



# EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

**Mr Peter Senfuka**

**v**

**The Freemantle Trust**

**Heard at:** Watford

**On:** 21,22 and 23 February 2022

**Before:** Employment Judge Allott

**Members:** Ms N Duncan

Mr W Dykes

## **Appearances**

**For the Claimant:** In person

**For the Respondent:** Ms Caroline Jennings (counsel)

## **JUDGMENT**

The judgment of the tribunal is that:

1. The claimant's claim is dismissed.

## **REASONS**

### **Introduction**

1. The claimant was employed by the respondent, a charitable trust which provides residential and nursing care to vulnerable adults in homes across the South East of England, as a Care Worker from 5 August 2019 until dismissal with effect on 17 March 2020. By a claim form presented on 17 June 2020, following a period of early conciliation from 9 June 2020 to 16 June 2020, the claimant brought complaints of race discrimination and unfair dismissal. Since he did not have sufficient qualifying service to bring a claim for unfair dismissal, the tribunal accepted his claim in part, namely the claim of race discrimination.

### **Postponement**

2. At the outset of this hearing the claimant applied to postpone the hearing. The context of this application is as follows:

3. The claimant presented his claim on 17 June 2020. At the time he was represented by a lay representative, Mr Glenroy Charles of GAC Business Management Limited. The claimant was represented by Mr Charles at the closed preliminary hearing held on 2 February 2021 and the open preliminary hearing held on 11 June 2021. This three-day hearing was listed at the hearing held on 11 June 2021. Pre-hearing check lists were sent to the parties for completion with a return date of 1 February 2022.
4. On 31 January 2022 the claimant wrote to the tribunal requesting a postponement of this hearing. He informed the tribunal that Mr Charles had withdrawn from the case and exhibited an email from Mr Charles stating that he was not in the UK. The claimant stated he wanted a postponement to get alternative representation.
5. On 31 January 2022 the respondent objected to the postponement application pointing out that the claimant had nearly four weeks to obtain representation and that the case was already nearly two years old.
6. On 10 February 2022 Employment Judge George refused the postponement application stating:

“It is nearly two years since dismissal, and it may not be possible to find an alternative date until 2023. The claimant has enough time to find a new representative and the scope of the issue is narrow enough for any necessary preparation to be done in time.”
7. On Thursday 17 February 2022 Equip Law emailed the tribunal on behalf of the claimant requesting Employment Judge George reconsider her refusal of the application to postpone. The grounds were that the claimant had failed to secure representation and he would be put at a disadvantage if the hearing went ahead. The reason for the withdrawal of Mr Charles was that he had had to travel out of the UK to the Caribbean due to family bereavement.
8. The application was put before Employment Judge George on Friday 18 February 2022 who directed:

“PP refused. Failure to find an alternative representative is not a sufficient reason to postpone the hearing.”
9. That decision does not appear to have been communicated to the parties.
10. At the start of this hearing the claimant renewed his application for a postponement. The claimant submitted that without representation he would be at a severe disadvantage; that it was the first time he had represented himself; and that he felt he needed assistance. The respondent opposed the application. Ms Jennings submitted that it was not uncommon in employment tribunals for claimants to represent themselves; that it was now almost two years since dismissal and memories fade; that the respondent had been put to considerable cost and expense already; that the case was unlikely to come back until 2023; and that the issue in the case was relatively straightforward and simple.

11. The application for postponement is refused. We have balanced the various matters advanced and concluded that it is not in the interest of justice to postpone the case. It is unfortunate that the claimant does not have his representative of choice, but he has had nearly four weeks to obtain alternative representation. The issue in this case is not complex and, in our judgment, the claimant should be well able to put his case in cross examination and closing argument. He will be given appropriate breaks in the hearing. In any event, Employment Judge Alliot is confident he can ensure that the claimant's case is put to witnesses in fairness to all parties. Any delay is the enemy of justice due to failing memories and the case is already two years old. It is unlikely to be relisted for another year. The overriding objective includes the appropriate use of tribunal resources and the case is ready to be heard with witnesses in attendance.

### **The issues**

12. The claim essentially arises out of the claimant's dismissal which the respondent alleges was because of gross misconduct, namely that it was found that he had threatened a resident with physical violence. The claimant denies the allegation against him and says that the sole witness to the alleged incident, Ms Fahawn Baker, had a perception that he, the claimant, was being threatening due to a racist assumption based on the claimant's strong African-English accent. The respondent then dismissed the claimant based on Ms Baker's evidence and the claimant's argument is that the decision to dismiss is therefore contaminated by Ms Baker's allegedly prejudiced view of the claimant's accent.
13. The issues were set out by Employment Judge George following the preliminary hearing heard on 2 February 2021. They are as follows:-

#### **"The issues**

7. The issues between the parties which potentially fall to be determined by the Tribunal are as follows:

#### *EQA, section 13: direct discrimination because of race*

- 7.1 It is not in dispute that the respondent dismissed the claimant with effect from 17 March 2020.
- 7.2 Has the respondent subjected the claimant to the following treatment
  - a. Ms Baker giving evidence that the claimant threatened and verbally abused a resident.
- 7.3 Was that treatment "*less favourable treatment*", i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The claimant relies on hypothetical comparators...[no comparator given]

- 7.4 If so, was this because of the claimant's race and/or because of the protected characteristic of race more generally?

*Remedy*

- 7.5 If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the claimant is awarded compensation and/or damages, will decide how much should be awarded."

14. By the time of the open preliminary hearing on 11 June 2021 the claimant's claim had developed somewhat. In a skeleton argument advanced on his behalf, the following was recorded:-

"i The Freemantle defence has apart from the flawed and implausible witness Fahawn Baker produced no evidence of:

- A "smoking gun" in the form of corroborating witnesses
- photographic evidence of harm or previous evidential "smoke".

Thus, is Fahawn Baker and her ethnic cleansing mission grounds to render the claimant as having no reasonable prospects of success with his claim?

ii Fahawn Baker is the only witness to the "offence" with her crusade to work only with people who look like she does and sound like she does is. Is it reasonable to make a judgment without her being heard and challenged?"

**The evidence**

15. We had a hearing bundle running to 171 pages. We had witness statements and heard evidence from:

15.1 The claimant (two statements)

15.2 Mr Blesson Thomas, a Home Manager of one of the respondent's homes (not Freemantle Court) and Dismissing Officer.

15.3 Ms Fahawn Baker, Senior Care Worker at Freemantle Court.

16. In addition, we had written closing submissions from both parties.

**The law**

17. The claimant brings a claim of s.13 Equality Act direct discrimination on the grounds of race.

18. As per the IDS Employment Law Handbook Discrimination at Work at 15.7

"An employer directly discriminates against a person if:

- It treats that person less favourably than it treats or would treat others, and

- The difference in treatment is because of a protected characteristic.

Tribunals often deal with these two stages in turn... However, as Lord Nicholls commented in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337, HL (a sex discrimination case), in some cases the “less favourable treatment issue cannot be resolved without, at the same time, deciding the reason why issue. The two issues are intertwined.”

19. Regarding the burden of proof, as per the IDS Handbook at 33.11

“Two stage approach. As succinctly put by Her Honour Judge Eady QC in *Fennell v Foot Anstey LLP* EAT 0290/15, “Although guidance as to how to approach the burden of proof has been provided by this and higher appellate courts, all judicial authority agrees that the wording of the statute remains the touchstone.”

20. Further, at paragraph 33.12:

“The Court of Appeal explicitly endorsed guidelines previously set down by the EAT in *Barton v Investec Henderson Crossthwaite Securities Ltd* [2003] ICR 1205, EAT, albeit with some adjustments, and confirmed that they apply across all strands of discrimination. The guidelines can be summarised as follows:

- it is for the claimant to prove, on the balance of probabilities, facts from which the employment tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination. If the claimant does not prove such facts, the claim will fail.
- in deciding whether the claimant has proved such facts it is important to bear in mind that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In many cases the discrimination will not be intentional but merely based on the assumption that ‘he or she would not have fitted in’
- the outcome at this stage will usually depend on what inferences it is proper to draw from the primary facts found by the tribunal (see further Chapter 34, ‘Proving discrimination’, under ‘Inferring discrimination’)
- the tribunal does not have to reach a definitive determination that such facts would lead it to conclude that there was discrimination – it merely has to decide what inferences could be drawn
- in considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts
- these inferences could include any that it is just and equitable to draw from an evasive or equivocal reply to a request for information (see Chapter 34, ‘Proving discrimination’, under ‘Ask and respond process’)
- inference may also be drawn from any failure to comply with a relevant Code of Practice (see Chapter 34, ‘Proving discrimination’, under ‘Inferring discrimination – breach of EHRC Codes of Practice

- when the claimant has proved facts from which inferences could be drawn that the respondent has treated the claimant less favourably on a protected ground, the burden of proof moves to the respondent
- it is then for the respondent to prove that it did not commit or, as the case may be, it is not to be treated as having committed that act
- to discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that its treatment of the claimant was in no sense whatsoever on the protected ground
- not only must the respondent provide an explanation for the facts proved by the claimant, from which the inference could be drawn, but that the explanation must be adequate to prove, on the balance of probabilities, that the protected characteristic was no part of the reason for the treatment
- since the respondent would generally be in possession of the facts necessary to provide an explanation, the tribunal would normally expect cogent evidence to discharge that burden – in particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or any Code of Practice”

### **The facts**

21. The claimant was employed as a Carer on 5 August 2017 at Freemantle Court. He describes his race as black African.
22. Freemantle Court is a large nursing home with capacity to accommodate 90 individuals. It has a number of wings.
23. This case involves an incident that took place on 18 November 2019.
24. Although three allegations were subsequently made against the claimant, two were found not proved and consequently we do not deal with them.
25. The incident on 18 November 2019 involved Patient A. Patient A was aged between 80 and 90 and had dementia. He lived on a nursing wing, slept in a hospital bed, needed frequent repositioning and around the clock care. His behaviour could be challenging and his mood variable. This was all known to the care staff including the claimant. We find that Patient A was a frail and vulnerable individual.
26. On 18 November 2019 Ms Baker and the claimant were due to work together. It is common ground that they had never worked together before. Ms Baker told us, and we accept, that prior to 18 November 2019 she did not know of the claimant at all. Prior to that day they were complete strangers.
27. On the morning of 18 November 2019, the claimant and Ms Baker went to Patient A’s room. Ms Baker told us, and we accept, that the claimant had in fact missed the handover that morning. Ms Baker was to wash Patient A and the claimant to dry him.

28. It is common ground that whilst being washed Patient A became distressed. Ms Baker states that he started to get confused, distressed and swore. Ms Baker said that she had never heard Patient A swear before.
29. The claimant's witness statements do not really deal with the incident in any detail. However, in an investigatory interview with Lucy Goodman (Investigation Manager) on 10 January 2020 he refers to Patient A being in a mood and having a tantrum.
30. Again, it is common ground that Patient A lashed out at the claimant. The claimant told us Patient A did not make contact and, in any event, we accept Ms Baker's evidence that, even if Patient A had made contact, he lacked the strength for it to have been with any force.
31. There is considerable dispute as to what happened next. The claimant told us that he moved back and said words to the effect, "If you don't stop, I will defend myself." At various times the claimant has sought to explain any comment he made as banter or dealing with the situation jokingly. By contrast, Ms Baker told us that the claimant grabbed Patient A's raised arm and pushed it down with force, bent over Patient A "squared up to him and with his face a mere fist distance from Patient A's said "If you hit me, I will punch you". She describes the claimant's tone as aggressive and his manner as clearly angry.
32. Whatever was said, it is common ground that Ms Baker immediately confronted the claimant and said that his behaviour was not acceptable. In his investigation interview on 10 January 2020 the claimant is recorded as saying, "Fahawn started having a go at me saying I should not have said that". In his disciplinary hearing on 12 March 2020 the claimant is recorded as saying the following:

"BT (Mr Blesson Thomas) she (Ms Baker) heard it?

PS – Yes and she had a go at me.

BT – Response?

PS – she rebuked me

BT - What did she say?

PS – shouldn't say that"
33. The context of these remarks will be given in due course.
34. Ms Baker gave evidence that the claimant's response to being told he should not have said what he said was "He gets me like that". The claimant denied saying this.
35. Having calmed Patient A, Ms Baker left the room and reported what had happened to Ms Paula Read the Registered Nurse on duty. Ms Baker made a handwritten note of the incident on 21 November 2020, shortly after

she made an anonymous call to the Safeguarding Team. In it she states that she told Paula Read about it who said, "Ok I'll have words just let me know if he does or says anything else". In her investigatory statement to Lucy Goodman on 10 January 2020, Paula Read is recorded as saying, when asked about the claimant threatening a resident with physical violence;

"On 18 November 2019 were you made aware of these incidents?

PR – Yes they were reported to me by Fahawn. I spoke to Darius, he advised me to do a key session. I did that. Peter told me it was just banter with [Patient A]"

...

and

"LG – Can you remember exactly what Fahawn reported to you ?

PR – I can't remember exactly what but she said that Peter... had been verbally aggressive towards [Patient A] she said that he threatened to hit [Patient A]"

36. In her handwritten account Ms Baker says that on leaving the nurses station she saw Ellen (the Duty Officer) and told her about it. Her response was "Well maybe you just need to remind him he is at work and he cant speak to people that way". This is consistent with what Ms Baker told Ms Goodman in an investigatory interview on 3 March 2020.
37. About an hour later Mr Darius Bancerek, the Duty Manager, looked into a room where Ms Baker was, and she says she told him. His reaction was to thank her and go for a cigarette.
38. In his investigatory statement to Ms Goodman on 10 January 2020 Darius Bancerek is recorded as saying, when asked about the claimant threatening a resident with physical violence:

"LG – On 18 November 2019 were you made aware of these incidents?

DB – I'm not sure that it was the 18 November but I remember that it was a Monday and it was the end of the shift, 2.30ish. Fahawn was leaving at the end of her shift, she had worked with Peter. We were just talking and she said "Do you know that Peter said to [Patient A] "If you hit me I'm going to hit you back". Fahawn then said "He needs to go, he needs to go".

39. We prefer the evidence of Ms Baker that this conversation actually took place at or around breakfast time.
40. It is clear that Darius Bancerek decided to deal with the incident by getting Paula Read to have a key session with the claimant. The key session form for 18 November 2019 deals with a number of practice issues and in the section dealing with 'unprofessional practice-verbal' it is recorded:



“Peter states that his conversation is “banter” and is not taken seriously. I advised Peter to be professional when speaking to residents. I also advised that if overheard his words may not come across as appropriate.”

41. We find that, but for the subsequent report by Ms Baker to Safeguarding, this probably would have marked the end of the matter as far as the claimant and his immediate management were concerned. We note that in the investigation report dated 10 January 2020 Ms Goodman states:

“Darius did not take appropriate action in line with the Trust’s policies and procedures.”

42. On Tuesday 19 November 2019 Ms Baker had the day off.

43. On Wednesday 20 November Ms Baker attended the breakfast shift. She asked Nicki, the Duty Officer, if she knew anything about the incident and was concerned that she did not and that the claimant was apparently working normally. Ms Baker decided to report directly to Safeguarding. As she put it in evidence at the disciplinary hearing on 12 March 2020:

“Not a single person has come forward to support me in the Management Team. I have safeguarding training and it seems like it doesn’t mean anything.”

44. On 20 November at about 2pm Ms Baker telephoned the Safeguarding Team to report the incident. It was then that she wrote her handwritten account as an aide memoire. In it she records:

“Patient A lashes out after I wash his armpits as Peter goes to dry him. Peter grabs his arm to stop him hitting him comes close to his face and says “If you hit me I will punch you”. Very clear and stern tone. I confront him straight away and say “excuse me you cannot say or do that. This man is ill. He doesn’t know what he is saying or doing. He has dementia. Even if he did he will apologise later.” Peter replies “He just gets me like that”.

45. On 21 November at 18.33 the Safeguarding Team at Bucks County Council notified Mr Antonias Loumousiotis of the respondent about the anonymous safeguarding allegations.

46. On 22 November 2019 the claimant was suspended from duty. The allegations were outlined, to him and he was informed that an investigation manager would be appointed.

47. The claimant questions why there was a delay in taking action from 18 to 22 November. We find that this has been properly explained by Darius not taking appropriate action on 18 November and the correct action only being implemented when the Safeguarding Team became involved. The police were notified. Also, on 22 November 2019 the respondent notified the CQC and an entry was made on the SOVA register.

48. On 29 November 2019 a letter was written to Patient A’s family under the Duty of Candour informing them of the incident. The letter states that the matter had been escalated to the police who were not taking action at that

point as there was no physical abuse. Nevertheless, the delay in the respondent investigating was due to the matter being in the hands of the police investigating a different allegation.

49. On 30 December 2019 the Safeguarding Team emailed the respondent to say that (as regards another allegation against the claimant which did involve physical contact with another patient but was later not proved) the police were to take no further action and the respondent could start its internal enquiries. Neither the claimant nor Ms Baker had been interviewed by the police.
50. On 2 January 2020 the claimant was invited to an investigatory meeting. Ms Goodman had been appointed as Investigation Manager.
51. On 10 January Ms Goodman held investigatory interviews with Darius Bancerek, Paula Read and the claimant.
52. Mr Bancerek and Ms Read confirmed that Ms Baker had reported the incident to them as set out above.
53. The claimant submitted a written statement in advance. This does not deal with the incident with Patient A. The interview notes record his comments as follows:-

“LG – It is alleged that you threatened a male resident known as [Patient A]. It is alleged that you got close to his face and said “if you hit me, I am going to punch you in the face”.

PS – I remember the incident although the words may not be accurate. I can explain what I said.

I joke with [Patient A]. When he is in that mood – having a tantrum.

I said “If you don’t stop, I will hit you back”.

LG – How did [Patient A] respond to that?

PS – He composes himself and he complies so we can go on.

LG – Is that how he responded on 18/11?

PS – He stopped the aggression. Fahawn started having a go at me saying I should not have said that.

LG – How did you respond to Fahawn

PS - I kept quiet.

LG - When you said “If you don’t stop I will hit you back” what was the distance between you and [Patient A]?

PS - He was trying to hit me so I moved away”.

54. Later in the interview the claimant is recorded as saying the following:-

“LG - Did you have a meeting with Paula on 18/11

PS – Yes, I had a performance meeting

LG – Can you tell me what was discussed please

PS – My interaction with residents I explained the banter with [Patient A] that I have just told you.”

55. The claimant was provided with the notes of his interview and sought to correct the words “I will hit you” to “I will defend myself”.
56. Ms Baker did not commit to an interview with Ms Goodman at that stage. She explained to us she felt unsupported by management and it was as if she was under investigation herself. She told us she wanted to be accompanied. We accept her explanation. We readily understand that a whistleblower may feel cautious when he/she has raised issues concerning patient welfare resulting in third party involvement and possible managerial shortcomings. We do not find that this undermines her credibility.
57. Ms Goodman produced the investigation report dated 4 February 2020. In it she records: “By his own admission PS threatened resident [Patient A] with physical violence. PS told me that he said to [Patient A] “If you don’t stop, I will hit you back.”
58. On 19 February 2020 the claimant was invited to a disciplinary hearing. The allegations were set out in the notification letter.
59. The claimant has relied upon the fact that the police did not take action in support of his contention that his actions were not threatening. We find that no such inference can be drawn. The police did not interview the claimant or Ms Baker and took no action due to the absence of physical abuse.
60. On 3 March 2020 Ms Baker provided a statement to Ms Goodman. In it she states:

“I was paired with Peter as two men should not work together.

Peter did not say a word whilst we supported the first person to wash and dress. We went to [Patient A] next, I knocked and Peter walked in behind me. [Patient A] had dementia and his mood is up and down. Peter was on [Patient A]’s left side, I was washing him and Peter was drying him. [Patient A] reached out to hit Peter. Peter pushed [Patient A]’s hands down and leant right over him ([Patient A] was laying in bed) Peter was a fist away from [Patient A]’s face when he said “If you hit me, I will punch you”.

I confronted him telling him that he cannot say that and explaining that [Patient A] has dementia.

Peter replied “He gets me like that”.

I told him that I don’t care, you can’t speak to people like that.”

61. On 12 March 2020 Mr Blesson Thomas held the disciplinary hearing. During this the claimant stated:-
- “PS – We went to [Patient A], she went in first, I followed, she went left I went right. I approached the bed, [Patient A] striked out, I was shocked, not expected, I moved backwards, knee jerk reaction, I talked, I stopped him and said Stop I’ll defend myself.”
62. When Ms Baker’s version of the words spoken was put to him the claimant said:-
- “PS – She misquoted me, I corrected that, I sent it to you, she did not hear that, she made it up.”
63. During the disciplinary hearing Ms Baker also gave evidence and she stated as follows:-
- “Armpits dry, goes to hit him. PS pushed his hand down and got close to his face and said “If you hit me, I will punch you”. I said what are you doing, he was a fist distance away from his face, you can’t do that it’s not right.”
64. On 16 March 2020 the claimant was informed by Mr Thomas that the allegation concerning Patient A had been proved and that he was summarily dismissed. He was informed of his right to appeal.
65. The claimant did not appeal until 31 May 2020 as he understood he needed to do so as part of the Employment Tribunal process. The appeal was not dealt with as it was out of time.
66. At no stage prior to the claim did the claimant complain of racist motivation or conduct by anyone.

## **Conclusions**

67. We find that on 19 November 2019 the claimant did grab Patient A’s arm, pushed it down and said to Patient A “If you hit me, I will punch you”.
68. We find that this was not said jokingly or as banter. We find that it was threatening physical violence to a vulnerable patient.
69. The reasons we make these findings are as follows:
- 69.1 We found Ms Baker to be an entirely credible witness.
- 69.2 We find that Ms Baker’s contemporaneous actions are entirely consistent with the claimant saying something very wrong. Ms Baker immediately challenged the claimant and she was unlikely to do this if the claimant had said something innocuous like “I’ll defend myself”.
- 69.3 Ms Baker escalated the matter appropriately as soon as possible and informed the Registered Nurse and two managers. Two of these have corroborated the fact that she reported what she says the claimant had done.

- 69.4 Ms Baker has been consistent throughout as to what she saw and heard.
- 69.5 We find that the claimant has been inconsistent on this matter. Initially he sought to dismiss it as banter or a joke. Later he admitted he said he would hit Patient A. Later still he changed this to “I’ll defend myself”.
- 69.6 We find it improbable that Ms Baker would invent such an allegation against someone she did not know and had only just met.
- 69.7 We find that Ms Baker did not perceive the claimant as threatening due to a racist assumption based on his strong, African-English accent. The threatening conduct was clear and related principally to content and not tone.
- 69.8 We find that Ms Baker’s motive in reporting the claimant to Safeguarding was concern about the fact that no appropriate action had been taken against the claimant and not due to the claimant’s race in any way.
- 69.9 We find that no action taken by Ms Baker or the respondent was motivated by the claimant’s race either consciously or unconsciously.
70. The claimant asserts that Ms Baker is in essence “a racist bad apple” and has orchestrated his dismissal by fabricating the allegation against him. We reject this as being in any way accurate. We accept that Ms Baker has worked harmoniously alongside many diverse care workers including those from the black and Asian communities.
71. We find that the claimant was dismissed.
72. We find that Ms Baker did give evidence that the claimant threatened and verbally abused a resident.
73. We have taken the hypothetical comparator as a non-black African who had done the same things.
74. We find that that treatment was not less favourable treatment as the hypothetical comparator would have been treated in exactly the same way by both Ms Baker and the respondent.
75. Accordingly, the claimant’s claim is dismissed.

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Employment Judge Alliot

Date: 3 May 2022

Sent to the parties on: 5 May 2022

For the Tribunal Office