



# EMPLOYMENT TRIBUNALS

**Claimants:** Mr Chica Ukwouma

**Respondent:** Kent County Council

## REASONS

1. Full reasons were given at the conclusion of the hearing. The Claimant's claim was not upheld. These written reasons prepared following requests by both the Claimant and the Respondent.
2. The Claimant presented a claim to the Tribunal on 3 June 2020 alleging that the Respondent:
  - a) directly discriminated against him because of race;
  - b) directly discriminated against him because of age;
  - c) directly discriminated against him because of sex;
  - d) subjected him to harassment related to race;
  - e) subjected him to harassment related to age; and
  - f) subjected him to harassment related to sex. (the "Equality Act Claims").
2. The Respondent defended the claims on the basis that the discrimination alleged had not happened. The Claimant had originally brought a claim for constructive unfair dismissal; he withdrew this claim as he did not have the required period of two years continuous employment.
3. There have been several preliminary hearings, not all of which were effective. At the preliminary hearing before Employment Judge Mason on 26 February 2021, the Claimant was ordered to provide additional information of his claim and it was recorded in that order that:

*"I asked the Claimant about his breach of contract claim. He confirmed to me that he had been paid for his notice period (17 -24 January 2020). I could not identify a breach which would give rise to a stand-alone claim for breach of contract. However, he did not withdraw this claim and I have asked him to give particulars.*

*I explained to the Claimant that he also needs to provide full particulars of his discrimination claims so that the Respondent and the Tribunal properly understands his case. He agreed to do so by 19 March 2021. The Respondent will then have leave to submit an amended response by 9 April 2021."*

4. The orders specified (Paragraph 4):

*"Further particulars of claims*

*4.1 By reference only to matters already pleaded in his claim form, the Claimant will provide to the Respondent the following particulars of his discrimination claims by 19 March 2021:*

*4.2 Breach of Contract*

*Specify each breach of contract relied upon specifying in each case: what was said or done (or not said or done); the relevant dates(s); and the person(s) he says were responsible for the alleged breach;*

*4.3 Direct race discrimination claim (s13 Equality Act 2010 (EqA))*

5. *(i) Specify the detrimental action(s) relied upon and the less favourable treatment he says he was subjected to specifying in each case: what was said or done (or not said or done); the relevant dates(s); and the person(s) he says were responsible for the alleged treatment;*

*(ii) Explain why he believes that treatment was because of his race; and*

*(iii) Identify his comparator(s) (actual or hypothetical).*

*4.4 Direct age discrimination claim (s13 EqA)*

*4.5 (i) Specify the detrimental action(s) relied upon and the less favourable treatment he says he was subjected to specifying in each case: what was said or done (or not said or done); the relevant dates(s); and the person(s) he says were responsible for the alleged treatment;*

*(ii) Explain why he believes that treatment was because of his age; and*

*(iii) Identify his comparator(s) (actual or hypothetical).*

*4.6 Direct sex discrimination claim (s13 EqA)*

*(i) Specify the detrimental action(s) relied upon and the less favourable treatment he says he was subjected to specifying in each case: what was said or done (or not said or done); the relevant dates(s); and the person(s) he says were responsible for the alleged treatment;*

*(ii) Explain why he believes that treatment was because of his sex; and*

*(iii) Identify his comparator(s) (actual or hypothetical).*

*4.6 Harassment:*

*(i) Precise details of each and every act he relies upon that he states was an act of harassment related to his race; to include the date of the incident, what*

*happened in each incident; who was involved, what was said and/or done that the Claimant states amounted to harassment.*

*(ii) Precise details of each and every act he relies upon that he states was an act of harassment related to his age; to include the date of the incident, what happened in each incident; who was involved, what was said and/or done that the Claimant states amounted to harassment.*

*(iii) Precise details of each and every act he relies upon that he states was an act of harassment related to his sex; to include the date of the incident, what happened in each incident; who was involved, what was said and/or done that the Claimant states amounted to harassment”.*

6. The Claimant provided additional information on 27 March 2021 and 14 April 2021. This information did not give any further detail of his Equality Act claims. A draft list of issues was sent by the Respondent for him to comment on 21 April 2021 in accordance with the Tribunal’s orders, the Claimant had no comments but set out a few ‘concerns’ in an email dated 7 May 2021 to the Respondent. As the Claimant did not provide any further details of his claim and agreed the draft list of issues his claim proceeded on this basis. His claim is therefore based on what he put in his claim form and in the additional information he provided. The Claimant had every opportunity to add details about his Equality Act claims in additional information but chose not to do this.

### **The agreed issues**

7. The agreed issues are set out in the appendix to this judgment.

### **The relevant law:**

8. The relevant statute is the Equality Act 2010.

#### **Direct discrimination**

- a) Direct discrimination is dealt with in sections 13 and 23 of the Equality Act 2010.

- b) Section 13 provides that:

“A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.”

- c) Section 23 provides that:

“On a comparison of cases for the purposes of section 13...there must be no material difference between the circumstances relating to each case.”

- d) In considering the claim of direct discrimination, the first task of the Tribunal is to decide whether on the primary facts as proved by the Claimant, and any appropriate inferences which can be drawn, there

is sufficient evidence from which the Tribunal could (but not necessarily would) reasonably conclude that there had been unlawful discrimination. If the Claimant can prove such facts, then the burden of proof passes to the Respondent to show that what occurred to the Claimant was not to any extent because of the relevant protected characteristic as set out in the Equality Act 2010. In each case, the matter is to be determined on a balance of probabilities. The fact that a claimant has a protected characteristic and that there has been a difference in treatment by comparison with another person who does not have that characteristic will not necessarily be sufficient to establish unlawful discrimination. In all cases the task of the Tribunal is to ascertain the reasons for the treatment in question and whether it was because of the protected characteristic. The provisions of section 136 of course apply to any proceedings under the Act, and not only to claims of direct discrimination.

### Harassment

- e) Section 26 of the EqA provides:
- (1) A person (A) harasses another (B) if—
    - (a) A engages in unwanted conduct related to a relevant protected characteristic, and
    - (b) the conduct has the purpose or effect of—
      - (i) violating B's dignity, or
      - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.....
  - (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
    - (a) the perception of B;
    - (b) the other circumstances of the case;
    - (c) whether it is reasonable for the conduct to have that effect.
  - (5) The relevant protected characteristics are - . . . race sex and age”
9. A Tribunal should consider all the acts together in determining whether or not they might properly be regarded as harassment (**Driskel –v- Peninsular Business Services Ltd [2000] IRLR 151, EAT** and **Reed and Bull Information Systems Ltd –v- Stedman [1999] IRLR 299, EAT**).
10. The motive or intention on behalf of the alleged harasser is irrelevant (see

Driskel above).

11. The Court of Appeal confirmed in **Land Registry –v- Grant (Equality and Human Rights Commission intervening) [2011] ICR 1390** “*when assessing the effect of a remark, the context in which it is given is always highly material*”.
12. In **Richmond Pharmacology –v- Dhaliwal [2009] ICR 724** the EAT held that the Claimant must have felt or perceived his or her dignity to have been violated. The fact that a Claimant is slightly upset or mildly offended is not enough.
13. **Law Society v Bahl [2004] IRLR. 799** focused upon the importance of the tribunal giving proper consideration to, and proper reasons for a finding of, unconscious discrimination, namely where discrimination had been inferred in circumstances where non-discriminatory considerations could explain the adverse treatment complained of. It held that the starting point of all tribunals is that they must remember that they are concerned with rooting out certain forms of discriminatory treatment. If they forget that fundamental fact, then they are likely to slip into error.

#### **Burden of proof**

14. The burden of proof reversal provisions in the EqA are contained in section 136. Guidance is provided in the case of **Igen Ltd –v- Wong [2005] IRLR, CA**. In essence, the Claimant must, on a balance of probabilities, prove facts from which a Tribunal could conclude, in the absence of an explanation by the Respondent, that the Respondent has committed an act of unlawful discrimination. The Tribunal when considering this matter will raise proper inferences from its primary findings of fact. The Tribunal can take into account evidence from the Respondent on the primary findings of fact at this stage (see **Laing –v- Manchester City Council [2006] IRLR 748, EAT** and **Madarassy –v- Nomura International plc [2007] IRLR 246, CA**). If the Claimant does establish a prima facie case, then the burden of proof moves to the Respondent and the Respondent must prove on a balance of probabilities that the Claimant’s treatment was in ‘no sense whatsoever’ on racial grounds.
15. The term ‘no sense whatsoever’ is equated to ‘an influence that is more than trivial’ (see **Nagarajan –v- London Regional Transport [1999] IRLR 573, HL**; and **Igen Ltd –v- Wong**, as above).
16. Tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating on why the Claimant was treated as they were and postponing the less-favourable treatment issue until after they have decided why the treatment was afforded. Was it on the proscribed ground or was it for some other reason? (per Lord Nicholls in **Shamoon –v- Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285, HL**).
17. The Supreme Court in **Hewage –v- Grampian Health Board [2012]**

UKSC has confirmed:

*“The points made by the Court of Appeal about the effect of the statute in these two cases [Igen and Madarassy] could not be more clearly expressed, and I see no need for any further guidance. Furthermore, as Underhill J pointed out in Martin v Devonshires Solicitors [2011] ICR 352, para 39, it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.”*

### **Status of pleadings**

18. **Chandock v Tirkey UKEAT/0190/14/KN** - *“I do not think that the case should have been presented to him in this way or that it should have formed part of his determination. That is because such an approach too easily forgets why there is a formal claim, which must be set out in an ET1. The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a Respondent is required to respond. A Respondent is not required to answer a witness statement, nor a document, but the claims made – meaning, under the Rules of Procedure 2013, the claim as set out in the ET1”.*

### **The Tribunal’s findings**

19. The Tribunal has come to the following findings of fact on the balance of probabilities having heard the evidence and read the documentation it was taken to. These findings of fact are limited to those findings which relate to the issues and are necessary to explain the decision reached. Even if not specifically recorded below all evidence both oral and written was considered by the Tribunal.
20. The Tribunal has considered the factual issues arising from the agreed list of issues. The Tribunal’s starting point was the Claimant’s ET1 and his amended particulars of claim which are referred to above. These form the basis of the claim that we must consider. The list of issues as agreed reflects these documents. We are mindful of the decision in **Chandock v Tirkey**. As already set out, the Claimant had every opportunity to give additional information but chose not to do this despite the very comprehensive and clear orders made. Therefore, matters that were only put forward in the hearing could not be considered or taken into account.

### **The parties’ submissions**

21. The Tribunal heard submissions from both parties which were considered in reaching its conclusions. They are not reproduced here. The submissions were considered carefully by the Tribunal in coming to its conclusions.

## Introduction

22. This is an unusual case in that it is not a case where the Claimant is saying he performed well but was wrongly told his work was bad. Here, he accepts that he was underperforming. The Tribunal has made the following findings of fact and reached conclusions on the balance of probabilities. These reasons are confined to matters which are relevant to the list of issues and pleadings and necessary to explain the Tribunal's judgment.
23. The Claimant was employed by the Respondent as a newly qualified social worker on 2 September 2019. He had attended university for two years obtaining a master's degree in social work. During his degree he did 200 hours of placement work. The Claimant had applied for work in other local authorities and before going to the Respondent was employed by the London Borough of Barnet as a Personal Advisor which involved undertaking various assessments.
24. As a newly qualified social worker (NQSW) he was expected to be able to do casework which, for the first year was to be reduced. He was part of the ASYE programme which is a support program for NQSW's. This was designed to bridge the transition from university to practical work in a supervised manner. The programme provided Supervision, assessment, and support for the one year. He was working with children in care (CIC). He started the ASYE on 19 September 2019. The aim was to start with very few cases and build up to a full case load by the end of the one-year program. The Claimant started with five cases.
25. Inevitably the nature of the work the Claimant was doing was very sensitive in that he was dealing with children who may be at risk of physical or emotional injury. Therefore, the managers had to be confident about his ability to do the job at the required standard to ensure that the risk to the children and families he was dealing with was minimised.
26. The Claimant was appointed at the same time as another newly qualified social worker, *Miss Baker*. In the first two weeks he did not have active cases to work on (although he knew the five cases he had been allocated) and this time was spent learning the systems and reading into his cases.
27. The ASYE process was for supervision meeting every week for the first six weeks and thereafter every other week. There were formal assessments every three months. The assessments were to review the work and supervisions and look at what had been done against actions that had been agreed. The assessments were done by Ms Anna Laine, from ASYE, and the supervisions by his manager Ms Fairbrass. He also had a mentor, Ms Laphorn, who also attended some of the supervisions.
28. The Claimant would leave very early for appointments thus losing valuable time in the office. This was suggested to be one aspect that affected his work. He also was reprimanded for doing work in McDonalds MacDonaldis when waiting for appointments. This did not provide

adequate security or privacy when considering the type of work the Claimant did. He was also criticised for breaching professional boundaries in buying a present for a client.

29. The Claimant accepts he was not performing well. He knew he was struggling in some areas, was late in providing a Child and Family report and there were general issues about him not being able to ask challenging questions, and instead taking on face value what he was told by children and families. This was something that it was important he could do. He struggled with time management and keeping up with his workload generally.
30. These issues were regularly discussed in the various supervision meetings, and it was explored how the Claimant could be supported in progressing further. They had a standard template for the supervision meetings which always began with looking at his welfare and what support he needed. The Claimant invariably, said he felt well supported, his case load was manageable, and he did not feel overwhelmed.
31. At the first ASYE review on 23 October 2019, the Claimant was provided with an action plan, as it was already apparent that there were areas that the Claimant found difficult. The purpose to support and develop him as a social worker. For example, he was provided 1:1 sessions with Ms Lane, a practice educator with ASYE, sample assessments to review and 1:1 coaching and feedback sessions.
32. We do not intend to discuss each supervision meeting individually. We can see that various support measures were considered and offered such as shadowing a senior social worker (on a case the Claimant was allocated to) which he refused on the basis that he did not have time. He was invited to attend workshops. The Claimant accepts that he did not mention in any supervision session or assessment that he felt he was being treated unfairly or in a discriminatory manner, and particularly said he did not need support, he was managing his case load and often said he felt well supported.
33. The intention was for the NQSW's to have a very low case load to start with and to increase numbers as they became more experienced. By January 2020 the Claimant was still struggling with his 5 cases. Ms Baker by then had 11. Both the Claimant and Ms Baker had extra tasks over and above their allocated cases, such as being on the duty rota, and attending some supervised contact sessions.
34. At one point in January 2020 the Claimant said he could take on more cases whilst at the same time acknowledging he was struggling. He also at one time suggested cancelling supervision sessions to give him more time to catch up on his work. He also said he was too busy to attend the learning opportunities that the Respondent had provided for him as support.
35. The Claimant now says that he did not say that he needed support in supervisions as he was not coping and felt he had been treated badly. He described this in his statement and evidence as '*emotional torture*'. He



said he had been humiliated, intimidated, and embarrassed during his employment daily by being told he was not performing well. He said he felt he could not say anything negative in these supervision meetings as he was worried it may make things worse and potentially result in him losing his job. The Tribunal acknowledges that an employee who knows that they are not performing and struggling will inevitably be stressed. This was acknowledged by Mr Meggit in his email to Ms Fairbrass which is discussed below.

36. The Claimant resigned by letter dated 17 January 2020 with the effective of termination being 24 January 2020.
37. The Claimant has alleged that (paragraphs refer to the paragraph numbers in his particulars of claim):

*On unspecified dates Ms Fairbrass constantly put him down, telling him that she did not think that he would succeed in this programme because he was struggling with five cases. (Para 6).*

*On unspecified dates Ms Fairbrass openly and in the presence of all other colleagues spoke to him in a very disrespectful and condescending manner. (Para 6).*

- a) Ms Fairbrass accepts that she gave feedback about his performance, which the Claimant acknowledges was not good, and raised concerns from the first supervision session on 30 September onwards. She gave suggestions as to how he could seek support from his colleagues. Even this early stage in the Claimant's employment, the Claimant said that he did not need further support. The Claimant's performance was unsatisfactory and inevitably, especially in the environment in which the Claimant worked, this was discussed with him not only in supervision sessions but on a day-to-day basis as matters arose. Not to do so, could put children and families at risk.
- b) In his evidence the Claimant said that everyday Ms Fairbrass put him down and that this had an impact on his confidence and self esteem. He said that he was constantly told his work was not good and he was in danger of not passing the ASYE.
- c) There is evidence that in supervision sessions Ms Fairbank raised her concerns and discussed how to help the Claimant and give him support. There was no evidence that this happened everyday outside those supervision sessions although it is likely that there were discussions on a day-to-day basis about what the Claimant was doing and what he should be doing. The supervision carried on between the formal supervision meetings as one would expect.
- d) After each supervision meeting, the Claimant was given a copy of the supervision notes and given the opportunity to correct them or add to them. He never did this. He now says he did not do this because he was worried it would jeopardise his position.

- e) The Claimant's performance still did not improve and therefore other suggestions were put forward which are discussed below. By 4 December 2019 Ms Fairbrass expressed her concern in a supervision meeting that the Claimant was not managing his five cases and asked how he would manage when more cases were allocated to him. The Tribunal finds this to be fair comment given the poor performance the Claimant admits to and the low number of cases he was responsible for.
- f) The pleaded allegations are vague and unparticularised and it is therefore not possible to give further comment.

38. The Claimant has alleged that:

*On the afternoon of 5 December 2019 Ms Fairbrass spoke to him in a very disrespectful, embarrassing, and humiliating manner in the office floor as if she was looking for evidence to prove to his colleagues listening that he was incompetent and useless (Para 7).*

- a) This allegation sets out the date on which it is alleged to have occurred but no detail as to what was said which was disrespectful, embarrassing and humiliating. Ms Fairbrass gave unchallenged evidence that she was not at work that afternoon but on leave. The Tribunal accepts she was not there and dismisses this part of his claim.

39. The Claimant has alleged that:

*It was a few weeks before 5 December 2019, that Ms Fairbrass and Mr Meggitt told the Claimant that he was not good for her team. Ms Fairbrass suggested he consider a transfer to another team as she felt that her team was not suitable for him (Para 8).*

- a) The Tribunal believes this refers to a supervision meeting on 16 December which Mr Meggitt also attended. The supervision notes of this meeting show that it was then that the issue of whether the Claimant should move to another team was discussed. Mr Meggitt's statement said that he had previously suggested to Ms Fairbrass that the Claimant may want to move team and that this may help and support him. The Claimant says that this suggestion shows that he was not wanted.

40. The record of this meeting (which was not challenged) says *"Suggestion therefore put to Chika that he move to another team and another manager to have the experience of a different management style and approach and the best opportunity to be able to pass his ASYE year. Rationale for this is that a different style and approach may be one that is a better fit for him".* The Claimant did not want to move to another team. He raised a concern that Ms Fairbrass did not want him in her team and was reassured that this was not the case.

41. The Tribunal finds that this suggestion was not to get rid of the Claimant as he suggests but as a way of trying to support him given that

attempts so far had not yielded improvement in his performance.

42. The Claimant has alleged that:

*On two different occasions the Claimant asked his supervisor Ms Abigail Laphorn some questions relating to the Claimant's work, and she responded by telling him that she was not there to spoon-feed the Claimant (Para 9).*

- a) This is the only complaint about Ms Laphorn. Ms Laphorn said she had concerns that the Claimant was operating at more of a student level than a professional qualified social worker level and he needed to be able to reflect on his own work, increase his professional curiosity and she did not want him to be over reliant on her.
- b) Ms Laphorn denies using this exact expression but does say that it was possible she said something similar. The Tribunal finds this to be fair comment in the context in which it was made. Indeed, the Claimants representative conceded this was not his strongest point.

43. The Claimant has alleged that:

*During his employment he never received any words of encouragement, emotional support or show of appreciation in comparison with Ms Baker (Para 10).*

*Ms Fairbrass would always speak to Ms Baker with smiles only to turn and addressed him with frowned face. (Para 11).*

- a) The evidence shows that on 4 October 2019 Ms Fairbrass sent the Claimant an email which praised his work whilst at the same time pointing out some omissions and errors. It concluded '*well done for a better report*'. The Claimant criticises this as it does not say '*thank you*'. There was no other document the Tribunal was referred to where the Claimant was specifically praised. The Claimant compares himself to Ms Baker who he said was praised. However, we find that this is not a fair comparison as Ms Baker's work was good and she had increased her case load in accordance with expectations.
- b) The Tribunal notes that at every supervision meeting the Claimant was asked if he wanted more support and that he said that he did not and felt well supported.
- c) The Tribunal finds that these allegations are vague and unparticularised. It is akin to proving a negative. The Tribunal does not accept that there was no encouragement, indeed the support offered is itself encouragement. Although Mr Meggit does express concern that the Claimant is being judged too soon (email 14 November) by Ms Fairbrass, the Tribunal finds that Ms Fairbrass took this on board and continued to support the Claimant. As set out above, it is not surprising that there was a feeling of negativity

around the Claimant as he was not performing well.

44. The Claimant has alleged that:

*At some point Ms Fairbrass asked the Claimant if the Claimant had problems being managed by a woman to which the Claimant answered, no. (Para 11).*

*On another occasion, on the office floor, Ms Fairbrass asked him face-to-face if he felt intimidated by her. (Para 11).*

- a) These issues involve one person's word against another. There was no context given as to how the Claimant said these comments arose. On balance the Tribunal prefers the evidence of Ms Fairbrass. The Claimant told the Respondent he felt supported during his employment and we can not find a context in which this would have been said. There was no context provided in the evidence before us. Ms Fairbrass denies she said this. The Tribunal notes that the office was described as very open plan. Some meetings were in private rooms. If there was a conversation in the open plan office any general communication like have you done this, or asking a question about something, would be the potential to be overheard.

45. The Claimant has alleged that:

*Ms Fairbrass from time to time asked the Claimant where he studied, making the Claimant to look like someone who had not attended a university, even though she was knew where he had studied. (Para 11).*

- a) Ms Fairbrass denies asking this and she said would have known where the Claimant had studied as she saw his application form. However, even she had asked this question, it likely to be in the context of understanding how assessments were taught at his university to gain an understanding of his level of knowledge. It is hard to see how a comment of this sort could be construed as making it look like the Claimant had not gone to university.

46. The Claimant has alleged that:

*Sometime in early January 2020, Ms Fairbrass referred the Claimant to Occupational Health for an assessment relating to possible ASD. (Para 12).*

- a) This conversation took place in a supervision meeting on 7 January 2020. The referral was suggested in the context of the Claimant still not performing to the required standard and that it had been noticed that he struggled to manage transitions from one task to another and to multitask. Ms Fairbrass gave evidence that she had previous experience of another employee who was struggling and noticed this employee had difficulty in her written work when her verbal work was good. She therefore wondered if there was an underlying

condition which affected her performance and referred this employee to Occupational Health. There was a diagnosis of dyslexia, and this employee was then given the support and equipment needed. This employee passed the ASYE.

- b) Ms Fairbrass had exposure to people with ASD in the course of her work and wondered whether might explain the difficulties the Claimant was having. At the meeting the Claimant said he had thought about this in the past and agreed to being referred.
- c) The Tribunal has considered the actual referral in which the focus is very much on how the Claimant could be supported. The Claimants suggests this was a ploy to get evidence to get rid of him. The Tribunal disagrees. If there had been a diagnosis of ASD this may be a disability which could give rise to further claim to the Tribunal had the Claimant been dismissed because of it. It is therefore unlikely that this was the reason for the referral. The Tribunal finds that the referral was made to try and find out if there were other issues which would affect how support was given and what support was given to the Claimant.

47. The Claimant alleges:

*At 09.45 on 17 January 2020 Ms Fairbrass came to him and told him that:*

- i. *he was not good for her team,*
  - ii. *he had been unable to complete a child and family assessment to required standard;*
  - iii. *he had struggled all along;*
  - iv. *she did not think that the Claimant was good enough to pass the assisted and supported one year in employment (ASYE) programme;*
  - v. *he should start looking for another place to start another ASYE programme, he would not be progressed further on this programme at Kent County Council; and*
  - vi. *he would remain on the current case load until he found another place to go. (Para 14)*
- a. The Claimant's evidence is that Ms Fairbrass came to his desk unannounced and said these things. He relies on a handwritten note which is dated 17 February. This was challenged by the Respondent who said it was taken from a notebook and it was not possible to see where in the notebook it appeared to confirm it was contemporaneous. Ms Fairbrass said that the context of her seeing the Claimant that morning is that he had sent her an email and asked to see her that afternoon as he was unhappy that he was not getting an assessment right. Ms Fairbrass was on her to court and stopped by his desk to discuss his email. She denies saying what is alleged and pointed out these were matters that had been discussed on

various previous occasions. This was not challenged.

- b) In this context, the Tribunal find it highly unlikely that the conversation was as the Claimant alleges. The Tribunal accepts Ms Fairbrass's evidence.

48. The Claimant has alleged:

*On 11 March 2020 the Respondent completed a reference for him which was inaccurate and unfair (Paras 19-24).*

- a) A discussion about a reference arose on the Claimant's last day of work, on 24 January 2020. In that meeting the Respondent asked the Claimant if he wanted to retract his resignation, he said he did not want to. The meeting went on to discuss a reference and it is recorded that the Claimant wanted to be included positives, namely that he was hardworking, polite, and ambitious.
- b) The areas of development he identified as being relevant to the reference were that he *'struggles with understanding processes in context of previous experience (lack of exposure to statutory SW)'*. It was agreed that a reference *"as outlined"* would be given. The Claimant was told he would be provided with details of a former colleague of his same nationality who works near where he lives and that he would be invited to future social events.
- c) The reason for leaving given in his resignation letter was stated to be for *"personal and family reasons"*. In the meeting the Claimant also said he jumped before he was pushed as he was not making the necessary progress.
- d) The Respondent received a request for a reference from an agency which provided locum Social Workers. It was a tick box reference rather than a free form reference. This noted his quality of work was unsatisfactory and reason for leaving was *'Chica decided the role was not right for him'*. The Claimant accepts the unsatisfactory performance remark but takes issue with the reason for leaving as it was different from what he says had been agreed and what he put on his resignation letter. He says this was a further attempt by the Respondent to further damage his career.
- e) The notes of the meeting on 24 January, indicates there was no agreed specific wording agreed. What was said is that a reference would be given as *'outlined'* above. There was no mention of what should go in a reference about reasons for leaving.
- f) In hindsight Ms Fairbrass said that she maybe should have used the wording in his resignation letter, but said it was her interpretation of his reason for leaving. The Claimant's case is that the reason put

for leaving on the reference meant he was not employed by the agency. The Tribunal does consider it may reflect her own view more and that it would have been better to use his actual wording which has been acknowledged.

- g) However, the Tribunal satisfied this was not based on race, age, or sex. Indeed, the reference says that the Respondent might re-engage him '*dependent on his future development and references at the time*'.

49. The Claimant alleges that, independent of the Equality Act, the Respondent:

- a) breached its duty to take reasonable care when giving the reference on 11 March 2021 (the "Negligent Misstatement Claim"); and
- b) breached the implied term of mutual trust and confidence which forced him to resign (the "Constructive Wrongful Dismissal Claim").

50. Given above findings above, this not considered further.

#### **Unconscious bias**

51. It was put forward by the Claimant that Ms Fairbrass was unconsciously biased against him. The Tribunal has considered this carefully. The Tribunal particularly noted the following matters:

- a) Ms Fairbrass had seen the pre-employment assessment. She was informed that part of the interview process was informal assessment with care experienced young people which was not positive.
- b) There were difficulties in obtaining references for the Claimant and Ms Fairbrass was concerned about the brevity of them.
- c) There were performance issues from the start of the Claimant's employment.
- d) There was lack of progress by the Claimant and inability to take on more cases. By the 23 October ASYE meeting it was apparent he was struggling.
- e) The Claimant had time keeping issues (leaving much too early for appointments and missing deadlines), and judgment issues such as working on sensitive matters from MacDonalds.
- f) There were concerns about his honesty, in that he said had sent an email he had not sent
- g) There was a lack of awareness of risk and a reluctance to challenge children and families potentially putting them at risk

- h) The Claimant showed poor professional boundaries
  - i) The Claimant evidenced a lack of knowledge about highly publicised cases Baby P and Victoria Climbié.
  - j) The Claimant did not take up training opportunities such as shadowing senior social workers which were designed to support him
  - k) That the Claimant had an apparent lack of awareness that he needed support as he said he was coping and not overwhelmed and said support was not needed when he was clearly not coping.
52. This list is not exhaustive. Inevitably these matters would cast the Claimant in a negative light. This was recognised by Mr Meggit in his email to Ms Fairbrass on 14 November. It was recognised this may be a problem and therefore an offer to move to a new team was suggested.
53. The Tribunal accepts that there was negativity about the Claimant from very early on in his employment. This is not surprising given the list we have set out above. It is understandable that Ms Fairbrass may have come across differently to Ms Baker, who was performing well and increasing her case load as expected. This is not to do with the Claimant's age, sex, or race.
54. The Tribunal then considered the references to culture made during the Claimant's employment which he says evidence this unconscious bias.
55. The first reference to ethnic culture came from the Claimant when he said in a supervision meeting on 17 October 2019, that he could not believe that parents could harm their children as in his culture children are not deliberately harmed. This would have alerted Ms Fairbrass to the possibility of cultural differences.
56. On 1 November in a conversation between Ms Fairbrass and HR, issues with the Claimant's performance were discussed. The note made by HR, has "*protection characteristic*" near the top (presumably this should read protected characteristic). Nothing further is put there. The Claimant's comment set out in the previous paragraph was discussed. Then, in relation to his difficulties in asking challenging questions, it is noted "*helping people is not always about being nice, - capacity to change – too nice to do that – cultural?*"
57. The next reference to culture was in a supervision on 4 November 2019. The issue being discussed was that he was finding it difficult to ask more challenging and probing questions and it was queried whether the issue was a cultural one. Ms Fairbrass had supervised another Nigerian NQSW who had told her that she found it difficult to ask challenging and probing questions because culturally this was not done in Nigeria where this was considered rude. After appropriate support, this NQSW went on to successfully complete the ASYE. It was suggested that the Claimant could talk to her about these issues as a means of support for him.



58. In relation to negativity, the Tribunal finds that there was negativity, but this was because of the Claimant's performance issues and not to do with his race or any other protected characteristic. It was the Claimant who first raised cultural differences, this was then discussed with HR. Given Ms Fairbrass's experience with another Nigerian employee, she wondered if this was the same for the Claimant and raised it with him.
59. The Claimant suggests that Ms Fairbrass was not properly trained in diversity and inclusion. The evidence was that she had had some training as part of other training she had attended no dedicated training. We do not know what that training was or extent of it in relation to diversity and inclusion. However, the Tribunal take judicial notice that diversity and inclusion training would normally include a recognition of cultural differences. It is certainly part of the training the panel has received. The Tribunal find that Ms Fairbrass was reasonable in considering cultural differences in the context of trying to support him and if she had not, she would have been criticised for that.
60. The Tribunal finds that there was no unconscious bias on the part of Ms Fairbrass or anyone else at the Respondent. The Claimant was considered negatively, however this was not to do with his race or sex, but to do with his levels of performance which, despite efforts to help him, had not improved and were not satisfactory. The reason the Claimant's comparator was treated in a positive manner was not to do with her race, age, or gender, but because she was working to a good standard and progressing as expected. The evidence is that the Respondent was trying to engage with the Claimant both in the formal supervision meetings and on a day-to-day basis. The Claimant however did not take the Respondent up on the various offers of support made and did not improve.
61. The Tribunal approached this case by considering why the Claimant was treated as he was. The Tribunal accepts the Respondent's submission that the Claimant did not manage the transition from a student to being a social worker, and his work was below standard. The Claimant resigned on his own volition. He says he resigned before he was pushed. The Tribunal notes that the Respondent asked him to reconsider his resignation, but he did not want to.
62. The Claimant has not articulated his breach of contract claim. If it related to his resignation, the Tribunal does not find that there was a repudiatory act by the Respondent entitling him to resign and claim in relation to this. The Claimant resigned of his own volition, he said before he was pushed, and the Respondent asked him to reconsider his decision.
63. Given the findings and conclusions reached the Tribunal did not consider whether the Claimant's claims had been brought in time. The Claimant's claims are dismissed.

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Employment Judge Martin

Date: **18 March 2022**

Reasons sent to the parties on

Date: **4 April 2022**

FOR EMPLOYMENT TRIBUNALS

## Appendix Agreed issues

1. The matters relied upon by the Claimant to support his Equality Act Claims are (with reference to the relevant paragraph of his FBP):
  - a) He was given more cases than he should have been (Para 5). This allegation was withdrawn in the Claimant's submissions.
  - b) On unspecified dates Ms Fairbrass constantly put him down, telling him that she did not think that he would succeed in this programme because he was struggling with five cases. (Para 6).
  - c) On unspecified dates Ms Fairbrass openly and in the presence of all other colleagues spoke to him in a very disrespectful and condescending manner. (Para 6).
  - d) On the afternoon of **5 December 2019** Ms Fairbrass spoke to him in a very disrespectful, embarrassing, and humiliating manner in the office floor as if she was looking for evidence to prove to his colleagues listening that he was incompetent and useless (Para 7).
  - e) A few weeks earlier than **5 December 2019**, Ms Fairbrass and Mr Meggitt told the Claimant that he was not good for her team. Ms Fairbrass suggested he consider a transfer to another team as she felt that her team was not suitable for him (Para 8).
  - f) On two different occasions the Claimant asked his supervisor Ms Abigail Laphorn some questions relating to the Claimant's work, and she responded by telling him that she was not there to spoon-feed the Claimant (Para 9).
  - g) During his employment he never received any words of encouragement, emotional support or show of appreciation in comparison with Ms Baker (Para 10).
  - h) Ms Fairbrass would always speak to Ms Baker with smiles only to turn and address him with a frowned face. (Para 11).
  - i) At some point Ms Fairbrass asked the Claimant if the Claimant had problems being managed by a woman to which the Claimant answered, no. (Para 11).
  - j) On another occasion, on the office floor, Ms Fairbrass asked him face-to-face if he felt intimidated by her. (Para 11).
  - k) Ms Fairbrass from time to time asked the Claimant where he studied, making the Claimant look like someone who had not attended a university, even though she knew where he had

studied. (Para 11).

- l) Sometime in **early January 2020**, Ms Fairbrass referred the Claimant to Occupational Health for an assessment relating to possible ASD. (Para 12).
  - m) At 09.45 on **17 January 2020** Ms Fairbrass came to him and told him that:
    - i. he was not good for her team,
    - ii. he had been unable to complete a child and family assessment to a required standard;
    - iii. he had struggled all along;
    - iv. she did not think that the Claimant was good enough to pass the assisted and supported one year in employment (ASYE) programme;
    - v. he should start looking for another place to start another ASYE programme, he would not be progressed further on this programme at Kent County Council; and
    - vi. he would remain on the current case load until he found another place to go. (Para 14)
  - n) On **11 March 2020** the Respondent completed a reference for him which was inaccurate and unfair (Paras 19-24).
2. The Claimant alleges that, independent of the Equality Act, the Respondent:
- a) breached its duty to take reasonable care when giving the reference on 11 ~~Mar~~ **Mar** 2021 (the "Negligent Misstatement Claim"); and
  - b) breached the implied term of mutual trust and confidence which forced him to resign (the "Constructive Wrongful Dismissal Claim").

Issues relating to Equality Act Claims - Direct Discrimination

3. In relation to each of the matters listed in Paragraph 2 above:
- a) Did the matter occur?
  - b) If it occurred, did it amount to treating him less favourably than the Respondent treated Olivia Blake or would treat others in circumstances which are not materially different because of the Claimant's **race**?

- c) Was it presented in time?
  - d) If it was not presented in time, did it form part of a continuing act of direct **race** discrimination under section 123(3)(a) of the Equality Act 2010 and if so, was that continuing act of direct **race** discrimination presented in time?
  - e) If it was not presented in time, would it be just and equitable for the Tribunal to consider the complaint out of time?
4. In relation to each of the matters listed in Paragraph 2 above:
- a) If it occurred, did it amount to treating him less favourably than the Respondent treated Olivia Blake or would treat others in circumstances which are not materially different because of the Claimant's **age**?
  - b) Was it presented in time?
  - c) If it was not presented in time, did it form part of a continuing act of direct **age** discrimination under section 123(3)(a) of the Equality Act 2010 and if so, was that continuing act of direct **age** discrimination presented in time?
  - d) If it was not presented in time, would it be just and equitable for the Tribunal to consider the complaint out of time?
5. In relation to each of the matters listed in Paragraph 2 above:
- a) If it occurred, did it amount to treating him less favourably than the Respondent treated Olivia Blake or would treat others in circumstances which are not materially different because of the Claimant's **sex**?
  - b) Was it presented in time?
  - c) If it was not presented in time, did it form part of a continuing act of direct **sex** discrimination under section 123(3)(a) of the Equality Act 2010 and if so, was that continuing act of direct **sex** discrimination presented in time?
  - d) If it was not presented in time, would it be just and equitable for the Tribunal to consider the complaint out of time?

#### Issues relating to Equality Act Claims - Harassment

6. In relation to each of the matters listed in Paragraph 2 above:
- a) If the matter occurred, was it unwanted conduct related to **race**?
  - b) If it was related to race, did it have the purpose or effect of violating

the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

- c) Was it presented in time?
  - d) If it was not presented in time, did it form part of a continuing act of **race** harassment under section 123(3)(a) of the Equality Act 2010 and if so, was that continuing act of **race** harassment presented in time?
  - e) If it was not presented in time, would it be just and equitable for the Tribunal to consider the complaint out of time?
7. In relation to each of the matters listed in Paragraph 2 above:
- a) If the matter occurred, was it unwanted conduct related to **age**?
  - b) If it was related to **age**, did it have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?
  - c) Was it presented in time?
  - d) If it was not presented in time, did it form part of a continuing act of **age** harassment under section 123(3)(a) of the Equality Act 2010 and if so, was that continuing act of **age** harassment presented in time?
  - e) If it was not presented in time, would it be just and equitable for the Tribunal to consider the complaint out of time?
8. In relation to each of the matters listed in Paragraph 2 above:
- a) If the matter occurred, was it unwanted conduct related to **sex**?
  - b) If it was related to **sex**, did it have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?
  - c) Was it presented in time?
  - d) If it was not presented in time, did it form part of a continuing act of **sex** harassment under section 123(3)(a) of the Equality Act 2010 and if so, was that continuing act of **sex** harassment presented in time?
  - e) If it was not presented in time, would it be just and equitable for the Tribunal to consider the complaint out of time?
9. In relation to any finding of unlawful direct discrimination or harassment what is the appropriate remedy by way of compensation for financial loss and injury to feeling?

**Issues relating to the Breach of Contract Claim**

10. Was the Claimant's resignation caused or triggered by any of the matters in paragraph 1.a) to 1.m) above (if proven by the Claimant)?
11. Had the Claimant affirmed his contract since any of those acts?
  - a) By continuing to perform his contract?
  - b) By giving and working notice (s.95 ERA1996 does not apply)?
  - c) By attending the OH appointment in his notice period?
12. Was any conduct in paragraph 1.a) to 1.m) above, which occurred after the last affirmation, if any:
  - a) Sufficient to amount to a repudiatory breach of contract?
  - b) Innocuous in terms of breach of the Claimant's contract?
13. If neither, was any conduct in paragraph 1.a) to 1.m) above, which occurred after the last affirmation, part of a course of conduct comprising several acts within paragraph 1.a) to 1.m) above, which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term?
14. As the Claimant was paid for his notice period, what, if any, damages is the Claimant entitled to?

Issues relating to Discriminatory 'Constructive dismissal'

15. Did any discriminatory conduct materially influence the conduct that amounted to a fundamental breach of the Claimant's contract?
16. The alleged discriminatory 'constructive dismissal' occurred on 17 January 2020 and the ACAS EC process was started on 17 April 2020 more than 3 months later, so otherwise out of time.
  - a) If the reference, paragraph 0 above, is found to be an act of post employment discrimination; does that form part of a course of conduct whose effect is to make the relevant date 11 March 2020?
  - b) If not, is it just and equitable to extend time from 16 April 2020 to 3 June 2020?