



EMPLOYMENT TRIBUNALS

Claimant: Mr R Melki

Respondent: Bouyges E and S Contracting UK Limited

Heard at: Manchester Employment Tribunal

On: 28 February 2022, 01, 02, 03 and 04 March 2022

Before: Employment Judge Mark Butler
Ms J Beards
Ms K Fulton

Representation

Claimant: Self-represented

Respondent: Mr C Kelly (of Counsel)

JUDGMENT

The unanimous decision of the Tribunal is that:

1. The claimant's claims of direct race discrimination and harassment related to race are ill-founded. They do not succeed and are all dismissed.

The Claimant requested written reasons during the handing down of oral reasons, and only remained for part of the oral reasons. These are those written reasons.

REASONS

Introduction

1. The various claims in this case arise following the claimant having been dismissed by the respondent on 09 March 2020. The claimant presented his claim form on 10 June 2020, having entered and completed the ACAS Early Conciliation process on 09 June 2020.
2. The claim form provided very little detail of the claims that were being brought by the claimant. The claimant ticked the box at 8.1 to express that he was making another type of claim which the Employment Tribunal could deal with, and only wrote 'Automatic unfair dismissal' in the box where text could be entered. No other boxes were ticked. At box 8.2, the claimant provided one paragraph of text, and named 8 individuals that he says were involved in conduct against him. Within that paragraph, the claimant alludes to treatment of him that was related to

his nationality.

3. The tribunal directed that the claimant explain what his claim was, in particular, the basis on which he was saying that he was automatically unfairly dismissed. This resulted in the claimant producing and sending to the tribunal a letter on 22 June 2020. This letter contained details of what the claimant's claims were. This letter was treated by the tribunal as an application to amend the claim by the claimant (see p.22).
4. The outcome of treating this letter as an application to amend is not within the bundle, and at the time of completing these written reasons, I did not have sight of the tribunal file. However, it suffices to say that this letter then formed the basis of the claim brought by the claimant.
5. At a Preliminary Hearing before Employment Judge McDonald, which took place on 11 December 2020, the claims brought by the Claimant were discussed and recorded (see pp.49-65). The claimant was given until 29 January 2021 to confirm that the issues as recorded was the claim being brought in its entirety.
6. At a second Preliminary Hearing (see pp.71-78), this time before Employment Judge Buzzard on 21 May 2021, the issues as recorded by EJ McDonald was recorded as having been confirmed by the claimant as a complete list of allegations of discrimination on which he brings his claim. In total there were 16 separate allegations, the first 14 of which were brought as both direct race discrimination and harassment related to race, with the final two brought as direct race discrimination only. The claimant brought his race discrimination claim on the grounds of nationality. The claimant describes himself as being of Iranian nationality.
7. In considering this matter, the tribunal was provided with a bundle of 266 electronic pages. The tribunal was also provided with additional documents on during the proceedings. On the second day the respondent provided us with email chains relating to the exchange of witness statements as requested by the tribunal (explained further below), and we were provided with a document entitled 'Standard Planning Procedure'.
8. The claimant gave evidence on his own behalf and called no further witnesses. Although the tribunal note here that the claimant appeared genuine in how he perceived his treatment, in that he appeared to genuinely feel aggrieved, we consider it necessary to pass some comment on the evidence given by the claimant during these proceedings. We do this whilst being mindful that English is not the claimant's first language, and have tried to ensure that it is not simply the choice of words that have led to this comment, but have focused on what the tribunal considered to be more significant issues. The tribunal considered that on some fairly central matters to the claimant's claim there are a number of inconsistencies that go beyond the use of language. These inconsistencies were seen across the presentation of the claimant's case, in what he brings, in the evidence he gave and in the way the case developed throughout the hearing. All of which led the tribunal to concluding that the claimant was not a reliable historian. Whereas, the witnesses giving evidence on behalf of the respondent (noted below) gave evidence that was consistent for the most part, both in terms of an individual's written and oral evidence, but also across witnesses when events involved multiple witnesses, and which was largely consistent with contemporaneous documents, where those were available. In these circumstances, the tribunal when faced with a direct conflict of an account, and where there was no other means of resolving the conflict, preferred the evidence of the respondent witnesses. There are various examples of the inconsistencies in the claimant's case throughout the hearing, including, but not limited to, the following. In the claimant's appeal document (p.168), Jennifer Minnett was

recorded as whispering words to the effect that 'we're going to get rid of him', whilst in the claimant's witness statement this had changed to threatening him. During the course of the hearing the identity of Steve Clayton was changed to Steve Cooper. There was mention of thinking that Phil Johnson's son was involved (item 12 of Appendix A), this was changed to not knowing who the person was under cross examination. With respect the USA trip allegation, in the claimant's appeal document it was described as whilst he sat next to them, and took place specifically and purposefully in his presence around the beginning of February. Whilst in his oral evidence, this changed to include him being in the vicinity, he was on the phone and was one week before he left. Most notably, the USA trip was omitted in its entirety from the document that the claimant presented as his witness statement for these proceedings. It is these inconsistencies on matters central to the claims being brought that led the tribunal to the view that the claimant was not a reliable historian.

9. The respondent called the following witnesses:
 - a. Mr Aslam
 - b. Mr Carr
 - c. Ms Gould
 - d. Mr Bielderman
 - e. Mr Pughe
 - f. Mr Harris
 - g. Mr Peacock

Adjustments during the case

10. This case required some careful management throughout. And necessitated a number of adjustments to the procedures, to ensure that the claimant had a fair hearing. Below, we have set out a number of the adjustments made in this hearing. This is not an exhaustive account of adjustments made.
11. The tribunal was conscious that the claimant was of Iranian nationality and that English was not his first language. That he was a litigant in person. And that there was evidence of anxiety related disorders in the bundle. The tribunal adjusted the hearing throughout to ensure that the claimant was able to appropriately engage and participate in the hearing.
12. The tribunal, having read the claimant's witness statement was somewhat concerned as to whether the claimant had properly understood what was required of him in relation to a witness statement and the evidence he wanted to bring. This primarily related to the brevity of the document that had been presented to the tribunal as the claimant's witness statement. The claimant's witness statement extended to just over one page of typed notes, and was the same document that the claimant had sent to the tribunal when EJ Warren had asked the claimant to explain why he says he was automatically unfairly dismissed.
13. Due to that described above, the tribunal made enquiries of the claimant as to what his understanding of a witness statement was. This was to ensure that there had not been any confusion as to what a witness statement should include, and if there was, to try and understand what had caused any such confusion. This was important to the tribunal, as we had to be satisfied that a fair hearing could take place, and if we were not satisfied that that was possible then assessing the available options would take place.
14. On asking the claimant to explain his understanding of what a witness statement was and what was to be included, the tribunal was satisfied that the claimant had

understood what was required of him. The claimant further explained that the content in the document before us was everything that he wanted to say about his claim. In addition, the tribunal considered that the detail included in EJ Buzzard's Record of Preliminary Hearing gave a sufficient explanation as to what the claimant needed to include. We were satisfied that there was no misunderstanding on the part of the claimant, but that he had made a deliberate decision to present the evidence he did.

15. The tribunal also considered the email correspondence between the claimant and the respondent on 29 October 2021 around witness statement exchange. And the email of 01 February 2022. Having been in receipt of the respondent witness statements, the claimant did not seek to re-write his statement.
16. The tribunal was grateful for Mr Kelly's indication that he would be exploring each of the allegations in full, and would allow Mr Melki the opportunity to respond to those questions.
17. The tribunal invited and considered the views of both parties in relation to allowing both the list of issues (Appendix A of EJ McDonald's Record of Preliminary Hearing) and the claimant's letter of appeal at pp.168-169 (although limited to the allegations) to stand as supplemental witness statements of the claimant. These two documents did stand as supplemental witness statements of the claimant in this case. This was done with a view to ensuring that the claimant's witness statement covered all the allegations he was bringing.
18. The tribunal was satisfied in light of the above that a fair hearing was possible in this case, and the case proceeded on that basis.
19. An explanation as to the process over the course of the hearing was provided to the claimant at the beginning of the hearing so that he understood how things were going to proceed and what would be required of him during the hearing. This was reiterated to the claimant throughout.
20. The tribunal monitored closely the claimant to ensure that he was able to understand questions being asked of him, and able to respond accordingly. On occasion questions were re-phrased to assist the claimant.
21. The tribunal also assisted the claimant with cross examination. Some assistance was given in formulating questions being asked, in ensuring a topic was adequately covered and in ensuring that his case was properly put to the respondent's witnesses. However, care was taken to make sure that the tribunal did not step into the arena, and represent the claimant.
22. The claimant was given clear signposting as to the order in which the respondent was seeking to call witnesses. And was given time to prepare his questions throughout. This was following discussion with the claimant on the third day of the hearing, which is explained below.
23. On the afternoon of the second day of the hearing, the respondent's witnesses started giving evidence. The claimant cross-examined Mr Pughe. He asked the questions he wanted to ask. It was assumed that the claimant had read Mr Pughe's witness statement given the questions he asked. The claimant was reminded of who he would likely be cross-examining the following day and the order in which the respondent was calling its witnesses. The claimant was reminded of the need to read the witness statements carefully and to focus his questions on parts of the statements that he wanted to challenge, or where they said something different to what he says. He was reminded that unchallenged parts of a witness statement will be taken as accurate evidence.

24. On the morning of day 3, the respondent called Mr Aslam. Given Mr Aslam's involvement in dismissing the claimant (amongst other matters live in this case) it was expected that, at the very least, cross examination would focus on matters around this period. However, the claimant simply stated that he had no questions for Mr Aslam. After a brief discussion with the claimant, he explained that he had not read any of the witness statements in advance of the hearing. It was again explained to the claimant that if he disagrees with any part of Mr Aslam's statement, or any other witnesses statement, then he would need to ask questions and challenge it, otherwise the tribunal will accept the written statements as being accurate. The claimant explained that he understood what was now needed of him. In order to try to help the claimant engage in the process, the tribunal offered him some time (initially 20 minutes, but more time if it was needed) to read Mr Aslam's witness statement and to prepare any questions he wanted to ask. The claimant when he returned to the tribunal explained that he had had enough time to prepare the questions he wanted to ask. The claimant did proceed to cross-examine Mr Aslam.
25. The tribunal continued to remind the claimant of which witnesses were being called and when. And gave time to the claimant to refresh his memory of witness statement and to ensure he had some time to prepare his cross-examination questions.
26. Throughout, where the claimant had not put his case to a witness, the judge would ensure that the witnesses were given an opportunity to respond to the case being brought.

Issues

27. The issues of the case were confirmed at the outset of the hearing. These were as recorded in annex A of EJ McDonald's record of Preliminary Hearing. However, some of these matters were amended during the course of the hearing by the claimant's concessions. These are noted below in the findings of fact and conclusion section. Appendix A is attached to the back of this judgment for ease, rather than repeating them here.
28. The issue of time limits was also live in the case.

Closing Submissions

29. We were provided with opening submissions from Counsel on behalf of the Respondent. And we were also assisted by closing oral submissions made on behalf of both the Claimant and the Respondent. We do not repeat them here, but considered them carefully in reaching this decision.

Law

Direct Race (nationality) Discrimination

30. Protection against direct race discrimination is provided for at s.13 of the Equality Act 2010:

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.

Harassment related to race (nationality)

31. Protection against harassment is provided for at s.26 of the Equality Act 2010:

- (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.

Burden of Proof

32. We reminded ourselves of the burden of proof in discrimination cases, with reference to section 136 of the Equality Act 2010:

- (1) This section applies to any proceedings relating to a contravention of this Act.
- (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

33. Mr Kelly helpfully took the tribunal to the following case law, that was relevant to the matters in this case:

- a. Richmond Pharmacology v Dhaliwal [2009] ICR 724
- b. Pemberton v Inwood [2018] ICR 1291
- c. Efobi v Royal Mail Group Ltd [2021] 1 WLR 3863
- d. Madarassy [2007] ICR 867
- e. Glasgow City Council v Zafar [1997] 1 WLR 1659
- f. The Law Society v Bahl [2003] IRLR 640

34. Each of these cases have been considered when reaching this decision. We are grateful for Mr Kelly having provided this case law, and his initial skeleton argument to the claimant in advance of the case starting. This ensured that the claimant was not faced with any legal argument not familiar (or at least something that the claimant could familiarise himself with) to him during these proceedings.

Findings of Fact, analysis and conclusions

Any findings of fact we make are based on the balance of probability from the evidence we have read, seen, and heard. Where there is reference to certain aspects of the evidence that have assisted us in making our findings of fact this is not indicative that no other evidence has been considered. Our findings were based on all of the evidence and these are merely indicators of some of the evidence considered in order to try to assist the parties understand why we made the findings that we did.

We do not make findings in relation to all matters in dispute but only on matters that we consider relevant to deciding on the issues that were before us.

Allegation 1

35. The claimant in evidence reduced this claim to harassment related to race only.
36. This allegation lacked specificity, which made it very difficult for the tribunal to make any specific findings on this allegation. There was no detail in the allegation, or in the claimant's evidence (written or oral) as to the conduct of Mr Peacock and in what way this was grumpy.
37. On the first day of his employment with the respondent, the claimant met with Mr Peacock and Mr Carr. The three had a meeting on that morning. The tribunal, on balance, finds that Mr Peacock was not grumpy toward the claimant on his first day of work. The tribunal preferred the evidence of Mr Carr and Mr Peacock on this matter. Their evidence in these proceedings remained largely consistent, whilst the claimant was not deemed to be a reliable historian (see above).
38. Allegation 1 in so far as it relates to Mr Peacock being grumpy does not succeed and is dismissed.
39. The planning team sat at a bank of desks. No person was designated a specific desk. However, individuals would often sit at the same desk, especially when they had work stored at it.
40. The two end desks were already occupied on the claimant's first day of work, one by Mr Carr and the other by Mr Peacock. There was one desk remaining. A chair was already at this unoccupied desk.
41. The office equipment, including chairs, were due to be replaced as part of a planned refurbishment of the offices. This resulted in some sample chairs being in the office.
42. The claimant was pointed towards the bank of desks on his first day of work, and with only one desk and chair available, that became his desk and chair on that day.
43. The claimant was able to swap the chair that was at his desk with one of the sample chairs within three days of starting work for the respondent.
44. In respect of this part of allegation 1, the tribunal concludes that first, he was not given the worst of three chairs. There was no deliberate choice made to give him any particular chair. He simply used the chair that was at the one desk space that was unoccupied. This does not reach the level of detriment. And there is no evidence adduced by the claimant from which the tribunal could conclude that this had some causative link to his nationality. Allegation 1 in its entirety must therefore fail and is dismissed.

Allegation 2

45. The claimant in evidence reduced this claim to harassment related to race only.
46. The different line management structures that were used by the respondent were explained to the claimant by Mr Carr in the meeting held with the claimant on his first day of work. It was explained to the claimant that Mr Carr would report to the Project Director of the Virtos project for matters relating to the Virtos project, and to the claimant for non-project matters. Mr Carr did not make it clear to the claimant that he would not report to the claimant. The tribunal preferred the evidence of Mr Carr on this. His evidence was consistent with the evidence of Mr Aslam, and others, on how line management worked at the respondent. And this appears to be a plausible way of arranging line management, where there is project work and non-project work.
47. The tribunal finds that the conduct on which allegation 2 is brought did not happen as alleged. Allegation 2 in its entirety must therefore fail and is dismissed.

Allegation 3

48. The claimant's evidence was that allegation 3 had no connection to his nationality. Allegation 3 in its entirety must therefore fail and is dismissed.

Allegation 4.1

49. The claimant's evidence was that allegation 4.1 had no connection to his nationality. Allegation 4.1 in its entirety must therefore fail and is dismissed.

Allegation 5

50. Mr Peacock and Mr Carr had a conversation about Mr Peacock having a trip around the USA. This was because Mr Peacock was planning a trip around the USA for the purposes of providing support at the 2026 Football World Cup.
51. This conversation included mention of areas in the Southern USA states that Mr Peacock was likely to avoid visiting. At no point was there any mention that this decision was made for reasons concerning the presence of Iranians. On this allegation the tribunal preferred the evidence of Mr Carr and Mr Peacock. Their evidence was consistent in both their written statements and their oral evidence. Whilst the claimant accepted under cross examination that he did not catch the whole conversation as he was on the phone and was distracted. This calls into question the accuracy of the claimant's evidence on this matter. Furthermore, the claimant never raised this as a matter of concern or seek to discipline Mr Carr (who he line managed) despite, if what he is saying is correct, the clear links to his nationality. In those circumstances, on balance, we find that the conversation did not include the content as alleged by the claimant. Further, we also noted that this event is wholly missing from the document which the claimant presented as his witness statement, further supporting that this event likely did not happen as the claimant is now saying.
52. The tribunal finds that the conduct on which allegation 5 is brought did not happen as alleged. Allegation 5 in its entirety must therefore fail and is dismissed.

Allegation 6

53. Mike Pugh did not nod to Mr Peacock. And Mr Peacock did not then test the claimant's basic knowledge to generate a row. There is simply no evidence to support that this happened. The claimant did not raise this as a matter of concern through his then legal representative when appealing the decision to dismiss him. In these circumstances, the tribunal prefers that evidence of Mr Pugh and Mr Peacock in that this event did not happen.
54. And even if the tribunal is wrong on this matter, and the events did take place, the claimant has not satisfied the tribunal that there was any connection to his nationality.
55. The tribunal finds that the conduct on which allegation 6 is brought did not happen as alleged. Allegation 6 in its entirety must therefore fail and is dismissed.

Allegation 7

56. Allegation 7 lacks detail and specifics. The claimant has not been able to explain what was said to him, when those words were spoken, the context of any such comments or anything else relevant. In these circumstances where the claimant was unable to give evidence on such specifics, the tribunal preferred the evidence of Mr Peacock.
57. Mr Peacock would smoke in the basement throughout the winter months, and out of the front of the main office entrance during the summer months. This was unchallenged evidence of Mr Peacock.
58. The claimant had only ever been to the basement on one occasion throughout his time working for the respondent. And on this occasion, Mr Peacock did not swear at him. On balance, we conclude, that Mr Peacock did not swear at the claimant regularly when he walked past Mr Peacock who was smoking.
59. The tribunal finds that the conduct on which allegation 7 is brought did not happen as alleged. Allegation 7 in its entirety must therefore fail and is dismissed.

Allegation 8

60. Mr Carr whilst on the phone to Mr Peacock did not describe the claimant as a 'stupid choice'. Again due to the inconsistencies of the claimant in this case, and the consistencies in the evidence given by Mr Carr and Mr Peacock, the tribunal preferred the evidence of Mr Carr and Mr Peacock
61. And even if the tribunal is wrong on whether this event took place. Any such circumstances would have been made in circumstances where the claimant had responded unhelpfully to Mr Peacock's questions, which Mr Carr considered to be inappropriate enough to forward them on to Mr Aslam (pp.120-124). Had such a comment been made, then it was more likely than not due to the claimant's behaviour rather than nationality.
62. The tribunal finds that the conduct on which allegation 8 is brought did not happen as alleged. Allegation 8 in its entirety must therefore fail and is dismissed.

Allegation 9

63. Mr Carr was the planning manager with responsibility for the Virtos project.
64. Bimal applied for a contractor role, working solely on the Virtos project.
65. Mr Carr was asked to be involved with interviewing Bimal, as Bimal would be reporting directly to Mr Carr, given the role was specifically with that project.
66. Mr Carr interviewed Bimal. Despite initially planning to be involved in interviewing Bimal, the Project Director was unavailable on the day of the interview. Mr Carr interviewed Bimal alone.
67. The claimant was not informed that Bimal was being interviewed for a role on the Virtos project. Nor was he involved in the process.
68. The tribunal does not doubt that the claimant perceived this as a detriment, given his role of planning manager. He clearly felt put out by not being involved in this process, and through not being told about it. However, we conclude that it would be unreasonable for the claimant to view this as unwanted conduct or a detriment in the circumstances. Those circumstances being where those that interview and are responsible for selecting a contractor are those at the site to whom the contractor would report. And further, where the claimant would have no practical involvement with Bimal, and would be unlikely to have any dealing with them.
69. In terms of creating the environment necessary to support a harassment claim, the claimant has not brought any evidence in relation to this.
70. And further, the claimant has not satisfied the tribunal that this had some causative link with his nationality.
71. Given those findings above, allegation 9 fails in its entirety.

Allegation 10

72. The claimant gave evidence that Mr Clayton did not ask him three or four times during the claimant's period of working for the respondent 'where are you from'. The claimant explained that it was a Mr Steve Cooper. No application to amend the claim was made by the claimant.
73. The tribunal finds that the conduct on which allegation 10 is brought did not happen as alleged. Allegation 10 in its entirety must therefore fail and is dismissed.

Allegation 11

74. Mr Pugh was not privy to information about who the respondent was intending to dismiss. And Mr Pugh did not have a relationship with Ms Minnett such that he would discuss such matters. Mr Pugh did not have a conversation with Ms Minnett where Ms Minnett said that the respondent was getting rid of the new planning manager in the second or third week of the claimant's employment. We preferred the evidence of Mr Pugh, in circumstances where his written statement paragraphs 8 and 9 were unchallenged by the claimant. Mr Pugh's oral evidence was consistent with his written statement. But further, it is also in light of the inconsistency of the claimant on this matter. In his appeal document (see p.168) it is described as Ms Minnett whispering the words. Whilst in his witness statement this went to threatening a manager.

75. The tribunal finds that the conduct on which allegation 11 is brought did not happen as alleged. Allegation 11 in its entirety must therefore fail and is dismissed.

Allegation 12

76. Mr Harris did not have a conversation with another employee in front of the claimant during his second or third week working for the respondent where it was said that the respondent was going to get rid of the claimant. The tribunal accepted Mr Harris's evidence on this. There is nothing to support the claimant's assertion that around this time there were discussions within the respondent of terminating the claimant's contract. This is the second occasion that the claimant alleges such conversation happened within the early period of his employment, and yet his evidence is that he did not challenge any such individual, raise this as a matter of concern with management, nor seek clarification from his line manager. The claimant's inconsistent evidence in this case, lack of detail and lack of contemporaneous evidence led the tribunal to preferring the evidence of Mr Harris.
77. The tribunal finds that the conduct on which allegation 12 is brought did not happen as alleged. Allegation 12 in its entirety must therefore fail and is dismissed.

Allegation 4.2 and allegation 13

78. On 15 January 2020 there was a kick off meeting for the team involved in a bid for tender on a Telefonica project. The claimant attended at this meeting, and he was tasked with creating the tender programme. In this meeting the claimant was provided with a hard copy of all of the tender documents. This was accepted by the claimant in evidence.
79. The claimant also had access to all of the tender documents on the respondent's SharePoint. And he was shown how to access these documents. Again this was accepted by the claimant.
80. Mr Bielderman raised concerns about the claimant's performance on the tender bid on 03 February 2020. This was on the basis that the claimant had not yet sent anything to him. And at which point the claimant was now saying that he did not have the information he required
81. Mr Bielderman sat with the claimant and showed the claimant again where the documents could be located on the respondent's SharePoint. The claimant accepted this under cross examination.
82. Over the following week, the claimant produced hard copies of draft programmes, which Mr Bielderman explained to the claimant that they did not satisfy what was needed. Mr Bielderman provided reflections on the hard copies, with suggestions to the claimant as to what was needed.
83. On around 20 February 2020, the claimant produced a further version of the programme. This again was deemed by Mr Bielderman as inadequate. Mr Bielderman's unchallenged evidence, and therefore accepted by the tribunal, was that he asked the claimant whether he had read the specifications of the tender, or had consulted the tender documents, to which the claimant answered that he had not.
84. Mr Bielderman raised his concerns about the claimant's performance with Mr

Aslam. Consequently, Mr Aslam emailed the claimant on 20 February 2020 (see p.137) reflecting those concerns about the claimant's performance on the Telefonica bid for tender.

85. Given the time pressures and need to complete the programme quickly, Mr Bielderman designed the programme himself using the information from the tender documents. Mr Peacock was involved in formatting the document and providing a sense check of the narrative contained within. Mr Peacock had no other involvement, and was not provided with additional information concerning the project.
86. Mr Peacock did not lie to the claimant about what he was working on.
87. The claimant had access to all of the information he needed in order to complete the programme that he had been tasked with producing. There was no further information needed that was outside of the tender documents, there was no information which Mr Bielderman had access to, which he withheld from the claimant. Mr Bielderman, Mr Peacock and Mr Aslam's evidence was preferred on this allegation. There is contemporaneous documents in the form of emails that support their version of events, which was largely conceded as accurate by the claimant. The claimant's case on this allegation appeared to change to focusing on a particular piece of software that Mr Bielderman was using, rather than on information provided. And further, the claimant at no point identified information that was needed that he was within the completed programme and which he did not have access to. All of this led the tribunal to making the findings that it did.
88. The tribunal finds that the conduct on which allegations 4.2 and 13 are brought did not happen as alleged. Allegations 4.2 and 13 in their entirety must therefore fail and are dismissed.

Allegation 14

89. The claimant was subject to a six-month probationary period in his contract (see p.109). This was subject to the probationary review procedure

3. Probation period

All new employees of the Company are subject to a six month probationary period. During this time you will be subject to the Probationary Review Procedure with regard to your conduct and performance.

90. The probationary review procedure envisaged mid probation reviews around the 12-week mark (see pp95 and 96). The probationary review procedure is explicit on this:

Purpose / Objectives

To assist the new employee to reach acceptable standards of performance through counselling, training and review of targets and for the Company to establish his / her suitability or otherwise for permanent employment within the first six months of employment.

Scope

Applies to all appointments or engagements of greater than six weeks duration.

Terminology

“Probationary Review Form” - Used to record the Manager’s assessment of the probationer.

References and Records

Record Name	Electronic File Name (if applicable)	Electronic Location	Hard Copy Location	Resp. for Maintenance & Disposal	Retention Time	Method of Disposal
12 Week Probationary Review Record	Microsoft Form issued by HR	HR Contracting SharePoint	N/A	HR Manager	Employment Period + 6 years	Deleted
21 Week Probationary Review Record	Microsoft Form issued by HR	HR Contracting SharePoint	N/A	HR Manager	Employment Period + 6 years	Deleted

91. The claimant was invited to a mid-probationary review at 13 weeks into his probationary period. He was invited to a review by letter dated 25 February 2020, with a view to the review taking place on 29 February 2020. The mid-probationary review process is the same process that has been applied to other employees who are on a probationary period.

92. Subjecting the claimant to a treatment that is allowed for, and envisaged by his contract, that being a mid-probationary review, falls short of being a detriment. It would be unreasonable to view this as such, even if the claimant himself did perceive it to reach that level. Further, there is no evidence adduced by the claimant that he was being subject to this review for a any reasons connected to his nationality. To the contrary, the claimant gave evidence that another individual, of a different nationality, was also subject to a mid-probationary review. Further, the tribunal consider that it would be unreasonable to view the holding of such a review in these circumstances as having the effect of purpose of that required in s.26 of the Equality Act 2010.

93. Allegation 14 in its entirety must therefore fail and is dismissed.

Allegation 15 (direct race discrimination only)

94. None of Mr Clayton, Mr Peacock, Mr Johnson or a colleague called Russell were congratulating Mr Carr on becoming the new Project or Planning Manager in front of the claimant on 28 February 2020.

95. Mr Carr was seconded into the role of Planning Manager in Mid-May 2020. And had not held this role before this date. He had had discussions about the role prior to the claimant joining the respondent but had decided that he would not

take up any such role at that time

96. Mr Carr was appointed permanent Planning Manager for the respondent on 30 June 2021. Mr Carr was not appointed to this role any earlier.
97. There were no congratulations of Mr Carr at his desk that took place on 28 February 2020.
98. The tribunal finds that the conduct on which allegation 15 is brought did not happen as alleged. Allegation 15 in its entirety must therefore fail and is dismissed.

Allegation 16 (direct race discrimination only)

99. The claimant was invited to attend at a mid-probation review, in accordance with probationary review procedure. This review was arranged to take place on 29 February 2020 (p.139). The reason for the review was due to unsatisfactory performance of the claimant, which was made known to the claimant in a conversation with Mr Aslam on 20 February 2020 (see pp137-138).

100. The claimant failed to attend the review meeting of 29 February 2020. The claimant did not give advance warning to Mr Aslam or the respondent that he was not going to attend the review meeting. Mr Aslam tried to contact the claimant at the time the review meeting was due to take place but got no response from the claimant (p141).

101. On 28 February 2020, Mr Aslam sent a letter to the claimant. This confirmed the claimant's non-attendance at the review meeting. It requested the claimant to make contact with either Mr Aslam or HR to explain his absence. And rearranged the review meeting to take place on 02 March 2020. It further explained:

If you do not make contact and do not attend our rescheduled meeting on Monday 2 March 2020, the meeting will take place in your absence with one potential outcome being termination of your employment within your probation period.

102. The claimant did not make contact with HR, nor with Mr Aslam. And he continued to be absent from work. The claimant failed to attend the re-arranged mid probationary review meeting on 02 March 2020.

103. Mr Aslam on 02 March 2020, sent a letter to the claimant explaining the following:

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Following your non-attendance at our 2nd Probation Review meeting scheduled for 14.00pm on Monday 2 March 2020, I write to request you attend a disciplinary hearing on Monday 9 March 2020 at 9.30am.

This request follows your failure to attend work on since Friday 28 February, without contacting myself or HR by phone, e mail or calling the Firstcare Absence Management Line.

These allegations are very serious and if upheld by the Company, may result in your immediate dismissal.

The meeting will be conducted by myself, James Timon, Senior HR Manager will also be in attendance.

You have the right to be accompanied at this meeting by a work colleague or trade union official if you wish.

Should you fail to attend the meeting for any reason without prior explanation a decision may be taken in your absence.

104. The claimant did not contact Mr Aslam or HR in advance of the disciplinary meeting arranged to take place on 09 March 2020. He continued to remain on unauthorised absence. And he failed to attend the disciplinary meeting of 09 March 2020.
105. Ms Aslam decided to dismiss the claimant for having been absent from the workplace without leave since the 27 February 2020, having failed to attend the two mid-probation reviews, having failed to respond to the communications that had been made with him and having failed to attend this disciplinary reasons. The decision to dismiss was in no way connected to the claimant's nationality.
106. The claimant was dismissed. However, these were for the reasons set out above. This was not because of the claimant's nationality as alleged. Allegation 16 in its entirety must therefore fail and is dismissed.

Conclusions

107. For the avoidance of doubt, all claims in this case fail and are dismissed, for the reasons set out above.

Employment Judge Mark Butler

Date 25 March 2022

JUDGMENT SENT TO THE PARTIES ON

12 April 2022

FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

APPENDIX A

The claimant relies on the following as being acts of race related harassment in breach of s.26 and s.40 of the Equality Act 2010 or direct race discrimination in breach of s.13 and s.39 of the Equality Act 2010. Incidents 14 and 16 are relied on as acts of direct race discrimination only. All the other acts are relied on as acts of race related harassment or acts of direct race discrimination.

1. On his first day of employment as Planning Manager the claimant was met by Steven Peacock, one of the planners supposed to be reporting to him. Steven Peacock's attitude was grumpy and he gave the claimant a desk between his and Damien Carr's which had the worst of the three chairs at those desks. The claimant says that this was a detriment.
2. From a get to know you meeting two hours later on that first day Damien Carr made it clear that he would not be reporting to the claimant even though he should have been because the claimant was the Planning Manager.
3. The site based planner known as Benji (the claimant was not certain of her second name) would also report to Mr Carr rather than to the claimant as she should have done.
4. Steven Peacock lied to the claimant. Specifically:
 - (i) Telling him that you needed to be a member of the Chartered Institute of Buildings in order to get a construction skills certification scheme card.
 - (ii) By telling the claimant that Ian Bielderman had given Steven Peacock information about a project other than the Telefonica project (see Incident 13 below).
5. Mr Peacock spoke disparagingly about Iranians. Mr Peacock and Mr Carr were having a conversation about a holiday which Mr Peacock was planning to have in the USA. Damien Carr said to Mr Peacock that he knew that there were areas of the USA where there were lots of Iranians and Steven Peacock said in response "that's why I'm not going to that area". This happened one week before the claimant left work, i.e. towards the end of February 2020.
6. Mark Pughe (CAD Designer) started to test the claimant's basic knowledge to generate a row with him in front of colleagues. That was in the first week the claimant worked for the respondent, around the third day.
7. Steven Peacock would swear at the claimant as he went past when Mr Peacock was having a cigarette/e-vape outside the office. This happened regularly.
8. While the claimant was on the phone with a sub-contractor talking about a project Damien Carr said the claimant was a "stupid choice". This happened in the third or fourth week the claimant was working for the respondent.

9. Even though the claimant was the Planning Manager a new Planner was interviewed by Damien Carr without the claimant's involvement. The respondent's Technical Director confirmed to the claimant that Damien Carr had interviewed the new Planner who would "start shortly". As Planning Manager, the new Planner would have reporting to the claimant but he had no involvement or prior knowledge of the recruitment. The claimant believes that the new Planners name was Bamal. This happened four or five days before the claimant was invited to the mid probationary review.
10. Steve Clayton who was a Technician asked him three or four times during the claimant's period of working for the respondent "where are you from".
11. Jennifer Minnett, who was a Junior Designer, was having a conversation with Mark Pughe about a new Planning Manager. Jennifer Minnett said they were getting rid of the new Planning Manager. The claimant said this referred to him as he was the new Planning manager. That happened in the second or third week when the claimant was working for the respondent.
12. Paul Harris, who was an Estimator, was having a conversation with another employee (the claimant thinks that other employee was the son of an employee called Phil Johnson). During that conversation Paul Harris was talking in front of the claimant and said that they were going to get rid of the claimant. This happened early in the morning on the second or third week when the claimant was working for the respondent.
13. The claimant was asked to make a tender programme for Telefonica. He asked Ian Bielderman for the information he needed to create that tender programme. Ian Bielderman would not give it to him. However, Ian Bielderman did provide it to Steven Peacock. When the claimant asked Steven Peacock about this he denied that he had been given the information for the Telefonica contract by Ian Bielderman and said he had been given it for a different project. This happened in the last week when the claimant worked for the respondent.
14. On 25 February 2020 the claimant was invited to a "mid probationary review" which was to be held on 28 February 2020. The claimant says that although his contract included a probationary period it did not provide for a mid probationary review. The claimant accepts he did not attend the mid probationary review.
15. On the day before his mid probationary review Damien Carr was being congratulated on being the new Project Manager by Steven Clayton, Steven Peacock, Paul Johnson and another colleague called Russell. This was done in front of the claimant. The claimant says that he knew then that there was no point him attending the mid probationary review because the respondent had already been made to get rid of him and appoint Mr Carr as Planning Manager in his place.
16. The claimant says that the decision to dismiss him at the hearing on 9 March 2020 was an act of discrimination. He says that an employee who was not

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Iranian would not have been dismissed even if they had not attended a mid probationary review but instead been absent without leave.

List of Issues

17. Direct Race Discrimination (Equality Act 2010 Section 13)

- (i) The claimant's nationality is Iranian;
- (ii) Did the respondent or its employees do the things at paragraphs 1 to 16 above ?
- (iii) Did each of the incidents at 1-15 amount to a detriment?
- (iv) For each of incidents 1-16 was it less favourable treatment?
- (v) The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimants. The claimant has not named a particular person who he says was treated better than he was.
- (vi) If there was nobody in the same circumstances as the claimant the Tribunal will decide whether he was treated worse than someone else would have been treated.
- (vii) If so, was that treatment because of the claimant's nationality.

18. Race Related Harassment (Equality Act 2010 Section 26)

- (i) Did the respondent or its employees do the things at paragraphs 1-14 above
- (ii) If so, was that unwanted conduct.
- (iii) Did the conduct relate to the claimant's nationality;
- (iv) Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant;
- (v) If not, did it have that effect. The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

19. Reasonable Steps Defence

If any of the respondent's employees did discriminate or harass the claimant, has the respondent shown that it has a defence in relation to those acts

because it took all reasonable steps to prevent them occurring (Section 109(4) of the Equality Act 2010).

20. Remedy for Discrimination or Harassment

- (i) Should the Tribunal make a recommendation that the respondent takes steps to reduce any adverse effect on the claimant or should it recommend? Can and should that include a recommendation that the claimant be reinstated?
- (ii) What financial losses has the discrimination and/or harassment caused the claimant.
- (iii) Has the claimant taken reasonable steps to replace lost earnings, for example, by looking for another job.
- (iv) If not for what period of loss should the claimant be compensated.
- (v) What injury to feelings has the discrimination or harassment caused the claimant and how much compensation should be awarded for that.
- (vi) Has the discrimination or harassment caused the claimant personal injury and if so, how much compensation should be awarded for that.
- (vii) Is there a chance the claimant's employment would have ended in any event? Should their compensation be reduced as a result?
- (viii) Did the ACAS code of practice on disciplinary and grievance procedures apply?
- (ix) Did the respondent or the claimant unreasonably fail to comply with that code.
- (x) If so, is it just and equitable to increase or decrease any award of compensation payable to the claimant.
- (xi) By what proportion up to 25%.
- (xii) Should interest be awarded and if so, how much.