EMPLOYMENT TRIBUNALS

Claimant: Mr I Efobi

Respondent: Royal Mail Group Limited (1)

Royal Mail plc (2)

HELD AT: Manchester (by Cloud Video Platform ('CVP')) **ON:** 15, 16, 17 & 18 June 2021 (and in chambers on 25 June 2021)

BEFORE: Employment Judge Johnson

Members: Ms K Fulton
Ms V Worthington

REPRESENTATION:

Claimant: in person
Respondent: Mr S Peacock (solicitor)

JUDGMENT

1. The complaint against the second respondent is dismissed as the correct employer in this case is the first respondent 'Royal Mail Group Limited'.

2. The complaint of race discrimination is not well founded and is dismissed. This means that the claim was unsuccessful.

CORRECTED REASONS

Introduction

1. The claimant is employed as a reserve Ordinary Postal Grade ('OPG') and has worked for the respondents since 11 September 2011.

2. He presented a claim form to the Tribunal on 13 March 2020 following a period of early conciliation from 20 February 2020 until 4 March 2020, when he brought complaints of race discrimination.

3. The respondent was given an extension of time by Employment Judge Batten on 5 May 2020, in order that a response could be presented. The claim was resisted, and the response has since been amended with the permission of Employment Judge Feeney on 30 November 2020.

4. The case was subject to case management before Employment Judge Horne on 3 July 2020 and in addition to the issues being identified, the case was listed for this final hearing date and appropriate case management orders were made.

5. Although there has been further consideration of the management of this case by Employment Judges following applications of the parties, it is not necessary to consider them in any detail in this judgment.

List of issues

6. The list of issues was originally identified at the preliminary hearing before Employment Judge Horne at the preliminary hearing on 3 July 2020. The respondent prepared a list of issues based upon this original list for use at the final hearing and the claimant had inserted some amendments. However, at the beginning of the final hearing, the claimant accepted that these amendments did not introduce additional issues and simply provided additional considerations concerning the treatment identified, which did not comply with the necessary statutory steps to be applied for cases of direct discrimination, harassment and victimisation. Accordingly, the issues remained as originally drafted and can be found in this section below:

<u>Direct Race Discrimination (section 13 Equality Act 2010)</u>

Whether the reason why the claimant ('C') was required to attend 4 fact -finding meetings was because of race.

a) Whether the reason why C was required to attend the fact-finding meeting on 16.01.20 in respect of his non-attendance on 03.01.20, despite that he says that he stated he was his mother's carer, was because of race.

b) Whether C was informed that the notes of the fact-finding meetings of 16.01.20 would be sent to Human Resources ('HR'), escalating formality of the process, and, if so, whether the reason why was because of race.

c) Whether the reason why Lyndsey Rossiter ('LR') made the flippant remark on 04.01.20 was because of race.

d) Whether the reason why C was not informed of the deduction of his day's pay at the time it was made was because of race.

e) Whether the reason why C was not provided with the email address of his 2nd line manager and was not given a blank grievance form, despite his request, was because of race.

f) Whether C was given the notes of the 4 fact finding meetings and, if not, whether the reason why was because of race.

g) Whether the investigation into the road traffic accident was allowed to drag and, if so, whether the reason why was because of race, in circumstances where C says a hypothetical comparator would have been 'let off with a verbal warning' and told that no further action would be taken.

h) Whether the reason why LR failed to apologise for the flippant comment when C asked for the 2nd line manager's email address was because of race.

i) Whether Robin Tysoe ('RT') used the pretext of informal resolution to C's grievance in order to cover up for LR's actions and, if so, whether he did so because of race.

j) Whether the reason why Alan Rankin ('AR') did not deal in the Grievance Appeal to the issue of LR not providing the email address of the 2nd line manager or a blank grievance form despite C requesting one was because of race.

k) Whether LR made an 'unsafe statement' to AR that she was unaware as of the Fact-Finding meeting on 04.01.20 that C was the carer to his mother, despite C believing the meeting notes recorded the same, and, if so, whether she did so because of race.

Victimisation (section 27 Equality Act 2010)

l) Whether RT used the pretext of informal resolution to the grievance in order to cover up for LR's actions and, if so, whether he did so because of the previous Employment Tribunal ('ET') claim.

m) Whether C was given the notes of the 4 fact finding meetings and, if not, whether the reason why was because of the previous ET claim.

n) Whether the reason why, at the time of setting up his 'out of office' reply, RT's failure to send C a separate email explaining the automatic reply did not apply to him and that he should not address queries to Mr Nichol, was because of the previous ET claim.

o) Whether the reason why LR, when she contacted HR following the fact-finding meetings on 16.01.20, and then failed to send C an email outlining the next steps, was because of the previous ET claim.

p) Whether the reason why C was not provided with a formal outcome to the road traffic accident investigation prior to 28.08.20 was because of the previous ET claim.

q) Whether the reason why a day's pay was deducted from C's salary was because of the previous ET claim.

r) Whether the reason why C was required to attend the Fact-Finding meeting on 16.01.20 in respect of his non-attendance on 03.01.20 despite the fact he says that he stated he was his mother's carer, was because of the previous ET claim.

s) Whether the reason why C was not provided with the email address of his 2nd line manager and was not given a blank grievance form, despite his request, was because of the previous ET claim.

t) Whether the reason why AR did not deal in the grievance appeal to the issue of LR not providing the email address of the 2nd line manager or a blank grievance form despite C requesting one was because of the previous ET claim.

u) Whether LR made an 'unsafe statement' to AR that she was unaware as of the fact-finding meeting on 04.01.20 that C was the carer to his mother, despite C believing the meeting notes record the same, and, if so, whether she did so because of the previous ET claim.

Harassment (section 26 Equality Act 2010)

v) Whether requiring C to attend 4 fact finding meetings was related to race.

w) Whether not providing C with a formal outcome to the road traffic accident investigation prior to 28.08.20 was unwanted conduct and, if so, whether it was related to race.

x) Whether sending C to another Office (1) once in Dec 2019 following the accident (2) then again on 3rd and 4th Jan 20, was unwanted conduct and, if so, whether it was related to race.

y) Whether the flippant remark made by LR on 04.01.20 was related to race.

z) Whether, at the time of setting up his 'out of office' reply, RT failing to send C a separate email explaining the automatic reply did not apply to him and that he should not address queries to Mr Nichol was unwanted conduct and, if so, whether it was related to race.

aa) Whether AR not dealing in the Grievance Appeal to the issue of LR not providing the email address of the 2nd line manager or a blank grievance form despite C requesting one was unwanted conduct and, if so, whether it was related to race.

bb) Whether LR made an 'unsafe statement' to AR that she was unaware as of the Fact-Finding meeting on 04.01.20 that C was the carer to his mother, despite meeting notes recording the same, and, if so, whether that was unwanted conduct and, if so, whether it was related to race.

Evidence used

7. The Tribunal heard from the claimant, and he had also provided a short statement from his wife. However, this statement was agreed by Mr Peacock and the Tribunal did not wish to ask questions of Mrs Efobi.

8. The respondent relied upon the witness evidence of the claimant's line manager Lyndsey Rossiter (Ellesmere Port Delivery Office Manager ('DOM')), Robin Tysoe (Senior Operations Manager Chester and Wirral) and Alan Rankin (Appeal Hearing Officer).

9. There was an agreed hearing bundle available which was in excess of 300 pages in length. An additional document was provided by the claimant mid-way through the hearing which was a full copy of the Royal Mail's Conduct Policy. This was relied upon by the claimant and no objections were made by the respondent, so it was added to the bundle.

10. The Tribunal reminded itself of its obligation under the Equal Treatment Bench Book and the overriding objective and made appropriate allowances for the claimant as a litigant in person. The respondent's solicitor, Mr Peacock behaved reasonably towards the claimant and made allowances for his lack of representation. Nonetheless, the claimant's cross examination was lengthy and this was because at times, the claimant strayed from the issues to be considered by the Tribunal. It was necessary for the Tribunal to remind the claimant that he should answer the questions put to him.

11. Despite being given ample opportunity, the claimant failed to cross examine Ms ROSSITER concerning the issues relating to victimisation. Mr Peacock behaved extremely fairly by reminding the Tribunal of this failure and Employment Judge Johnson asked appropriate questions of this witness concerning these issues as part of judicial examination towards the end of her evidence.

12. At a later stage of the hearing, the claimant made an application to recall Ms ROSSITER when he decided that some of the questions, he wished to ask could not be answered by the management witnesses called after she had given her evidence. This application was refused as it was not in the interests of justice. The claimant had been aware of the witnesses and the list of issues for some time before the hearing took place and should have prepared his questions accordingly. While some latitude had been given in accordance with the overriding objective as described above, a point had to be reached where it was no longer appropriate to do so. It was noted that Ms ROSSITER had found the giving of evidence and being subject to cross examination by the claimant very arduous and it would not be fair to subject

her to further questioning. While this decision was made by Employment Judge Johnson alone, (due to the difficulties of arranging an impromptu chambers discussion without removing parties from the 'CVP room'), the matter was discussed during the next lunchtime break and both members agreed with the decision made and confirmed that they did not want it to be varied.

Findings of fact

Introduction

13. The respondents are the national postal service and are commonly known as the Post Office or the Royal Mail. Although there was some confusion as to the correct name of the respondent in these proceedings, the Tribunal finds that the correct name is Royal Mail Group Limited ('Royal Mail') as they employ OPGs involved in the standard collection and delivery of post. Accordingly, the claim against the second respondent 'Royal Mail Plc' is dismissed. In any event, Mr Peacock confirmed that if the claimant was successful with his claim either in whole or in part, the first respondent would accept responsibility as his employer.

14. The Royal Mail employs more than 140,000 staff across the UK and has considerable access to HR and other support services and has very well-developed policies and procedures which includes a Conduct Procedure which has been agreed with the main trade unions and applies to all staff.

15. The delivery side of the business is devolved to a number of Delivery Offices, and they are located in geographical areas. In this case, the Chester and Wirral area is relevant. In each Delivery Office there are numerous Ordinary Postal Grade ('OPGs') which includes those who are allocated to dedicated postal rounds or 'walks'. There are also reserve OPGs who are not allocated specific rounds and instead cover those walks where the allocated OPG is on leave. The Tribunal accepts that longer serving reserve OPGs would usually be allocated more regular walks closer to their home address, but that their contract still required them to be sent to cover walks across the Chester and Wirral area as required. This region stretched from Chester and Ellesmere Port in the south/southeast and up to Wallasey and Moreton DOs in the north/north west of the Wirral peninsula.

16. The claimant ('Mr Efobi') was employed as a reserve OPG and had worked for the Royal Mail since 11 September 2011. He lives in Chester and routinely worked in Ellesmere Port but would sometimes have to work at other Wirral DOs. Mr Efobi worked part time over 3 days each week.

Road traffic accident

17. On 14 December 2019, Mr Efobi was involved in collision with another vehicle when he was driving his Royal Mail van on A41 near Ellesmere Port. The details of the accident are not particularly important, but in accordance with Royal Mail procedures, Ms Rossiter investigated the accident as Mr

Efobi's line manager. She carried out a 'Safety Root Cause Analysis' process which involved the completion of document on the Royal Mail's intranet, and which concluded that Mr Efobi *'exercising poor decision making or analysis of the situation and taking a short cut in performing the manoeuvre'.* The Tribunal understood that this involved Mr Efobi making an ill-advised reversing manoeuvre in his van and this exercise was to identify the cause of the accident.

18. In terms of any potential conduct issues arising from the incident, the first informal part of the investigation involved a '*Seek and Explain'* meeting with Mr Efobi and this was completed on 28 December 2019. The Tribunal found the investigatory process to be somewhat complicated and Ms Rossiter explained the Seek and Explain meeting was an informal investigation with an employee and it was to determine whether the matter should then proceed to the formal '*Fact Finding'* stage of the disciplinary process.

19. It was determined by Ms Rossiter that the severity of the incident justified further investigation and she decided that a fact-finding meeting should take place. This took place on 16 January 2020 and note taker took a detailed note while Ms Rossiter questioned Mr Efobi.

20. Ms Rossiter produced an outcome letter following this interview, but it was not given to Mr Efobi until August 2020. Ms Rossiter said that the reason why Mr Efobi was not informed earlier was that he was absent from work through sickness and once the Covid 19 pandemic reached the UK in late March 2020, Mr Efobi refused to come into work to meet with her. It is understood that at this time the Royal Mail suspended face to face meetings with staff. It was not clear why Ms Rossiter did not instead write to Mr Efobi with details of her decision following the fact finding as the Tribunal accepts his evidence that he was receiving other correspondence from the Royal Mail at time involving other matters, (such as the risk of dog bites to OPGs on deliveries). While Ms Rossiter felt that it would have been easier to meet with Mr Efobi to explain her decision and to allow him to ask questions and this was what was expected by Policy, it seems that the failure to send a letter allowed this matter to drift and arose from a lack of flexibility on the part of management. It is understandable that due to the pandemic, the Royal Mail was under a great deal of pressure, but Mr Efobi should have been informed of Ms Rossiter's decision at a much earlier date.

21. In any event, Ms Rossiter determined that following the fact finding, Mr Efobi should have a penalty imposed and he was given a serious warning which remained on his record for 24 months, beginning on 6 August 2020. The Tribunal feels that it was not fair to commence this penalty from August 2020, when Ms Rossiter must have reached her decision on or around 16 January 2020. However, in giving her evidence, she acknowledged that in hindsight she could have sent a letter but was concerned that an opportunity to discuss the contents of the decision would be a fairer way of communicating the outcome. Indeed, she provided an apology to Mr Efobi for this delay in her witness statement. Despite the shortcomings of Ms Rossiter's communication of the outcome of the investigation, the Tribunal

did not find any evidence which suggested these were motivated by Mr Efobi's race. On the contrary, Ms Rossiter displayed a concern about how an employee should be notified of the penalty and it was her focus upon the means of communication, which caused the problem of delay to arise. Overall, Ms Rossiter gave credible and reliable evidence throughout and she was willing to concede circumstances where upon reflection she felt should have done things differently.

Incident on 3 January 2020

22. On 2 January 2020, Ms Rossiter required Mr Efobi to travel to the Moreton DO to cover a walk on 3 and 4 January 2020. She sent him a text message at 13:26 informing him of these shifts and he replied confirming that he would travel there by train the next morning. While Ellesmere Port DO and the claimant's home in Chester were located at the southern end of the Wirral peninsula, Moreton DO was situated at the northern end of the peninsula. Accordingly, some additional travel time was required as part of Mr Efobi's commute to work, but the walks were within the delivery area where he worked.

23. Mr Efobi subsequently received a message from his wife informing him that his mother had an appointment at the Aintree hospital in Liverpool. It was not entirely clear when he received this message from his wife, but he messaged Ms Rossiter later in afternoon on 2 January 2020 informing her that he could not cover the Moreton walk the next day. He did not explain the reason for the urgent absence being required, but instead forwarded the text which he says he had received from his wife. This forwarded text said, *'Reminder for your appointment: Friday 3 January at 11am at clinic 5 elective care centre'.* His message simply said; *'Hi Lyndsey just received this text below'.*

24. Ms Rossiter replied at 18:46 on the evening of 2 January 2020 and asked *'Can you not go after your appointment?! The manager is expected you now and we will have a walk uncovered'.* Mr Efobi replied at 18:47 and said that it depended when the appointment was over because there were different tests in different departments. The Tribunal noted that at this point Mr Efobi had not mentioned that the appointment related to his mother, Ms Rossiter had assumed it related to him in her message and he had not disabused her of this assumption.

25. Ms Rossiter replied at 18:52 and asked, '*Can you go before your appointment and maybe get some delivery done?!*' Mr Efobi responded at 18:55 to say '*apologies not possible to Moreton and I don't know where Aintree hospital is, so need to leave by 9:00 for traffic, to find the hospital, find parking etc.*' Ms Rossiter did not then reply until 07:44 on 3 January 2020 and asked Mr Efobi to give her a call. He did not call her and did not pick up Mr Rossiter's call to him, instead he sent a message at 8:09 saying '*saw your missed call, getting ready to go to my mother's place, hope you are ok'*.

26. Ms Rossiter replied at 9:09 *'Ike due to the short notice we cannot accommodate your hospital appointment. If you had told us in advance, then we could have tried to rearrange one of your days off. You are required to attend work today as it will result in there being a possible USO failure. Is it possible for you to attend after your hospital appointment? If you do not attend today this could be classed as abandonment of duty as this absence is not pre-arranged'*. The Tribunal were informed that 'USO' related to Universal Service Obligation, which was the Royal Mail's statutory obligation to deliver mail according to its delivery schedules. This is a public commitment and to fail to deliver, was a serious failing for the Royal Mail. The Tribunal finds the claimant's reply at 09:12 to this message to his manager to be surprising, arrogant, and patronising: '*That's a shame, we will take it up when I come in tomorrow'.* It was clear that he felt the now vacant walk in Moreton and the USO, were now management's problem rather than his, despite it being him who sprung his absence upon them without any reasonable warning notice being given.

27. It was not clear whether Mr Efobi attended Moreton DO on 4 January 2020, but he had a meeting at 08:25 to 08:40 in Ellesmere Port, with Ms Rossiter. It was a Seek and Explain meeting and involved a discussion about his absence. The note of the meeting gives a clear illustration of Ms Rossiter's initial belief that the appointment was for Mr Efobi and she expressed surprise when he told her that it related to his mother. It is apparent that she became increasingly exasperated with Mr Efobi as the meeting progressed. He was unwilling to agree that someone else could have taken his mother to the appointment, despite the message which he had shared with Ms Rossiter being a reminder, he asserted that his mother did not have an earlier notification and that this appointment was not an emergency. The Tribunal found that Mr Efobi displayed a great deal of self-righteous indignation in how he replied to Ms Rossiter's questions and seemed unwilling to recognise the implications that his actions had upon the business.

28. Although it was not recorded in the note of the subsequent Seek and Explain meeting, Ms Rossiter did concede that she said to Mr Efobi; *'If you had not attended the appointment with your mother, would she have died?'* She accepted that this comment was inappropriate, insensitive and should not have been said. However, the Tribunal accepts that while ill judged, this comment was made because of frustration and that the conversation had become *'heightened'.* This can be detected from the meeting note and while this is the case, Mr Rossiter's reaction was provoked by Mr Efobi's responses to her quite reasonable and appropriate questions. The Tribunal heard no evidence to suggest that the comment motivated by his race. Indeed, the Tribunal would have expected any employee who responded in the way that Mr Efobi did, to have been treated similarly and accepts Ms Rossiter's evidence to that effect.

29. The Tribunal accepts Ms Rossiter's evidence that on previous occasions she had assisted Mr Efobi with personal circumstances in terms of how his shifts were allocated. One example given was that she had moved his

working days when without notice he asked for time off to collect his mother from the airport and on another occasion when he needed to sit an exam.

30. As part of the Royal Mail's staffing intranet known as PSP, Ms Rossiter was required to provide details of Mr Efobi's absence on 3 January 2020. She had sought clarification from HR on 2 January 2020 and they confirmed it must be entered as an unauthorised absence. This had the effect of Mr Efobi losing a day's pay. The Tribunal accepted her evidence that this matter would not be concluded until she had finished her investigation and if it was felt that there was a reasonable explanation for the absence, Mr Efobi could have this pay reinstated. Ms Rossiter said, *'The investigation was to determine whether I was right or wrong to deduct'* and that *'…every employee is treated the same'.* The Tribunal was shown extracts of the respondent's policy relating to special leave and accepts that the claimant's leave request fell within this category. In relation to time off for dependents, the respondent clearly applied UK legislation concerning absences of this nature and stated the following:

'All employees of Royal Mail Group with a dependent are able to take time off from work to deal with an emergency. What is reasonable will depend on the facts of each case but will normally be one day's unpaid leave; additional days will be unpaid or taken as annual holiday.
For the purposes of this policy a dependent can be:

- *A spouse or civil partner*
- *A child*
- *A parent*

Employees should try to arrange medical and dental appointments outside of working hours. If this is not possible, managers can allow them to make up the time or change their shift. In exceptional circumstances, managers may give paid time off'.

Ms Rossiter was clearly applying usual Royal Mail practice in relation to Mr Efobi's absence, which related to a dependent. Mr Efobi's race and it would have been applied to any other employee in similar circumstances.

31. On 6 January 2020, Mr Efobi sent an email to Ms Rossiter and asked for an email address for Rob Fellows as he wanted to complain about Ms Rossiter's comments relating to his mother at the meeting on 3 January 2020. Ms Rossiter identified this complaint as being an intention to bring a grievance and she said she would have the form ready for him when he was next in work later that week.

32. There was a fact-finding meeting on 16 January 2020 relating to the absence and this took place after the other fact finding meeting that day concerning the road traffic collision. The meeting followed a similar process to the Seek and Explain meeting which had taken previously. Mr Efobi denied that he knew about his mother's hospital appointment before 3 January 2020 and despite being asked on numerous occasions by Ms Rossiter whether he understood the process for making appointments that required time off work, the meeting note recorded him as being unwilling to answer the question. Instead, he adopted an approach where he suggested

that the Royal Mail was more concerned about business need than the health of others and he referred to Ms Rossiter's unfortunate flippant comment made at the earlier Seek and Explain meeting. The Tribunal was left with a clear impression that by the time of this meeting, Mr Efobi was not interested in reflecting upon what he should have done on 2 and 3 January 2020 and instead was more focused upon the grievance which he was seeking to bring. He clearly did not express any recognition of the impact had on the Royal Mail's obligation to fulfil the Moreton DO walk and this is surprising given the way in which he had notified the Royal Mail of this absence.

33. Although Mr Efobi had later asserted during the hearing that the allocation of the Moreton walk was discriminatory, it is telling that he did not complain when asked to go on 2 January 2020, he did not complain and apparently knew how to get to Moreton by train. The Tribunal heard evidence from Mr Efobi that longer serving OPGs might get more local walks. But while this might usually be the case, management witnesses were clear that this was not prescriptive because to do so, would be discriminatory on grounds of age. This matter only became a complaint during grievance process and the Tribunal finds that the allocation of walks to the claimant were not connected with his race. Mr Efobi did not have a dedicated walk and could find himself doing delivery rounds in several locations. However, while this was the case, most of his work tended to take place in the Ellesmere Port or Chester areas which were closer to his home address.

34. There was some confusion as to when the investigation 'closed down' in relation to the absence of 3 January 2020. Ms Rossiter said that she believed the matter was closed on 16 January 2020. However, the Tribunal was not provided with a copy of a decision letter prepared by Ms Rossiter following this meeting and accepts her evidence that she did not investigate the matter any further but had concluded that while it was appropriate to deduct days pay given the reason for the absence, no further disciplinary action was needed. This because the decision was made in accordance with policy related to leave for dependents and did constitute a disciplinary sanction.

35. It does appear that because of the grievance which had been brought by Mr Efobi shortly after the Seek and Explain meeting on 4 January 2020, the fact-finding meeting 'petered out' without a formal conclusion. Nonetheless, Mr Efobi was not provided with any 'closure' in relation to this stage of the process. The fact-finding exercise was clearly a formal part of the Royal Mail's Conduct Policy and it reasonable to expect a manager to provide an affected employee with some sort of decision letter. This is an omission on Ms Rossiter's part and while she no doubt found the matter to be a frustrating one in relation to the way Mr Efobi conducted himself, she should have informed him of the outcome and that the only sanction to be imposed was a loss of a day's pay. While this might be the case, the Tribunal does not accept that this failure was motivated by any conscious or unconscious bias because of Mr Efobi's race. Despite having only started work in Ellesmere Port DO in November 2019, Ms Rossiter's initial views of Mr Efobi were that he was a good worker and she had been willing to

previously accommodate some flexibility in his patterns. If anything, it appeared to the Tribunal that Mr Efobi took advantage of Ms Rossiter's understanding nature when he insisted on taking leave at short notice.

36. It was not clear whether Ms Rossiter provided Mr Efobi with a copy of the notes from the four meetings which took place concerning the two incidents. Her evidence was that she did, whereas Mr Efobi disputed this. Nonetheless, the Tribunal accepts that Mr Efobi was present at all 4 of these meetings and that he had ample opportunity to participate. Any failure, if it took place, did not impact upon his ability to raise his grievance and the important matter is that notes were taken by Ms Rossiter and were retained and made available during subsequent processes. On balance the Tribunal believes that Ms Rossiter failed to provide the notes of the meetings shortly after they took place. But while this was the case, it did not identify any underlying reason which would have been connected with Mr Efobi's race.

Grievance

37. As has already been mentioned above, Mr Efobi's initial reason for raising a grievance were the comments made by Ms Rossiter at the Seek and Explain meeting on 4 January 2020. However, the issues expanded when he emailed Mr Tysoe on 14 January 2020 and Mr Tysoe identified 5 separate issues for investigation.

38. Mr Tysoe wrote to Mr Efobi on 20 February 2020 updating him concerning his investigation into the grievance. Importantly, he decided to formally close down the investigation into the unauthorised absence on 3 January 2020. He confirmed that he was investigating the way in which Ms Rossiter had handled the matter and if necessary, would issue her with *'corrective action'.* He did however, suggest to Mr Efobi that both he and Ms Rossiter should take part in mediation to resolve this matter. Mr Efobi replied to this email on 27 February 2020 and seemed particularly concerned about compensation being payable to him if his complaint was upheld. The Tribunal observed that he also informed Mr Rossiter that he had notified ACAS about this matter and his reference to ACAS in the early conciliation certificate was dated 20 February 2020. While Mr Efobi asserted on several occasions during the hearing, that he simply wanted an apology from Ms Rossiter concerning the comments that she had made on 4 January 2020, his attitude once he commenced his grievance appeared to contradict this belief.

39. Mr Tysoe then spent some time looking into the grievance before he met with Mr Efobi. They had a meeting on 24 April 2020 and discussed Mr Efobi's grievance in detail. He referred to each of the five grounds of complaint and discussed them with Mr Efobi. The grounds were as follows:

a) Mr Efobi's absence on 3 January 2020 being classified as unauthorised;

b) The deduction of wages for that day;

c) The manner in which Ms Rossiter spoke to him at the "Seek and Explain" meeting on 4 January 2020;

d) The decision to send Mr Efobi to Moreton DO on 3 and 4 January 2020; and,

e) The failure to provide Mr Efobi with an outcome to the fact-finding meeting.

40. Following this meeting a grievance report was prepared and sent to Mr Efobi on 22 June 2020. Mr Tysoe explained that the delay in preparing this report was because Ms Rossiter was away on annual leave for a week and a more general delay in accessing witnesses arising from social distancing during the first lockdown due to Covid 19. The Tribunal has reminded itself that due to the exceptional circumstances existing in the UK at this time, delays would inevitably arise because of the restrictions placed upon employers and employees in being able to meet and many employees were also shielding at this time. Additionally, the Royal Mail was a business which was continuing to operate as normally as possible and was subject to an increased level of work.

41. The grievance concluded that only one of the grounds of complaint was upheld and, in that case, it was described as being *'partially upheld'.* This related to the comments made by Ms Rossiter on 4 January 2020 and it was recorded that she accepted that she said to Mr Efobi but began her comments by saying *'I am not trying to be flippant'* and Mr Tysoe found that while inappropriate, Ms Rossiter's comments were not *'malicious or deliberate'* and he did *not believe that there is any basis for any suggestion that this comment was motivated by Ike's race and I cannot find evidence to support this'.*

42. Mr Tysoe also found that Ms Rossiter could have treated Mr Efobi's attendance at the hospital appointment as abandonment of duty and a disciplinary matter. She had taken HR advice concerning the issue, yet despite this, she had taken a more sympathetic decision of allowing special unpaid leave. He also noted her previous flexibility when Mr Efobi needed to collect his mother from an airport on a working day and she swapped his shift around. He also noted that Mr Efobi was not the only OPG who had been sent to other DOs and that operationally it was sometimes necessary to require reserve OPGs to be allocated to other DOs at short notice. He also noted that he did not complain at the time he was told to work at Moreton DO. It was simply a reasonable operation in Mr Tysoe's opinion, that required Mr Efobi to travel to Moreton DO. He also noted that the 4 meetings which Mr Efobi was required to attend as a result of conduct issues were in relation to the road traffic incident and the absence and were in accordance with the respondent's policy. Mr Tysoe's conclusion was that Mr Efobi had contributed to the issues which led to the grievance and his only criticism was in relation to Ms Rossiter's comments, which she acknowledged were inappropriate. He recommended amongst other things, that she undergo coaching and a discussion take place to return Mr Efobi to work.

43. The Tribunal found Mr Tysoe to be a credible and reliable witness. We find that he properly investigated the grievance and despite acknowledging the need for Ms Rossiter to investigate the absence on 3 January 2020 he was willing to accept that her flippant comments were inappropriate. There was no evidence which suggested to the Tribunal that he knew of Mr Efobi's earlier Tribunal claim which he had brought against the respondent, which is not surprising given that he only commenced his post on 16 January 2020 in Mr Efobi's and Ms Rossiter's delivery area. The covering letter enclosing the grievance, notified Mr Efobi of a right of appeal of his decision and he exercised that right.

44. One of the issues which had been raised by Mr Efobi related to his belief that when he set up his 'out of office' reply during a period of absence, Mr Tysoe should have sent a separate email to Mr Efobi explaining that it did not relate to him. From the evidence which the Tribunal heard concerning this case, we were satisfied that Mr Tysoe's actions concerning the out of office reply were reasonable and not motivated by Mr Efobi's race. We accepted Mr Tysoe's evidence and Mr Peacock's submission that there was no requirement for him to treat Mr Efobi separately in this way.

45. Mr Efobi also raised as an issue concerning Ms Rossiter failing to provide the email address of the line manager who would deal with his proposed grievance and a failure to provide a blank grievance.

46. Mr Efobi believed that the second line manager whom he should raise a grievance with was Mr Robin Fellows. When he raised the possibility that he might raise a grievance, he initially asked Ms Rossiter for Mr Fellows' email address. She said that she was concerned that she should not give another employee's email address to a member of staff without permission being granted.

47. Mr Efobi saw Mr Fellows on 11 January 2020 and asked him to contact Ms Rossiter about these contact details. However, she subsequently asked Mr Efobi to contact Mr Tysoe instead. Mr Fellows was not called to give evidence at the hearing. However, we understood that he was not Mr Efobi's second line manager from 16 January 2020. This was when Mr Tysoe assumed the role and he would now deal with Mr Efobi's grievance instead of Mr Fellows.

48. In terms of the grievance form, Ms Rossiter said Mr Efobi was not in work so that she could hand the blank form to him, whereas Mr Efobi said that he was. These matters were somewhat puzzling to the Tribunal, but we find that Mr Efobi was not assisted either Ms Rossiter or Mr Fellow by helping him to raise his grievance. None of this appeared to be deliberately preventing him bringing a grievance. Once the grievance had been raised with Mr Tysoe, it then progressed smoothly.

49. While this might be case, we find that Ms Rossiter had already accepted that Mr Efobi could bring a grievance. It is possible that Mr Fellows, knowing he was moving elsewhere, did not want to take on any new matter

before he left, although we did not hear any evidence from him. In reality, management should have been more proactive in assisting Mr Efobi with his proposed grievance. But while this might be the case, Mr Efobi was an experienced employee who would have known that there were other ways of bringing a grievance. The Tribunal accepted witness evidence that there were trade union posters displayed in the workplace and that employees were aware of the Royal Mail's grievance '0800' telephone number. Indeed, Mr Efobi was able to bring his grievance in any event on 16 January 2020.

Grievance appeal

50. Mr Efobi appealed Mr Tysoe's decision. Mr Rankin was appointed as the appeal hearing officer. Importantly, the Tribunal noted that he was based in Scotland and although had some experience of complaints brought in the Employment Tribunal against the Royal Mail, these had all taken place in the Scottish Employment Tribunal Region and he was rarely asked to deal with claims in England and Wales.

51. It is perhaps appropriate to note that each witness called by the respondent was accused by Mr Efobi of being aware of his previous Tribunal claim brought several years earlier. The Tribunal heard reliable and convincing evidence from each of these witnesses that they were unaware of this earlier Tribunal complaint (and its subsequent appeals), until they were preparing their evidence for this case and became aware of the issues being raised by Mr Efobi.

52. Mr Rankin met with Mr Efobi on 28 July 2020 and the available and lengthy note demonstrated that Mr Efobi was able to properly explain his appeal. He was given an opportunity to review and provide additional information to the note once the meeting concluded. Mr Rankin also explored the possibility of alternative dispute resolution with Mr Efobi and whether he would accept an apology from Mr Rossiter or to participate in mediation, but he declined saying it was insufficient because it was too late.

53. Mr Rankin then reviewed the information that he had heard at the meeting, and he made enquiries with Ms Rossiter concerning the alleged failures on her part. The Tribunal accepted Mr Rankin's evidence that it was a reasonable action for him to take so that he could understand how she had approached the issues which she had been involved with.

54. Mr Rankin concluded by producing a detailed report dealing with each of the complaints which Mr Efobi had raised. He did not uphold any of the allegations that Mr Efobi had been subjected to discrimination because of his race, that it was inappropriate for his pay to be stopped, to be asked to work at the Moreton DO or to treat his absence that day as unauthorised. This report was made available to Mr Efobi.

The Law

Direct discrimination

55. Section 39 of the Equality Act 2010 provides that an employer must not discriminate against an employee of his by, amongst other things, subjecting him to a detriment.

56. Section 13 of the Equality Act 2010 sets out the legal test for direct discrimination. A person (A) discriminates against another (B) if, because of a protected characteristic (race in this case), A treats B less favourably than A treats or would treat others.

Causation

57. If the act is not inherently discriminatory, the Tribunal must look for the operative or effective cause. This requires consideration of why the alleged discriminator acted as he/she did. Although his motive will be irrelevant, the Tribunal must consider what consciously or unconsciously was their reason? This is a subjective test and is a question of fact.

Comparators

58. For the purposes of direct discrimination, section 23 of the Equality Act 2010 provides that on a comparison of cases there must be no material difference between the circumstances relating to each case. In other words, the relevant circumstances of the complainant and the comparator must be either the same or not materially different. Comparison may be made with an actual individual or a hypothetical individual.

Harassment

59. Section 40 of the Equality Act 2010 provides that an employer must not, in relation to employment by him, harass an employee. The definition of harassment is set out in section 26(1) of the Equality Act 2010. A person (A) harasses another (B) if:

(a) A engages in unwanted conduct related to a protected characteristic (race in this case); 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.

60. Section 26(4) provides that 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.

61. Thus, the test contains both subjective and objective elements. Conduct is not to be treated as having the effect set out in section 26(1)(b) just because the complainant thinks it does. The Tribunal is required to take into account the Claimant's perception, the other circumstances of the case, and whether it is conduct which could reasonably be considered as having that effect.

62. In Richmond Pharmacology v Dhaliwal [2009] IRLR 336, the Employment Appeal Tribunal held a Tribunal should address three elements in a claim of harassment: first, was there unwanted conduct? Second, did it have the purpose or effect of either violating dignity or creating an adverse environment: Third, was that conduct related to the Claimant's protected characteristic?

Victimisation

63. Section 27 of the EQA provides that:

(1) a person (A) victimises another person (B) if A subjects B to a detriment because –

(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act –

(a) Bringing proceedings under *[The Equality]* Act;
(b) Giving evidence of information in connection with proceedings under this act;
(c) Doing any other thing for the purposes of or in connection with this Act;
(d) Making an allegation (whether or not express) that A or another person has contravened this Act.

64. For a complaint of victimisation to succeed, a claimant has to be able to identify a protected act and to show that a detriment took place which arose because the protected act in question.

The burden of proof

65. Section 136 of the Equality Act 2010 sets out the burden of proof that applies in discrimination cases. Subsection (2) provides that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that person (A) has contravened the provisions concerned, the Tribunal must hold that the contravention occurred. However, subsection (2) does not apply if A shows that A did not contravene the provision.

66. Thus, it has been said that the Tribunal must consider a two stage process. However, Tribunals should not divide hearings into two parts to correspond to those stages. Tribunals will wish to hear all the evidence

before deciding whether the requirements at the first stage are satisfied and, if so, whether the Respondent has discharged the onus that has shifted; see Igen Ltd v Wong and Others CA [2005] IRLR 258.

67. At the first stage, the Tribunal has to make findings of primary fact. It is for the Claimant to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of any other explanation, that the Respondent has committed an act of discrimination. At this stage of the analysis, the outcome will usually depend on what inferences it is proper to draw from the primary facts found by the Tribunal. It is important for Tribunals to bear in mind in deciding whether the Claimant has proved such facts that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination and in some cases the discrimination will not be an intention but merely an assumption.

68. At the first stage, the Tribunal must assume that there is no adequate explanation for those facts. At this first stage, it is appropriate to make findings based on the evidence from both the Claimant and the Respondent, save for any evidence that would constitute evidence of an adequate explanation for the treatment by the Respondent.

69. However, the burden of proof does not shift to the employer simply on the Claimant establishing a difference in status and a difference in treatment. Those bare facts only indicate a possibility of discrimination. “Could conclude” must mean that a reasonable Tribunal could properly conclude from all the evidence before it; see Madarassy v Nomura International [2007] IRLR 246. As stated in Madarassy, “the bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal could conclude that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination”.

70. If the Claimant does not prove such facts, his or her claim will fail.

71. If, on the other hand, the Claimant does 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 the act of discrimination, unless the Respondent is able to prove on the balance of probabilities that the treatment of the Claimant was in no sense whatsoever because of his or her protected characteristic, then the Claimant will succeed. That explanation must be adequate, which as the courts have frequently had cause to say does not mean that it should be reasonable or sensible but simply that it must be sufficient to satisfy the tribunal that the reason had nothing to do with the protected characteristic in question: see Glasgow City Council v Zafar [1998] ICR 120 and Bahl v The Law Society [2004] IRLR 799."

Discussion

72. The Tribunal has considered each of the issues in turn and in the order that they were presented in the list of issues. However, for the avoidance of doubt, the Tribunal accepted Mr Peacock's argument that the correct claimant in this case was the Royal Mail Group Limited, who are the first respondent and the complaint against the second respondent Royal mail Group plc should be dismissed. The first respondent is the correct respondent in these proceedings for the reasons given above.

Direct discrimination

Whether the claimant was required to attend 4 fact finding meetings because of race (issue (a))

73. In relation to this issue, the Tribunal agrees that the claimant was required to attend 4 meetings, but that they were not all findings of fact meetings. They were as follows:

a) 28 December 2019 – Seek and Explain meeting regarding the road traffic collision;
b) 16 January 2020 – Fact Finding meeting regarding the road traffic collision;
c) 4 January 2020 – Seek and Explain meeting regarding the unauthorised absence; and,
d) 16 January 2020 – Fact Finding meeting regarding the unauthorised absence.

74. These were 4 investigatory meetings, but they related to 2 separate incidents and were following the two stages described by the Royal Mail's conduct process. It was reasonable for Ms Rossiter as Mr Efobi's line manager to conduct them. The Tribunal failed to see how any other employee in a similar situation would have been treated any differently to him and it does not find that these meetings were in any way motivated by his race. These events did not amount to direct race discrimination.

Whether the reason why C was required to attend the Fact-Finding meeting on 16.01.20 in respect of his non-attendance on 03.01.20, despite that he says that he stated he was his mother's carer, was because of race (issue (b))

75. To some extent, the Tribunal would repeat what it has said above concerning issue (i). Nonetheless, the Tribunal accepts that it is reasonable for a manager to investigate an unauthorised absence and there was no reason for the Tribunal to find that Mr Rossiter's decision related to Mr Efobi's race. It might have been a more complicated and difficult matter if Mr Efobi had given a reasonable period of notice to Ms Rossiter and made a request for leave to be granted and she in turn had refused the request without any or an adequate explanation. But this is not what was in issue here. As the Tribunal described in its findings of fact above, Mr Efobi effectively provided a request for time off late in the afternoon/early evening of the day before the hospital appointment was due to take place. It was very much a fait accompli on his part and in Mr Efobi's mind, he was going to take the leave whether or not Ms Rossiter agreed to his request and

would not engage in any compromise concerning working a partial shift or starting at different times. He was aware of the requirement to get the post out and his absence was unauthorised. It was reasonable for Ms Rossiter to investigate in the way that she did, a comparable employee in the same circumstances would have been treated exactly the same as Mr Efobi regardless of race and this complaint of direct race discrimination in not made out.

Whether C was informed that the notes of the Fact-Finding meetings of 16.01.20 would be sent to Human Resources ('HR'), escalating formality of the process, and, if so, whether the reason why was because of race (issue (c))

76. It was not clear whether Mr Efobi was informed by Ms Rossiter that the fact-finding meeting notes would be sent to HR. However, the Tribunal agrees that for formal meetings of this nature, it would not be surprising if Ms Rossiter sent these documents to HR, especially as she was a relatively new manager in Ellesmere Port DO and wanted to check that she was following policy correctly. The Tribunal does not accept that Ms Rossiter treated Mr Efobi in a way which was different to comparable hypothetical employees who were not of the same race as him and this incident had nothing to do with race. Accordingly, it was not race discrimination.

Whether the reason why Lyndsey Rossiter ('LR') made the flippant remark on 04.01.20 was because of race (issue (d))

77. The Tribunal heard evidence from Ms Rossiter that she accepted she made a flippant comment regarding Mr Efobi's mother, that it was inappropriate and insensitive. She apologised for these comments. However, the Tribunal does not find that these comments were in any way connected with Mr Efobi's race. Indeed, she provided convincing evidence of assisting Mr Efobi on a previous occasion as described in the findings of fact concerning an absence request so that he could pick up his mother from the airport. Her comments although inappropriate, arose from Ms Rossiter's frustration with Mr Efobi and the way he had taken the leave on 3 January 2020 and the way in which he behaved when challenged, with an unwillingness to take any personal responsibility or to display an understanding of his impact on the business. It was her frustration with that behaviour which was the reason for the flippant remark and the Tribunal does not find that it was in anyway connected with Mr Efobi's race.

Whether the reason why C was not informed of the deduction of his days' pay at the time it was made was because of race (issue (e))

78. The Tribunal accepted that Mr Efobi was not formally informed about deduction of a day's pay for the unauthorised absence. This should have been done and amounted to an omission by Ms Rossiter. However, the actual deduction was carried out in accordance with the Conduct Policy when an unauthorised deduction was recorded by a manager. This had been done because on 3 January 2020, Mr Efobi took the leave without it being agreed by Ms Rossiter. However, following the subsequent meetings

with him, she reasonably reached the conclusion that the deduction should remain in place. There was a failure to communicate this consequence of the recorded unauthorised absence to Mr Efobi, but the Tribunal is not convinced that this failure was in any way motivated by Mr Efobi's race whether consciously or unconsciously.

Whether the reason why C was not provided with the email address of his 2nd line manager and was not given a blank grievance form, despite his request, was because of race (issue (f))

79. As the Tribunal explained in its findings of fact, it felt that both Ms Rossiter and Mr Fellows should have provided the necessary information concerning the grievance process in order that he could quickly progress this matter. However, having considered the available evidence, on balance of probabilities, we do not accept that the failure to provide the email address or the blank grievance form arose from or was connected with Mr Efobi's race, and it amounted to a misunderstanding on the part of Ms Rossiter as outlined in the findings of fact. It did not prevent Mr Efobi from raising his grievance and on balance of probabilities, it did not represent an attempt to deter or sabotage Mr Efobi's grievance. If anything, it appeared to represent inexperience on Ms Rossiter's part and it was noticeable that once Mr Tysoe became involved as a more experienced manager. The Tribunal was therefore unable to accept that this issue arose from or was connected with Mr Efobi's race.

Whether C was given the notes of the 4 Fact Finding meetings and, if not, whether the reason why was because of race (issue (g))

80. The Tribunal accepts that Mr Efobi did not receive the notes of the 4 meetings relating to the 2 incidents until sometime after they took place and they were not sent to him by Ms Rossiter immediately following the meetings taking place. There did appear to be some disorganisation amongst line management just above Mr Efobi in how the two incidents under investigation were concluded, hence the perception that the processes 'petered out' as described in the findings of fact.

81. In mitigation, Mr Efobi was being investigated in respect of 2 matters almost simultaneously and which did not proceed to more formal or serious disciplinary action. The relatively minor outcomes and the fact that no further action took place from management, on balance indicated to the Tribunal that these incidents were seen as less serious to management than they perhaps were to Mr Efobi. In conclusion, the Tribunal did not see any evidence which suggested a deliberate policy from Ms Rossiter or her management colleagues to keep these notes from Mr Efobi and which suggested that his race played a part in this failure which appeared to be an omission rather than an act.

Whether the investigation into the road traffic accident was allowed to drag and, if so, whether the reason why was because of race, in circumstances where C says a

hypothetical comparator would have been 'let off with a verbal warning' and told that no further action would be taken (issue (h))

82. There was no evidence that the investigation into the road traffic collision was actually allowed to drag on. The Seek and Explanation meeting took place on 28 December 2019 and the subsequent Fact Finding took place on 16 January 2020. The Christmas period is a particularly busy time for the Royal Mail and with Mr Efobi not working full time, there were fewer opportunities for a meeting with Ms Rossiter to take place. Moreover, with the second incident taking place relating to the unauthorised absence, it was understandable that the Fact Finding would take place on the same day so that they could be resolved without Mr Efobi having to wait for a complete conclusion of the investigations.

83. In any event, there was no significant delay or evidence of any deliberate decision to prolong matters. In addition, Mr Efobi did not provide any evidence to support his contention that a hypothetical comparator in similar circumstances who did not share his protected characteristic, would have been 'let off with a verbal warning'. There was therefore no evidence that race played a part in the timings of the investigation.

Whether the reason why LR failed to apologise for the flippant comment when C asked for the 2nd line manager's email address was because of race (issue (i))

84. Ms Rossiter did apologise to Mr Efobi at the meeting on 4 January 2020 and as soon as it was clear that the Mr Efobi was unhappy with her comment. She has maintained contrite about her unfortunate comments and gave evidence to that effect at the hearing. It was clearly a matter for Mr Efobi as to whether he chose to accept the apology or not. He was not obliged to accept it.

85. It was not clear what Mr Efobi subsequently wanted from Ms Rossiter, but he was not prevented from raising his grievance by her and while his attitude concerning the unauthorised absence was no doubt frustrating, there was no attempt by Ms Rossiter to defend her comment, which arose from exasperation rather than any underlying views regarding race. The Tribunal did not believe a hypothetical comparator would have been treated any differently than he was and with the apology being given as quickly as possible, this particular issue is not well founded.

Whether Robin Tysoe ('RT') used the pretext of informal resolution to C's grievance in order to cover up for LR's actions and, if so, whether he did so because of race (issue (j))

86. Mr Tysoe did offer mediation or a simple apology from Ms Rossiter as an informal resolution to the process. The Tribunal found Mr Tysoe's evidence to be credible and reliable and accepted that he was simply exploring alternative forms of resolution. This was not an unreasonable thing to do and while undoubtedly, it would have resulted in less time being taken up by

Mr Tysoe in resolving the matter, a mediated resolution can often produce a happier and less contentious resolution for parties in a grievance.

87. There was nothing from the evidence that the Tribunal heard, to suggest an underlying bias or belief by Mr Tysoe that this was a racially motivated incident. Nor did the Tribunal find that management was seeking to 'cover up' the issues which lay behind the grievance. Interestingly, Mr Tysoe was of the view that Mr Efobi was only interested in mediation if this would yield some financial compensation, and this was supported in the email correspondence which was sent between them. Ultimately, however, this an incident which was in any way connected with Mr Efobi's race.

Whether the reason why Alan Rankin ('AR') did not deal in the Grievance Appeal to the issue of LR not providing the email address of the 2nd line manager or a blank grievance form despite C requesting one was because of race (issue (k))

88. Mr Rankin did not deal with this matter in his investigation of the appeal. However, the Tribunal accepts his evidence that this was not a key issue identified in the grievance appeal and it was therefore not dealt with by him as part of his investigation. Mr Efobi was given every opportunity to refer to the issues and amend the list if he felt necessary. The investigation report was wide ranging and followed a detailed investigation and involved questioning of Ms Rossiter, Mr Fellows and Mr Tysoe. The Tribunal was unable to see any reason why the reason why the matter was not dealt with was caused by Mr Efobi's race and this issue is not well founded.

Whether LR made an 'unsafe statement' to AR that she was unaware as of the Fact-Finding meeting on 04.01.20 that C was the carer to his mother, despite C believing the meeting notes recorded the same, and, if so, whether she did so because of race (issue(l))

89. On 4 January 2020 Seek and Explanation meeting, Mr Efobi mentioned to Ms Rossiter that the appointment which led to his absence involved his mother and nothing to suggest primary caring responsibilities and possible legal implications. She confirmed to Mr Rankin that she was not told by Mr Efobi at that meeting that he was his mother's carer until the subsequent fact-finding meeting on 16 January 2020. This was not an 'unsafe statement' and it certainly was not connected with Mr Efobi's race.

Victimisation (section 27 Equality Act 2010)

Protected Act

90. Mr Efobi asserts that the protected act which he relies upon in order that he can bring a complaint of victimisation is an earlier Employment Tribunal claim which he brought against the Royal Mail which alleged discrimination on grounds of race contrary to the Equality Act 2010. Mr Peacock explained in his submissions (which were not disputed by Mr Efobi), that the earlier claim was heard in the Liverpool Employment Tribunal in February or March

2016 and concluded with a judgment dated 21 March 2016. In principle this could amount to a valid protected act for the purposes of these proceedings.

91. The Royal Mail accept that in corporate terms, it was aware of the earlier Tribunal. It would be difficult to argue otherwise. However, they submit that in terms of knowledge by management involved in this case, neither Ms Rossiter, Mr Tysoe or Mr Rankin were aware of the case. The earlier claim was the subject of an appeal to the Employment Appeal Tribunal on 4 July 2017, the Court of Appeal on 27 November 2018 and finally, in a hearing before the Supreme Court on 27 April 2021. Mr Peacock submitted that by the appeal stage, the case had become a matter where knowledge was restricted to Royal Mail HR, Royal Mail Legal Services and Weightmans solicitors.

92. The respondent's witnesses dispute that they were aware of the earlier Tribunal claim at the material time and the Tribunal accepts that this was the case. Ms Rossiter was only appointed as a Delivery Office Manager in Ellesmere Port in November 2019 and Mr Tysoe was only appointed as a Senior Operations Manager covering the Ellesmere Port location in January 2020. Mr Rankin, while being an Independent Casework Manager, was based in Scotland and was usually restricted to cases which were based in Scotland. There was no evidence to suggest that any of these 3 witnesses became aware of the case until they needed to deal with the specific allegation of victimisation raised by Mr Efobi in these current proceedings.

93. The Tribunal does not accept Mr Efobi's argument that the Royal Mail's witnesses would have been told about the earlier case by HR at the material time in 2020 and there is nothing available to the Tribunal to suggest that this may have been within their knowledge at that time.

94. Under these circumstances, the Tribunal cannot accept that the alleged protected act was something which would have been known to Ms Rossiter, Mr Tysoe or Mr Rankin when the alleged detriments were taking place and the complaint of victimisation must fail.

95. However, for the avoidance of doubt, the Tribunal has briefly addressed the alleged detriments and its comments can be found in the next section below.

Detriments

Whether RT used the pretext of informal resolution to the grievance in order to cover up for LR's actions and, if so, whether he did so because of the previous Employment Tribunal ('ET') claim (issue (m))

96. This particular detriment is effectively a repetition of the allegation of direct discrimination under issue (j) and is discussed in paragraph 86 to 87 above. For the avoidance of doubt, the Tribunal did not find any evidence of the alleged treatment to be connected with race and did not amount to a detriment under section 27, given that its aim was to resolve the grievance

informally and there was no obligation placed upon Mr Efobi to agree to the suggestion.

Whether C was given the notes of the 4 Fact Finding meetings and, if not, whether the reason why was because of the previous ET claim (issue (n))

97. This alleged detriment effectively repeats the allegation of direct discrimination under issue (g). It is discussed in paragraphs 80 and 81 above and there is no need to discuss this matter any further, other than to dispute this matter was in any way connected with Mr Efobi's race or indeed, with knowledge of his earlier Tribunal claim.

Whether the reason why, at the time of setting up his 'out of office' reply, RT's failure to send C a separate email explaining the automatic reply did not apply to him and that he should not address queries to Mr Nichol, was because of the previous ET claim (issue (n))

98. Mr Tysoe's alleged failure was discussed in the findings of fact above. The Tribunal has no reason to criticise Mr Tysoe for applying a generic out of office message for his email account. He had no reason to anticipate that Mr Efobi would email him during his annual leave which the Tribunal understood to be a week in length. It is difficult to understand how a message of such general application could be construed as a specific detriment, even had Mr Tysoe been aware of the earlier Tribunal claim. It is a wholly misconceived allegation.

Whether the reason why LR, when she contacted HR following the Fact-Finding meetings on 16.01.20, and then failed to send C an email outlining the next steps, was because of the previous ET claim (issue (o))

99. Ms Rossiter disputed that she was aware of the earlier Tribunal claim and the tribunal accepts this. As has already been discussed above, the Tribunal does recognise that Ms Rossiter did not provide all of the information that she should have ideally provided to him following the fact-finding meeting on 16 January 2020. However, these failures amounted to nothing more than omissions on her part and the Tribunal did not hear anything to suggest that they were motivated by his race or knowledge of the earlier Tribunal claim.

Whether the reason why C was not provided with a formal outcome to the road traffic accident investigation prior to 28.08.20 was because of the previous ET claim (issue (p))

100. This alleged detriment effectively repeats the allegation made in issue (h). It also bears a close relationship to the previous allegation made in issue (m) above. The Tribunal does not see any need to repeat what has previously been said in the paragraphs above.

Whether the reason why a days' pay was deducted from C's salary was because of the previous ET claim (issue (q))

101. The deduction of a day's pay was made automatically because an unauthorised absence was recorded by Ms Rossiter on the Royal Mail PSP system. Following the subsequent investigation meetings which took place, she saw no reason to remove this given the way in which Mr Efobi took the leave. There was no evidence that her decision not to remove the deduction of pay was in any way connected with her knowledge of the earlier Tribunal claim.

Whether the reason why C was required to attend the Fact-Finding meeting on 16.01.20 in respect of his non-attendance on 03.01.20 despite the fact he says that he stated he was his mother's carer, was because of the previous ET claim (issue (r))

102. This meeting was required because Mr Efobi's absence was unauthorised and as has been discussed above, was not discriminatory towards him and any other comparable employee in similar circumstances who did not share his protected characteristic would have been treated any differently.

Whether the reason why C was not provided with the email address of his 2nd line manager and was not given a blank grievance form, despite his request, was because of the previous ET claim (issue (s))

103. This complaint bears some similarity to issue (e) and is discussed above. It was a clear omission by Ms Rossiter, it was not a deliberate act and was in no way connected with knowledge of his earlier Tribunal claim.

Whether the reason why AR did not deal in the Grievance Appeal to the issue of LR not providing the email address of the 2nd line manager or a blank grievance form despite C requesting one was because of the previous ET claim (issue (t))

104. This complaint bears some similarity with issue (k) which was discussed above. Details of why this did not amount to a discriminatory act are discussed above in relation to that issue. It was certainly not a discriminatory act, was not a detriment and was in no way connected with Mr Efobi's protected characteristic.

Whether LR made an 'unsafe statement' to AR that she was unaware as of the Fact-Finding meeting on 04.01.20 that C was the carer to his mother, despite C believing the meeting notes record the same, and, if so, whether she did so because of the previous ET claim (issue (u))

105. This issue is similar to issue (l) and for the reasons given above, Ms Rossiter's statement does not amount to an 'unsafe statement' and is not discriminatory or a detriment in relation to a complaint of victimisation.

Harassment (section 26 Equality Act 2010)

Whether requiring C to attend 4 Fact Finding meetings was related to race (issue (v))

106. This issue effectively repeats the allegation made at issue (a) above. There is no need to repeat what has already been discussed above in relation to issue (a). For similar reasons, the Tribunal does not accept that this treatment amounted to unwanted conduct related to Mr Efobi's race with the purpose of effect of violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

107. These meetings were reasonably held under the Royal Mail's conduct policy and would have been applied in the same way to Mr Efobi's colleagues in similar circumstances. This was not an instance of harassment under the Equality Act 2010.

Whether not providing C with a formal outcome to the road traffic accident investigation prior to 28.08.20 was unwanted conduct and, if so, whether it was related to race (issue (x))

108. This issue repeats what was alleged in issues (h) and (p) and for the same reasons as discussed above, it does not amount to an incidence of harassment as it related to an omission and did not amount to unwanted conduct relating to Mr Efobi's race.

Whether sending C to another Office (1) once in Dec 2019 following the accident (2) then again on 3rd and 4th Jan 20, was unwanted conduct and, if so, whether it was related to race (issue (y))

109. This was not raised as an issue by Mr Efobi when he replied to Ms Rossiter's direction that he should work the next day in Moreton. As has been discussed in the findings of fact above, asking staff to work in other delivery offices could happen at short notice and Mr Efobi appeared to acknowledge this and did not challenge the request made. It only became an issue when he discovered later that day that his mother had a hospital appointment.

110. For these reasons, the move to Moreton did not amount to unwanted conduct related to Mr Efobi's race and was not done with the purpose of violating his dignity or creating a hostile act etc. It does not amount to an act of harassment.

Whether the flippant remark made by LR on 04.01.20 was related to race (issue (z))

111. This allegation is similar to the allegation of direct discrimination at issue (d). For the same reasons as provided concerning that allegation, the Tribunal does not accept that this amounted to harassment contrary to section 26 of the Equality Act 2010.

Whether, at the time of setting up his 'out of office' reply, RT failing to send C a separate email explaining the automatic reply did not apply to him and that he should

not address queries to Mr Nichol was unwanted conduct and, if so, whether it was related to race (issue (aa))

112. This allegation is similar to the allegation of victimisation at issue (n). For the same reasons as provided concerning that allegation, the Tribunal does not accept that this amounted to harassment contrary to section 26 of the Equality Act 2010. It was a normal act of setting up an out of office automatic message to an email account when commencing a period of annual leave and was sent to everyone who sent him an email while he was absent and the message was not directed at Mr Efobi.

Whether AR not dealing in the Grievance Appeal to the issue of LR not providing the email address of the 2nd line manager or a blank grievance form despite C requesting one was unwanted conduct and, if so, whether it was related to race (issue (bb))

113. This allegation is similar to the allegation of direct discrimination at issue (d) and victimisation at issue (t). For the same reasons as provided concerning those allegations, the Tribunal does not accept that this amounted to harassment contrary to section 26 of the Equality Act 2010.

Whether LR made an 'unsafe statement' to AR that she was unaware as of the Fact-Finding meeting on 04.01.20 that C was the carer to his mother, despite meeting notes recording the same, and, if so, whether that was unwanted conduct and, if so, whether it was related to race (issue (cc))

114. This allegation is similar to the allegation of direct discrimination at issue (u) and victimisation at issue (l). For the same reasons as provided concerning those allegations, the Tribunal does not accept that this amounted to harassment contrary to section 26 of the Equality Act 2010.

Note concerning the shifting of the burden of proof

115. As has been mentioned above in the section dealing with the Law in this case, Section 136 of the Equality Act 2010 sets out the burden of proof that applies in discrimination cases and the two-stage process.

116. In terms of the first stage, the Tribunal found that Mr Efobi as claimant was unable to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of any other explanation, that the Respondent has committed an act of discrimination. This was a case where the issues alleged and identified by Mr Efobi were not supported by evidence to suggest that the acts or omissions by the Royal Mail's managers were connected with his race. As Mr Efobi was unable to establish facts which would 'tip' the burden of proof towards the Royal Mail, his claim must fail in its entirety.

117. While he was unhappy with what happened at the beginning of 2020 during the series of meetings with Ms Rossiter, the Tribunal find that Mr Efobi was the subject of a reasonable a proportionate process dealing with two issues which required investigation. The road traffic collision was

related to poor judgment when driving, but Mr Efiobi's indignation appeared to be primarily concerned with his treatment in relation to the investigation into the unauthorised absence. Ultimately, the outcome of this process arose from Mr Efobi's unwillingness to take responsibility for his duties to his employer and an expectation that what appeared to be a pre-planned out-patients appointment for his mother could secure a day off work with virtually no notice being given.

118. It was Mr Efobi's lack of responsibility which can be contrasted with his treatment by Ms Rossiter. She had clearly sought to help him in the past with time out of work for personal matters and it seems that he felt she would acquiesce to his request for further leave at short notice.

119. Ms Rossiter appeared to treat Mr Efobi in a very reasonable way and the loss of a day's pay was a standard Royal Mail process. But ultimately, he was leniently treated. Had Mr Efobi taken a moment to consider how the two investigations had come about, he may have reflected upon the reasons for the treatment he received and how his behaviour in relation to the absence had been unreasonable. His failure to reflect, gave rise to a claim of little merit and this why he was unable to establish facts which in the absence of a reasonable explanation could amount to race discrimination.

Conclusion

120. For these reasons, the complaint of discrimination of grounds of race must fail, in relation to direct discrimination, victimisation and harassment. The claim is therefore dismissed.

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Employment Judge Johnson

Date: 16 September 2021
(Corrected on: 17 February 2022)

REASONS SENT TO THE PARTIES ON
20 June 2022

FOR THE TRIBUNAL OFFICE