of direct race discrimination and harassment do not succeed.

22. **Victimisation**

22.1 The definition of victimisation is set out in section 27 Equality Act 2010. Mr Lomas reproduces the wording of the statutory provision on pages 11-12 of his closing submission. We have already provided an explanation at paragraph 13.1 above. The detriments to which the Claimant says he was subjected, as listed at paragraphs 11.1 – 11.5 of the List of Issues, must occur because the Claimant has done a protected act as defined by section 27(2).

We find that there have been no such protected acts as alleged in paragraphs 10.1 to 10.6 of the List of Issues (pages 26-27 and page 36 of the bundle) and accordingly this claim fails.

22.2 We have reminded ourselves that a protected act must be either '*bringing proceedings under the Equality Act 2010'* or '*giving evidence or information in connection with proceedings under the Equality Act 2010'*. In relation to the alleged protected acts in this case all of the relevant events relied upon by the Claimant took place before any proceedings by anyone under the 2010 Act had commenced.

22.3 A protected act can also be '*doing any other thing for the purposes of or in connection with the Equality Act'* and/or '*making an allegation (whether or not express) that A [the Respondent or its agent in this case] has contravened the 2010 Act'.*

22.4 By reference to our findings as contained in these Reasons we have clearly determined that none of the protected acts relied upon by the Claimant consist of making allegations and/or doing any other thing by reference to the provisions of the Equality Act 2010.

22.5 We find that the Claimant did not make oral complaints to Mr Acton about alleged contraventions of the 2010 Act or do any other thing in respect of his working relationship with Mr Acton which was for the purposes of, or in connection with, the Equality Act 2010. (10.1. and 10.2)

22.6 We are satisfied that the grievances/complaints raised by the Claimant on 21 January 2019 and 8 March 2019 also did not contain any allegations of a contravention of the 2010 Act. The Claimant did nothing else in relation to these two complaints which was for the purposes of or was in connection with the Equality Act. (10.3 and 10.4)

22.7 Paragraphs 10.5 and 10.6 similarly identify no protected act as defined by section 27. The Claimant's oral complaint to Ms Orezzi and his email to her on 8 March 2019 together with a subject access request contain, as we have determined in our reasons above, no allegations of contravention of the 2010 Act and section 27(2)(c) is not engaged.

22.8 We agree with and adopt the submission of Mr Lomas at paragraphs 53-58 of his closing statement.

22.9 In the absence of the finding by us of any relevant protected act the complaint of victimisation does not succeed and is dismissed.

Employment Judge Elgot
Date: 31 March 2022