EMPLOYMENT TRIBUNALS

Claimant: Mr J W Johnson

Respondent: Key Care and Support Limited

Heard at: Manchester (remotely, by CVP) **On:** 23 and 24 May 2022

Before: Employment Judge Rice-Birchall
A Ross-Sercombe
T Cole

REPRESENTATION:

Claimant: In person
Respondent: Mr M Cameron, Consultant

JUDGMENT

The judgment of the Tribunal is that the claimant was not discriminated against because of his race. His claim is dismissed.

REASONS

Introduction

1. This claim has come before this Tribunal having been remitted to us, as a differently constituted Tribunal, by the EAT which, by its Judgment of 11 June 2021, upheld the respondent's appeal against the original Tribunal's finding that it had directly discriminated against the claimant, contrary to section 13 of the Equality Act 2010 (EqA), with written reasons sent to the parties on 22 March 2019.

The Issues

2. The issues to be determined by the Tribunal are as set out in a Case Management Order following a preliminary hearing before Employment Judge Allen on 28 July 2021. They were drawn to the parties' attention at the outset of the hearing and agreed as follows:

1. Did the claimant make complaints to the respondent about being racially abused by another health care worker?

2. Did the respondent fail to take any action in response to his complaints?

3. If so, was that less favourable treatment than would have been given to a person of another race in the same or not materially different relevant circumstances? Relevant to this issue will be the following:

   3.1 Who is/was the claimant's comparator?

   3.2 Was the claimant treated less favourably than an actual compactor was treated, or a hypothetical comparator would have been?

4. Was the claimant subjected to a detriment by that treatment?

5. Was the treatment because of the claimant's race (because he is black African)?

6. If the claimant succeeds in his claim, what should the remedy be?

Evidence and Witnesses

3. The Tribunal heard from the claimant and from Ms Rachel Walker and Ms Kirsty Wright. The Tribunal found Ms Walker to be a credible witness. Ms Wright struggled to recall anything other than her initial phone call with the claimant after his first shift at Mather Fold. However, the Tribunal does not consider that her evidence lacked credibility but is mindful that the events being discussed occurred around four years ago and also that Ms Wright's job role did not involve her in the safeguarding aspect of the claimant's role.

4. The claimant's evidence was confused and confusing. By way of example, the claimant was clear in his evidence on day 1 that he had not worked after 1 October 2017 until 10 October 2017 at Mather Fold as he had had to be persuaded to return there after the first incident of racial abuse. However, on day 2, the claimant produced evidence that he had accepted work at Mather Fold on 2nd, 4th, 6th and 8th of October 2017 and insisted that he had worked on those dates despite his previous evidence and despite the respondent's payslips indicating that he had only worked at Mather Fold on 1st and 10th of October. At another time he stated that he had continued to work there after 10 October 2017.

5. Additionally, the claimant seemed very confused about the number of times that he attended the respondent's office, and indeed what was said or done on these occasions. There is only written evidence of one such visit, which was on 22 November 2017, when he attended to write the statement for the safeguarding incident requested by Ms Walker. However, according to the claimant's evidence he either went in almost every day or just once or twice, when he was requested to bring documents. The respondent's evidence was that Ms Walker was contacting him and that their conversations were mostly by telephone, but that he only attended a couple of times.

6. Further, neither the claimant's statement nor his claim form make any mention of raising any allegation of racial abuse after working on 1 October 2017. Although Ms Wright acknowledges that he did so, orally, the claimant in evidence stated that he had made two calls and been into the office after 1 October. However there is no mention of that in his claim for or in his statement and again, the Tribunal found his evidence in this regard confused and confusing. According to the respondent, this was the first they had heard of these office visits.

7. At the outset of the second day, the claimant made an application to include approximately six additional documents. For reasons given at the time, the Tribunal allowed the claimant to include the documents and asked the claimant a question in relation to them. In response, the respondent sought to disclose the claimant's payslips for the relevant period.

Findings of Fact

8. The Respondent is an agency which supplies healthcare workers to its clients. The claimant was engaged by the respondent, on a zero hours contract, from 9 February 2016.

9. The respondent has a complaints procedure. It states, inter alia, that: all complaints from customers made will be taken seriously, no matter how minor they are; the organization views everyone as a customer, including staff; if a complaint is received, every effort must be made to resolve the matter immediately; and that any complaint dealt with must be documented and referred to the Branch Manager for review, with the name of complainant, contact details, nature of complaint and action agreed, documented. The first stage of the complaint process is that, when a complaint is received, it will be passed onto the Branch Manager, who will record the complaint in the Complaints Log File and send an acknowledgement letter to the complainant within two working days.

10. On 1 October 2017, the claimant accepted a nightshift at Mather Fold House, a residential unit. Following that shift, Ms Rachel Wright of the respondent ask the claimant how it had gone. The claimant informed her that he did not like working at Mather Fold House for three reasons, one of which was that he had been racially abused whilst working there by an agency worker supplied by a different agency. Ms Wright raised the complain of racial abuse with Mrs Walker who worked closely with her, but nothing was done about it, as Ms Wright believed the claimant did not want to raise it formally. He had said that he was not a baby and had raised it himself with the managers at Mather Fold.

11. According to the claimant's evidence, there was nothing done about it despite him going into the office at least twice to discuss it and emailing. The Tribunal does not accept this evidence. There is nothing to suggest that at this stage the claimant gave any indication that he wished to raise the matter formally or for it to be taken forward or progresses in any way. To the contrary, he had given the impression that he had dealt with it and was happy to have done so himself.

12. As mentioned above there was conflicting evidence from the claimant as to whether or not he continued to work at Mather Fold until his shift on 10 October 2017 when the second incident of racial abuse occurred. The claimant said that he only returned to work under duress from the respondent on 10 October, but also said that he had worked in between 1 and 10 October and that he had continued to work thereafter. The Tribunal finds that the claimant worked on 1 and 10 October but that he weas readily persuaded to return on that second occasion without pressure or duress.

13. On 10 October 2017 the claimant worked a further shift at Mather Fold House. He was contacted by Ms Wright the following morning, by email, to ask how it had gone. She was following up because she knew there had been an incident on the first occasion and was checking. There was no evidence to suggest that there was any verbal or written communication following that email between the claimant and Ms Wright, and the Tribunal is satisfied that no such communication occurred.

14. Ms Walker then contacted the claimant again by email on 17 October 2017 as she had been notified that a safeguarding concern had been raised. Her email stated: “Following your shift on Tuesday 10 October at Mather Fold can you please send an email to recall your version of events in the night. It is alleged that an incident has occurred on the night of this shift therefore if you can send anything in writing we can speak with the client to close this investigation.”

15. By response. on 19 October, the claimant responded as follows: “The shift at Mather fold went well, apart from a female member of staff from another agency that refused to work with black people! I was on shift with Dave, and another African lady called Liz, the other girl from the same agency as Dave and Liz refused to work with, myself and Dave went to the small building were a male service user was living, and we were expecting to swap with the other two female agency member of staff. However, one of the other agency staff came in and refused to work with her saying she doesn’t like her and it because of her culture. I asked her not to say discriminatory things like that, and she can’t be picking and choosing who she worked with, I then asked Dave to work with her so I could work with the other African lady so there wasn’t tension and a bad atmosphere all night. Before I left in the morning, Dave told me she has been saying that I haven’t done anything and I have left her to do all the jobs, that made me really sad, as that wasn’t the case. So I reported her to the main staff in the morning for been racist, and they advised me she has been having problems with the other African lady from same agency as her! There was no issues or concerns raised with any of the service users whilst I was on shift. I am surprised that Mather fold still allow this female agency worker to continue working for the. Cheers.”

16. The claimant was suspended as a result of the safeguarding concern being raised. Ms Walker was aware of the impact this would have on the claimant, namely that he would be unable to work, and sought to follow up on it with Mather House repeatedly.

17. On 8 November 2017, Rachel Barr from Mather Fold contacted Ms Walker and asked her for a "detailed response to how Darren the service user was on that night" from the claimant.

18. On 13 November 2017, Ms Walker responded to ask for a statement of allegations in relation to the claimant "as we need to follow our company procedure and ask him to complete a statement response form."

19. On 21 November 2017, Ms Walker chased again and reminded Mather Fold that the claimant was still unable to work because of the impending investigation and asking whether the case was open with safeguarding and, if so, whether she could see the allegations. That same day, she followed up with the claimant to ask him to complete a statement and said it looked as though the case would soon be closed.

20. The claimant did attend the respondent's office to write a statement which appears at page 74 of the Bundle. The statement confirms that the service user was fine on the night; that there was no physical intervention; and that the incident report from the night would prove that nothing happened. The statement made no reference to any alleged racial abuse. That statement was sent to Mather Ford the same day, with a request for the outcome to be confirmed as soon as possible.

21. Ms Walker followed up again, having heard nothing further, on 7 December 2017. She confirmed that they still had not heard, that the claimant was still unable to work, and that the claimant was contacting the office on a weekly basis for an update. The Tribunal is satisfied that, at this stage, Ms Walker had no impression from the claimant that what he was following up was the allegation of racial abuse, but rather that his sole concern was getting back to work and having the safeguarding issue resolved.

22. A further, similar follow up email was sent on 14 December 2017, but this time she received a confirmation, first orally and then in writing, that the safeguarding was closed as the allegation was unsubstantiated. She immediately informed the claimant.

23. There was then no communication with the claimant whatsoever until 29 January 2018. The claimant did not provide his availability for work and the respondent did not ask him for his availability. The Tribunal accepts the respondent's evidence that, although they might contact workers if they are short staffed, the onus is on the workers to provide their availability and to request work.

24. Some six weeks after Ms Walker contacted the claimant to inform him that the safeguarding was closed, he wrote to her as follows: "I am still waiting for you to send me all the correspondence in relation to action taken by the company, when I reported how I was discriminated against and racially abused at work, and also all the correspondence that was sent to you, when a false allegation was made against me which I was never furnished with."

25. Ms Walker responded as follows: "As discussed in the below email the case was closed and unfounded. I have your information off the back of the information we requested from you however you have not confirmed that you wanted to make a complaint and this was a verbal conversation we had with yourself about a different matter."

26. The claimant responded: "I was referring to the incident that I reported to you the morning after my shift at Matherfold, that morning I informed you that I have been racially abused and discriminated against at work. you didn't do anything about it, then I got an email from you week later which was about the false allegation that was made against me by the same person that abused me at work. I haven't done anything wrong, but I have been suspended and treated like I have done something wrong. All I want to know is what action you too when I reported how I was treated to you after my shift at Matherfold"

27. Ms Walker responded minutes later to say: "if you would like to make a formal complaint then please let me know several dates which you are available to come into branch."

28. The claimant responded to state: I made a complain three months ago and nothing was done about it. I have been the one ringing and emailing you to make sure that this matter was dealt with properly. I have passed it onto the professionals to deal with it now, you would hear from them soon." The claimant confirmed in evidence that he had lodged his Tribunal claim at this point.

The Law

29. Section 13(1) Equality Act 2010 ("EqA) provides:

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

30. Section 23(1) EqA requires that there be no material difference between the circumstances relating to each case. Under section 136(2), (3) and (6)(a) EqA, if there are facts from which the ET could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the Tribunal must hold that the contravention occurred, but that does not apply if A shows that A did not contravene the provision.

31. In **Zafar**, at paragraph 12, Lord Browne-Wilkinson commended the following words of Lord Morison, in the Court of Session:

> "…It cannot be inferred, let alone presumed, only from the fact that an employer has acted unreasonably towards one employee, that he would have acted reasonably if he had been dealing with another in the same circumstances."

32. In **Shamoon v Chief Constable of Royal Ulster Constabulary [2003] IRLR 285 HL**, Lord Nicholls of Birkenhead referred to the question of whether the claimant had received less favourable treatment than the appropriate comparator as "the less

favourable treatment issue" and the question of whether the less favourable treatment had been on the relevant proscribed ground as "the reason why issue". At paragraphs 7 and 8 he observed:

> "7. Thus, the less favourable treatment issue is treated as a threshold which the claimant must cross before the tribunal is called upon to decide why the claimant was afforded the treatment of which she is complaining.
>
> 8. No doubt there are cases where it is convenient and helpful to adopt this two-step approach to what is essentially a single question: did the claimant, on the proscribed ground, receive less favourable treatment than others? But, especially where the identity of the relevant comparator is a matter of dispute, this sequential analysis may give rise to needless problems. Sometimes the less favourable treatment issue cannot be resolved without, at the same time, deciding the reason why issue. The two issues are intertwined."

33. At paragraph 11 he continued:

> "[…] employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of the all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will usually be no difficulty in deciding whether the treatment, afforded to the claimant on the proscribed ground, was less favourable than was or would have been afforded to others."

34. At paragraph 116 of **Shamoon**, Lord Scott of Foscote held as follows:

> "…I would readily accept that it is possible for a case of unlawful discrimination to be made good without the assistance of any actual comparator. I respectfully agree with Lord Hope that the contrary opinion expressed by Carswell LSJ in *Chief Constable of the Royal Ulster Constabulary v A* [2000] NI 261 cannot be accepted (paras 46 and 47 of Lord Hope's opinion). But in the absence of comparators of sufficient evidential value some other material must be identified that is capable of supporting the requisite inference of discrimination. Discriminatory comments made by the alleged discriminator about the victim might, in some cases, suffice. Unconvincing denials of a discriminatory intent given by the alleged discriminatory, coupled with unconvincing assertions of other reasons for the allegedly discriminatory decision, might in some cases suffice. But there is nothing of that sort in the present case, or, at least, no reference to anything of that sort was made by the Industrial Tribunal."

35. In **Bahl v The Law Society and Ors [2004] IRLR 810 CA** Peter Gibson LJ observed at paragraph 104:

> "[…] in an area where the drawing of inferences is central, it is essential that the ET sets out with the utmost clarity the primary facts from which any inference of discrimination is drawn, see: *Chapman v Simon*… It is particularly important that the ET takes care to explain how it has made a finding of unconscious discrimination: see *Governors of Warwick Park School v Hazelhurst* [2001] EWCA Civ 2056, per Pill LJ at paragraphs 24-25 and *Shamoon*, per Lord Hutton at paragraph 86."

36. In **Igen v Wong**, in relation to a predecessor provision to section 136 EqA, the Court of Appeal held that it is for the claimant who complains of discrimination to prove, on the balance of probabilities, facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of unlawful discrimination. In deciding whether the claimant has proved such facts, it is important to remember that the outcome, at this first stage of the analysis by the Tribunal, will usually depend on the inferences which it is proper to draw from the primary facts found by the Tribunal. The Tribunal is looking for primary facts to consider which inferences of secondary fact might 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. Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourable on the ground of [here] race, it is then for the respondent to prove that it did not commit that act. That requires a Tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but, further, that it is adequate to discharge the burden of proof, on the balance of probabilities, that race was not a ground for the treatment in question.

37. As the Court of Appeal held in **Avodele v Citylink Ltd and Anor [2018] ICR 748**, at paragraph 106, the principles in **Igen v Wong** remain good law in relation to section 136EqA. The change in wording from the predecessor provisions simply makes clear that what should be considered at the first stage is all of the evidence and not simply the evidence adduced by the claimant.

Detriment

38. In order to bring a successful direct discrimination claim, it is necessary to show that there has been less favourable treatment because of a protected characteristic. However, it is also necessary to show that the discrimination falls under the relevant part of the EqA by showing that there has been a detriment.

39. In the context of the Part 5 (work) provisions, a claimant claiming direct discrimination needs to satisfy the terms of section 39 EqA in order to show that the discrimination has occurred in the work context and falls under that part of the Act. Section 39 provides that a detriment could arise where an employer unlawfully discriminates against an employee in the terms of employment, opportunities for promotion, transfer, training or any other benefit offered to them or by dismissing. There is also a catch-all which captures subjecting them to "any other detriment".

40. The term "detriment" is not defined in the EqA 2010 and courts and tribunals have looked to the meaning of detriment established by case law. In **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11,** it was held

that a worker suffers a detriment if a reasonable worker would or might take the view that they have been disadvantaged in the circumstances in which they had to work.

41. There is therefore no need for the claimant to prove some physical or financial consequences of the detriment (**Shamoon)**. The reference to a "reasonableness" test in **Shamoon** makes the concept of detriment similar (although not identical) to the concept of less favourable treatment.

Conclusions

Did the claimant make complaints to the respondent about being racially abused by another health care worker?

42. The claimant reported an allegation that he had been racially abused on 1 October 2017 verbally to Ms Wright and on 19 October 2017 he set out an allegation in writing that he had been racially abused on 10 October 2017, in the context of a safeguarding issue.

43. The Tribunal acknowledges that the claimant raised allegations, but he did not tell the respondent that he wanted to make a complaint, so neither Ms Wright nor Ms Walker considered that the complaints procedure applied.

Did the respondent fail to take any action in response to his complaints?

44. The respondent did fail to take any action in relation to the claimant raising the allegations. Neither Ms Wright nor Ms Walker recognised the claimant raising the allegations as a complaint.

If so, was that less favourable treatment than would have been given to a person of another race in the same or not materially different relevant circumstances? Relevant to this issue will be the following:

a. *Who is/was the claimant's comparator?*

b. *Was the claimant treated less favourably than an actual compactor was treated, or a hypothetical comparator would have been?*

45. The claimant's comparator is a hypothetical comparator, another person working for the respondent in the same capacity as the claimant but of a different race and colour, which could be White English, who made the same complaint/allegations in the same circumstances as the claimant.

46. The Tribunal concludes that a hypothetical comparator would have been treated in the same way as the claimant. Its reasons for so concluding are as follows.

47. First, at no point did the claimant make it clear he was making a complaint which he wanted to be investigated and dealt with. On the first occasion he said he had dealt with it with Mather Fold and on the second occasion the allegations were raised not by the claimant as a complaint but only when he was asked for his recollection of the evening in question because a safeguarding issue involving the claimant had been raised. That safeguarding issue became the focus of the respondent's attention.

48. Second, the respondent has a complaints procedure which depends on the complainant making it clear that they are raising a complaint. On these occasions, the allegations raised by the claimant were not badged by the claimant as a complaint, nor recognised as one by the respondent. The procedure wasn't invoked, though Ms Walker did give the claimant the opportunity for it to be raised formally when he wrote to her on 29 January 2018 when she realised he wanted it to be dealt with as a complaint.

49. The Tribunal accepts that it would be best practice in a modern workplace for issues such as those raised by the claimant to be investigated without the need for the claimant to need to raise them formally. However, the Tribunal is satisfied that the respondent, Ms Walker and Ms Wright would have dealt with a hypothetical comparator in the same way, because they did not consider the claimant to wish to make a formal complaint. That may be partly due to the inexperience of the managers, as the claimant frequently mentioned during his cross examination.

50. Finally, it is relevant that the allegations were made against a person who was not engaged by the respondent. Accordingly, it would not have been as easy to investigate as it would have meant involving a third party. This may be another reason why the allegations were not investigated.

Was the claimant subjected to a detriment by that treatment?

51. The claimant was subject to a detriment by the respondent's failure to address serious allegations of discrimination in circumstances in which the claimant alleged he had suffered racial abuse.

Was the treatment because of the claimant's race (because he is black African)?

52. The Tribunal does not consider that the claimant was treated less favourably than a hypothetical comparator. Further, the Tribunal concludes that the claimant's treatment, by the respondent failing to investigate the allegations, was not because of the claimant's race for the reasons set out below.

53. As stated above, it was not made clear that the claimant was raising a complaint within the meaning of the respondent's complaints policy and the respondent was focussed on the safeguarding complaint.

54. As regards the safeguarding complaint, Ms Walker was keen to resolve it for the claimant and admitted she had been worried about him being unable to work. She chased up Mather Fold to seek a resolution and informed the claimant immediately when she learnt that the safeguarding concern had been closed and the claimant could return to work. Those actions are not consistent with a person who was failing to investigate allegations because of the claimant's race.

55. In a business such as that of the respondent, employees such as Ms Walker and Ms Wright are focussed on getting employees placed and satisfying their client's needs. The claimant referred to himself frequently as a "cash cow". In circumstances in which the respondent was not being pressed to treat allegations as a complaint, which would involve time and effort to investigate and deal with, particularly when it involves a third party, they are likely to decide not to investigate further.

56. Ms Walker was a relatively inexperienced manager. Whilst the Tribunal considers, as stated above, that it would have been best practice to investigate these serious issues, her failure to do so was partly down to inexperience.

57. Accordingly, the claimant's claim fails and is dismissed.

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Employment Judge Rice-Birchall

Date: 13 June 2022

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

14 June 2022

FOR THE TRIBUNAL OFFICE