EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4111704/21 (V)

Heard by means of CVP on 4 April 2022

Employment Judge J Young

Sawan Naik	**Claimant** **Represented by:** **Mr G Singh, Solicitor**
University of Aberdeen	**1st Respondent** **Represented by:** **Mr N Maclean, Solicitor**
David Walton	**2nd Respondent** **Represented by:** **Mr N Maclean, Solicitor**
Hulda Sveinsdottir	**3rd Respondent** **Represented by:** **Mr N Maclean, Solicitor**
Tim Arnot	**4th Respondent** **Represented by:** **Mr N Maclean, Solicitor**
Owen Cox	**5th Respondent** **Represented by:**

Mr N Maclean, Solicitor

Rob Donelson — **6th Respondent**
Represented by:
Mr N Maclean, Solicitor

Debbie Dyker — **7th Respondent**
Represented by:
Mr N Maclean, Solicitor

Iain Harold — **8th Respondent**
Represented by:
Mr N Maclean, Solicitor

Brian Henderson — **9th Respondent**
Represented by:
Mr N Maclean, Solicitor

Karen E McArdle — **10th Respondent**
Represented by:
Mr N Maclean, Solicitor

Elizabeth Rattray — **11th Respondent**
Represented by:
Mr N Maclean, Solicitor

Tracey Slaven — **12th Respondent**
Represented by:
Mr N Maclean, Solicitor

Dean Philips — **13th Respondent**
Represented by:
Mr N Maclean, Solicitor

Susan White — **14th Respondent**
Represented by:
Mr N Maclean, Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that:-

1. The claim of victimisation under s27 of the Equality Act 2010 is struck out as having no reasonable prospect of success under Rule 37 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the Tribunal Rules").
2. The claim of direct discrimination under s13 of the Equality Act 2010 specified at (iv) of Table A within the Further and Better Particulars lodged by the claimant ("Table A") is struck out as having no reasonable prospect of success under Rule 37 of the Tribunal Rules.
3. The claims of harassment under s26 of the Equality Act 2010 specified at (i) (vii) and (x) of Table B within the Further and Better particulars lodged by the claimant ("Table B") are struck out as having no reasonable prospect of success under Rule 37 of the Tribunal Rules..
4. The allegations of direct discrimination specified at (i)- (iii) and (v) – (viii) inclusive of Table A have little reasonable prospect of success and the claimant is required to pay a deposit of £50 in respect of each of those allegations as a condition of continuing to advance each of those allegations under Rule 39 of the Tribunal Rules.
5. The allegations of harassment specified at (ii) – (vi) inclusive (viii) and (ix) of Table B have little reasonable prospect of success and the claimant is required to pay a deposit of £50 in respect of each of those allegations as a condition of continuing to advance each of those allegations under Rule 39 of the Tribunal Rules.
6. The claimant requires to pay the deposits by 27 July 2022. If the claimant fails to pay a deposit in respect of a specified allegation at 4 and 5 above by the date specified then the specific allegation shall be struck out.
7. The claims having been withdrawn against the 4th and 5th respondent the claims are dismissed against them under Rules 51 and 52 of the Tribunal Rules.
8. The claims against the 3rd 6th 7th 9th 11th 12th and 13th respondents are dismissed.

REASONS

Introduction

1. The claimant presented a claim to the Employment Tribunal on 13 October 2021 complaining that he had been unfairly dismissed; discriminated against because of the protected characteristics of race and sex and was owed notice pay and "other payments". The respondents deny all these claims. They admit that they dismissed the claimant but contend that was a fair dismissal on the grounds of gross misconduct. It is also maintained in the ET3 response that insufficient detail of any alleged act(s) of unlawful discrimination on the part of any of the respondents had been given and that the claims had no reasonable prospect of success and should be struck out; that time bar operated in that the less favourable treatment said to have occurred took place at the latest in November 2020 and the claim having been presented on 13 October 2021 was out of time.

2. I was advised that at the preliminary hearing on case management issues of 17 December 2021 it was confirmed that the claimant would not be proceeding with his claim of discrimination because of the protected characteristic of sex. That hearing also confirmed that the 1st respondent would not be invoking any statutory defence and would *"stand behind"* the individuals who had been listed as respondents. Instructions were to be taken on whether the individuals should remain as respondents given that the 1st respondent was to be vicariously liable for any discriminatory acts. At that time it was also ordered that there should be Better and Further Particulars prepared by the claimant of his case and these should be a *"full and comprehensive reiteration of the claimant's position";* that the claimant should make clear in *"the pleadings which incidents are simply background and which incidents either on their own or taken with others amount to race discrimination (and why)";* and that "*parties are aware that unreasonable behaviour is not in itself evidence of any particular form of discrimination. A*

party making a claim for discrimination must set out the prima facie facts from which a Tribunal can conclude that discrimination occurred".

3. The Orders made stated:-

> *"4. No later than 21 days after the date of this Order, the claimant shall send to the respondent, copied to the Tribunal, written further particulars in relation to the complaint of race discrimination containing:*
>
> *(a) full details in chronological order (set out in short numbered paragraphs), of all the events or incidents upon which he relies in support of the case, including in particular:*
>
> *i) the date of each event or incident,*
>
> *ii) the persons involved, and*
>
> *iii) what happened and what was done or said in each case; and*
>
> *(b) specification of:*
>
> *i) the act or acts complied of which are said to amount to less favourable/unfavourable treatment,*
>
> *ii) the identity of the person or persons with whom the claimant compares his treatment, and*
>
> *iii) the basis upon which the less favourable/unfavourable treatment is said to have occurred because of his nationality or race."*

4. Better and Further Particulars of the claims made and a response were lodged. In summary the Further and Better Particulars identified that the claimant commenced employment with the respondent as an Audio/Visual IT Technician on 3 June 2019 and his employment continued until terminated on 28 June 2021. He was located at a facility in Newburgh which was remote from the main University campus. He was managed by Iain Harold as his Line Manager and David Walton as Team Leader who were based on the

campus. The "*Centre Manager"* of the facility at Newburgh was Dr Karen McArdle.

5. It is contended that the claimant *"felt that Dr Karen McArdle was prejudiced against persons of colour"* and that there was tension between the claimant and Dr McArdle with reference to any management instruction. That led to a *"bitter fallout*" which led *"to the dismissal of the claimant".*

6. The claimant submitted a grievance in relation to various issues to the respondent on 22nd March 2020. None of the grievance was upheld in the outcome letter from the respondent of 15 April 2020. That grievance was appealed to stage 1 of the grievance procedure, was dealt with by way of written submission and was not upheld.

7. The grievance progressed to a stage 2 appeal and it was matters around this appeal which led to dismissal of the claimant. The date listed for the appeal hearing, which was to be conducted remotely, was 17 December 2020 but the claimant contends that he was to attend a work issue and did not attend the appeal. He maintains that someone else attended the appeal pretending to be him with the camera switched off. However on this contention being made it was investigated by the respondent who were of the view that the claimant was the individual "*behind the camera"* and had taken part in the appeal proceedings. His contention that he had not been there was considered to be an act of dishonesty and disciplinary proceedings ensued.

8. On 1 February 2021 the claimant submitted a second grievance raising a number of issues. However the respondent considered that they would proceed with the disciplinary issue before considering the second grievance. The outcome of the disciplinary procedure was the claimant's dismissal on 28 June 2021.

9. The claims made by the claimant relate to unfair dismissal under section 94 of the Employment Rights Act 1996 (ERA); direct discrimination under section 13 of the Equality Act 2020 (the Equality Act); harassment under section 26

of the Equality Act and victimisation under section 27 of the Equality Act. The claimant is a person of colour of Indian origin and states that it is *"inferred that the detrimental treatment that he suffered was because of his colour or nationality and or ethnicity".*

10. In relation to the claim of unfair dismissal the claimant contends that the suggestion he did not attend the appeal meeting which led to his dismissal was not taken seriously or investigated reasonably and the claimant had nothing to gain by lying about his attendance. If the respondent had examined CCTV that would have shown that he was busy working on the premises at the time of the online hearing. He maintains that the respondent "*held conscious or unconscious bias against the claimant for raising a grievance under the Equality Act 2020"* and that the real motivation to dismiss him arose from the fallout with Dr McArdle and the fact that he *"raised grievances pertaining to race discrimination".*

11. In relation to the claim of direct discrimination his Further and Better Particulars itemised 8 particular issues of less favourable treatment being part of a continuing act of discrimination leading to dismissal.

12. In relation to the claim of harassment his essential claim is that Dr McArdle was prejudiced against him because of his colour and was bullying him and that *"other staff members who were of white ethnicity did not get the same level of scrutiny and mistreatment to which he was subject".* He sets out 10 particular issues of alleged harassment.

13. In relation to the claim of victimisation it is stated that the claimant "*submitted a grievance containing elements of discrimination and harassment. The grievance that the claimant raised was dismissed entirely. Amongst other issues the claimant felt demonised and picked on. He felt thoroughly harassed and was eventually dismissed. The claimant raised a second grievance which was not looked into at all".*

14. The Further and Better Particulars also provides some background information under the heading of "*Supplementary Notes*".

The hearing

15. This preliminary hearing was ordered to be heard on the respondents' application for strike out failing which a deposit order under the Rules 37 and 39 of the Tribunal Rules of the claims of direct discrimination, harassment and victimisation. At the hearing there was produced a file of documents paginated 1-239 to which reference was made (J1-239). I heard helpful submission from both Mr Maclean for the respondent and Mr Singh for the claimant.

Issues for the Tribunal

(1) Has it been established that the claims or any part of them have no reasonable prospect of success?

(2) If so should the Tribunal exercise its discretion to strike out under Rule 37 of the Tribunal Rules?

(3) Failing strike out as above has any specific allegation or argument in the claims have little reasonable prospect of success?

(4) If the Tribunal considers that a specific allegation or argument has little reasonable prospect of success should a Deposit Order be made not exceeding £1,000 in respect of each such allegation or argument under rule 39 of the Tribunal Rules?.

(5) In the event that the Tribunal decided a Deposit Order should be made what should be the amount of the deposit having regard to the information provided on the claimant's ability to pay.

Preliminary Matters

16. Mr Singh advised that his instruction was that the claims against the 4th and 5th respondents (Tim Arnot and Owen Cox) were withdrawn but that the claimant wished to pursue claims against the remaining 11 individuals as well as the employer. Under Rule 51 of the Tribunal Rules the claims against the 4th and 5th respondents come to an end and under Rule 52 are dismissed.

The Relevant Law

Strike out

17. There was no dispute between the parties as to the legal principles which would apply to the striking out of a claim or response as having no reasonable prospect of success. It was acknowledged that the threshold was high and that where there were facts in dispute it would only be *"very exceptionally"* that a case would be struck out without the evidence being tested (**Ezsias v North Glamorgan NHS Trust** [2007] EWCA Civ 330) and that the power to strike out should not be exercised lightly (**Blockbuster Entertainment Limited v James** [2006] EWCA Civ 684).

18. This was particularly so in discrimination claims where:-

- Only in the clearest case should a discrimination claim be struck out
- Core issues of fact that turn on oral evidence should not be decided without hearing that evidence
- The claimant's case should ordinarily be taken at its highest
- If a claimant's case was completely inconsistent with undisputed contemporaneous documents it may be struck out
- A Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core facts

Anyanwu and another v Southbank Students Union and Southbank University [2001] IRLR 305 and **Mechkarov v City Bank NA** [2016] ICR 1121.

19. That is not to say that strike out is not possible in a discrimination claim. In discrimination claims generally a claimant must provide particulars of facts from which the Tribunal could infer that the less favourable treatment has taken place. There should be evidence of some link between the reason for the treatment and the protected characteristic invoked by the claimant. As was stated in **Bahl v The Law Society and others** [2004] IRLR 799 the unreasonable treatment of a claimant cannot of itself lead to an inference of discrimination even if there is nothing else to explain the treatment and *"merely to identify detrimental conduct tells us nothing about whether it resulted from discriminatory conduct".* Similar reasoning appears in **Madarassy v Nomura International Plc** [2007] IRLR 246 wherein Lord J Mummery advised:-

> "It will not be enough for a claimant simply to prove facts from which the Tribunal could conclude the respondent could have committed an act of discrimination. Such facts would only indicate the possibility of discrimination nothing more. So the bare facts of a difference in his status and the difference in treatment – for example in a direct discrimination claim evidenced that a female claimant had been treated less favourably than a male comparator would not be sufficient material from which a Tribunal could conclude that, on the balance of probabilities, discrimination had occurred. In order to get to that stage the claimant would also have to adduce evidence of the reason for the treatment complained of".

20. In relation to strike out LJ Underhill has stated in **Ahir v British Airways Plc** [2017] EWCA Civ 1392 that the 2013 Rules of Procedure did indicate that the test of "no ***reasonable*** prospect of success" was lower than the test in the previous versions of the Rule of whether a claim was "*frivolous*" or had "***no*** prospect of success" and that there may be cases which in terms of **Ezsias** *"embrace the disputed facts but which nevertheless may justify striking out on*

the basis of their having no reasonable prospect of success". As was stated by Underhill LJ (para 16):-

> *"Employment Tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where full evidence has not been heard and explored, perhaps particularly in a discrimination context. Whether the necessary test is met in a particular case depends on an exercise of judgment and I am not sure that that exercise is assisted by attempting to gloss the well understood language of the Rule by reference to other phrases or adjectives or by debating the difference in the abstract between "exceptional" and "most exceptional" circumstances or others such phrases as may be found in the authorities. Nevertheless it remains the case that the hurdle is high and specifically that it is higher than the test for the making of a Deposit Order, which is that there should be "little reasonable prospect of success".*

Submissions of the Parties

21. I was grateful for the submissions made and find it convenient to set out the submission made for the respondents on particular matters followed by the response for the claimant.

Claims against the individuals

For the Respondents

22. Failing the entire claims being struck out then they should in any event be struck out against the 11 remaining individual respondents. In the Further

Particulars lodged 7 individuals were not named and no allegations made against those individuals . The 4 individuals who had been mentioned were Dr Karen McArdle (Centre Manager of the facility where the claimant was employed); David Walton (being the Team Leader); Iain Harold (being the claimant's Line Manager); and Susan White of HR. However no valid claim had been being directed against them. The claims against all the individuals should be dismissed.

23. It was submitted in any event that even if the claims under the Equality Act should survive no statutory defence was being taken by the employer who had a strong covenant and who carried vicarious responsibility. No useful purpose was served in having 11 individuals also named which would only go to prolonging the proceedings.

For the Claimant

24. It was submitted that the claimant considered that the individuals named were those culpable for the discrimination claims. Information and the responsibility for various matter complained of in respect of those individuals not named specifically within the Further and Better Particulars (and also Susan White and Iain Harold who were named) was given as follows:-

(a) Dean Philips – in his position as Assistant Director (Relationship Manager) he had considered the formal grievance raised by the claimant on 23 March 2020 and issued an outcome letter which had not upheld any part of the grievance (J93/98). That was a discriminatory matter.

(b) Hulda Sveinsdottir – in her position as Director of Planning this respondent had heard the grievance appeal and in the stage 1 outcome letter had not upheld any part of the appeal. The concern was that the outcome letter was "*copy and paste"* without any real consideration. There was no meaningful appeal and discrimination was at play.

(c) Rob Donelson – in relation to the second grievance lodged by the claimant of 1 February 2021 it was contended that a decision was made by this individual not to hear the grievance pending the disciplinary procedure involving the claimant and which led to his dismissal. It was contended that this grievance should have been heard and not put on hold and this was a discriminatory act by this individual.

(d) Debbie Dyker – it was contended that this individual made investigation into the issue of whether or not the claimant had been "*behind the camera"* at the grievance appeal stage 2 and failed in that investigation to check the University CCTV to establish the whereabouts of the claimant and others. The contention is that the disciplinary measures were prejudged because of race.

(e) Iain Harold – the contention was that this individual as Team Leader gave Dr Karen McArdle supervisory powers over the claimant albeit Mr Harold was the Line Manager for the claimant. It was contended the claimant received no backing from Mr Harold on the various issues that arose with Dr McArdle and that he "*backed her in full".* In general it was asserted that the claimant's issues were not adequately dealt with by this individual because of race.

(f) Brian Henderson – the contention for this individual was that he assisted in the investigation into the disciplinary hearing and did not consider the second grievance albeit the employer policy says that a grievance should be dealt with before disciplinary investigation. This was due to race.

(g) Elizabeth Rattray – this individual was a member of the disciplinary panel who dismissed the claimant and so was part of the alleged discriminatory treatment.

(h) Tracey Slaven – this individual considered the appeal against dismissal and the refusal of that appeal was allegedly discriminatory.

(i) Susan White – this individual as HR Partner was instrumental in seeking to extend the claimant's probationary period and it is contended that was discriminatory. She also contributed to evidence to support the claim that he was "*behind the camera"* at the grievance appeal hearing when he was not and again that was a discriminatory issue.

25. It was submitted that the events concerning the 2 other individuals (Dr K McArdle and D Walton) could be identified from the Further and Better Particulars.

Claim of Direct Discrimination

For the Respondent - general

26. It was submitted for the respondent that the claims as itemised in Table A of the Further and Better Particulars (J45/46) should be struck out because even taking the evidence at its highest the claimant would be unable to show that the less favourable treatment alleged was because of race and therefore there was a failure to meet the test for direct discrimination under section 13(1) of the Equality Act 2010. Neither had any comparator been identified in any of the particular items listed. The claimant required to be able to show that he was treated less favourably than a real or hypothetical comparator because of the protected characteristic. Apart from the lack of any actual comparator being identified generalised statements were made that others would not be treated in the same way. That was insufficient to make a *prima facie* case of discrimination to be answered by the respondent.

For the claimant -general

27. It was submitted that albeit the pleadings did not identify actual comparators the inference arising from the pleadings was that there are actual comparators and that the claimant will be able to identify them. In any event a direct discrimination claim can rely on hypothetical comparators.

28. It was contended that the required high threshold to strike out a claim was not met and that there were reasonable prospects of success. This was not a simple case. There were many people involved. The facts were in dispute and it was important to hear oral evidence in the case before making any decision on its merits.

29. **Submissions on Particular Allegations of Less Favourable Treatment in Table A**

(i) June 2019 – Other colleagues of the claimant of white ethnicity had discretion to set their own holidays, however the claimant had little or no flexibility for holiday setting and his requests were the subject of approval by Dr Karen McArdle who was not his Line Manager. The claimant was not trusted to set his own holidays and seldom allowed to take holidays when he needed them most.

For the respondent

30. It was stated that the treatment complained of was not of itself objectionable. Approval for holiday requests was normal and did not show that unlawful discrimination occurred. No particulars were given from which it could be inferred that a holiday request was refused because of the claimant's race. If other employees had discretion to set their own holidays it could only be less favourable treatment of the claimant if those other employees were not in materially different circumstances. That was not stated. Within the documents only one example was given by the claimant when a holiday request was refused but he had only given 2 weeks' notice and there were commitments on site which required his presence (J109/111).

For the claimant

31. This issue was evidence of the influence of Karen McArdle over the claimant. She was not his Line Manager and was not relevant to approve holidays. Terms conditions should only be discussed with a Line Manager The claimant

was not happy with the role of Dr McArdle. Refusal of requests were unreasonable as the Centre was not a busy place and the calendar was free. In this connection Richard Nelson was a comparator and the claimant had been treated differently. The claimant was the only person of colour so the reason for less favourable treatment was race.

(ii) *August 19 – December 2019. Dr Karen McArdle denied the claimant the use of freely available consumables and accused him of thieving such items. Use of consumables was actually open to everyone. No other person would be criticised for consumables use.*

For the Respondent

32. Even if true these particulars were insufficient to allow the Tribunal to decide that unlawful discrimination took place. The facts say nothing about their reason for the treatment. There was no link between the treatment complained of and the claimant's race.

For the Claimant

33. In this connection the claimant had been held to account by Dr McArdle and demeaned and it was an issue of race. He would not have experienced this treatment had it not been his race. It was part of the grievance which was not upheld.

(iii) *18 December 2019. Dr Karen McArdle attempted to prevent the claimant from attending a Christmas lunch despite all other colleagues being allowed to attend the lunch. The inference was that the claimant's attendance was not relevant as he was a non-Christian.*

For the Respondent

34. There was no link between the treatment and the claimant's race and none could be inferred. The only protected characteristic centred around the

claimant's religion which was inconsistent with and therefore precluded the possibility of an inference of discrimination on grounds of race.

For the Claimant

35. The claimant's position was that Dr McArdle had asked for IT support that day albeit there were very few staff in and no need for IT cover. There were no events on that day. There was a dispute on the facts. The link specified was to religion but there was a crossover to race. The claimant's assertion was that he was prevented attending because of his race.

(iv) *December 2019. Dr Karen McArdle had offered information about a travel allowance to PhD students of white ethnic origin and excluded the claimant from this discussion despite it being of potential benefit to him. As such the claimant felt excluded from normal work activities.*

For the Respondent

36. In this respect a natural non-discriminatory inference arose. The claimant was employed as an Audio/Visual IT Technician. He was not a PhD student and so not entitled to the same travel allowances regardless of race. The claimant's comparators of PhD students were in materially different circumstances. No *prima facie* case arose.

For the Claimant

37. The claimant considered that he was "on par" with PhD students. They had similar supervisory structure and rate of stipend similar to his pay. There was racial motivation as Dr McArdle had prejudice against people of colour.

(v) *August 2020. Team Leader David Walton refused to let the claimant attend professional development courses without reasonable justification. University colleagues are very rarely refused access to such courses and there was no credible explanation for why it was refused.*

For the Respondent

38. In this respect the chain of emails (around e mail at J125) was relevant. The issue occurred in the period of furlough (20 April – 20 September 2020 which was agreed). The email exchange explaining the eventual decision not to support the £200 fee showed a sensible basis for the position adopted by the respondent. Even taking the allegation at its highest there was no link to show that there was any issue of discrimination. The documents (produced by the claimant) showed agreement for the claimant to attend a leadership and development course. The course not permitted was external.

For the Claimant

39. There was no reasonable justification for the refusal to attend. The course was relevant to the claimant's position and would enhance his ability. Only the registration fee was payable and there was budget for that in respect of staff training. There was no reason why cost was an issue. The inference arising was one of discrimination.

(vi) *20 August 2020. The claimant's request to do additional work during furlough to David Walton was ignored which led him to missing the opportunity to obtain additional income to over £300. The claimant believes that his colleagues of white ethnicity were granted the opportunity to do secondary jobs during furlough.*

For the Respondent

40. The claimant had produced emails on this matter (J136). The request was made with no time to respond. The picture painted in the allegation was one of delay or refusal but the facts did not bear this out in terms of the correspondence. Even at its highest no detail was given of any comparator. There was only an assertion made that others were treated differently without any factual foundation.

For the Claimant

41. It was accepted that additional work could have been done on furlough. It was asserted others were able to do so. Email exchange ended with an email of 31 August 2020 indicating work could be available "*tomorrow*" but no response was received (J126).

(vii) *21 September 2020 – 28 June 2021. The claimant was not granted access to the McRobert Building where he was required to work. Other staff members all of whom were of white ethnicity were granted access within 24 hours of returning from furlough. The claimant chased this matter after 2 months of still not getting access and he was told by his Team Leader David Walton "You are not special".*

For the Respondent

42. Again there was a failure to identify comparators employed in the same or similar work. No reasons could be inferred from the treatment itself. The particulars are insufficient to allow the Tribunal to decide even in the absence of explanation from the respondent that unlawful discrimination took place. The words "*You are not special"* would suggest the claimant was being treated the same way not differently.

For the Claimant

43. Access to the McRobert Building was granted to many after furlough. The claimant asked for 2 months but was told he could not have access as he was *"not special".* The comparators were in the same Department namely the Media Services Department.

(viii) 21 September 2020. On return from furlough the claimant's usual work laptop (and peripherals) had been reallocated to another staff member meaning that he had to resort to using his personal laptop for work purposes. Personal use of laptop contributed to the claimant's dismissal.

For the Respondent

44. It was not possible to infer any reasons or any link between the treatment on the claimant's race from the treatment itself. The particulars were insufficient to decide that unlawful discrimination took place. During lockdown it was common in all businesses for company property to be reallocated. There was nothing to suggest this was done because of the claimant's race.

For the Claimant

45. It was the claimant's position that the equipment should not be shared. Even Iain Harold was surprised the laptop was taken to be used by others. Little was done to rectify the situation. His Line Manager sided with Dr McArdle who had prejudiced views against the claimant.

Harassment Claim under section 26 of the Equality Act 2010

46. The incidents of alleged harassment under section 26(1) of the Equality Act 2010 were listed within the Further and Better Particulars at "Table B" (J47/48). The particular issues and the submissions made follow.

(i) *19 September 2019. During a meeting between David Walton (Team Leader), Dr Karen McArdle and the claimant, Dr McArdle thoroughly criticised the claimant and reminded him that he was still under probation. Dr McArdle was not criticising other colleagues of white ethnicity.*

For the Respondent

47. The content of the criticism was not stated. Even if it could be assumed that the claimant was subject to unreasonable criticism that is not a basis to infer

that the treatment complained of related to the claimant's race. It would not be reasonable for the claimant to have perceived these criticisms as related to race. The probation was still in place. In this probationary period particular issues had arisen.

For the Claimant

48. Reference was made to the grievance outcome letter of 15 April 2020 (J93/98). The Line Manager of the claimant was not Karen McArdle and so it was not her place to have a discussion with the claimant and make criticisms. The issue of lateness seemed to be a concern and had been explained by the claimant and there were mitigating circumstances and that criticism was unfair. Other criticisms regarding tidying cables for example were also unfair.

(ii) *19 September 2019*. *During the same meeting between David Walton (Team Leader) Dr Karen McArdle and the claimant Dr McArdle complained that the claimant had not prepared a User Guide which she had requested however this task had in fact been completed and the Guide had been sent to her. Dr McArdle's complaints against the claimant were unfounded and without reasonable excuse, leading the claimant to believe that Dr McArdle held racial prejudices against him.*

For the Respondent

49. On this complaint there was no reason to say that the issue was based on race even if the alleged complaint was unfounded. The complaint related to the claimant's work and was not a matter of race.

For the Claimant

50. The complaint was unfounded and unfair. The inference was that it was down to race.

(iii) 19 September 2019 – after a meeting between David Walton (Team Leader), Dr Karen McArdle and the claimant, Dr McArdle threatened the claimant saying

that he was under probation and that he was replaceable within 3 months (at the end of 6 months of probation). The claimant felt threatened and intimidated. Other colleagues of white ethnicity were not threatened in this manner.

For the Respondent

51. Even if these allegations are true there was no basis to infer the treatment complained of related to race. While a comparator is not necessary in a harassment complaint the particulars were silent on any link between the unwanted conduct and the claimant's race.

For the Claimant

52. The claimant was threatened by this and commenced looking for another job. He felt that his record was unblemished as a probationer and became anxious and traumatised about losing his job. This and other matters made him consider that race was the reason for the treatment. He could not point to other colleagues on probation but it was a very small Department.

(iv) October 19 – December 2019. Despite a driving licence not being a requirement of the job, Dr McArdle would regularly pressurise and harass the claimant about getting a driving licence. Other colleagues of white ethnicity were not pressured in this manner.

For the Respondent

53. Reference was made to the documents indicating that the claimant was not turning up for work on time on the basis that the bus timetable was a difficulty. In that context it was not unreasonable to ask if he could drive to get to work on time. Even if the allegation of being pressurised was true there was nothing to indicate that this related to race. On the claimant's own narrative there is a non-discriminatory inference as to why his Managers' might have asked him about driving to work.

For the Claimant

54. The concern regarding the relevance of Dr McArdle intervening with the claimant given she was not his Line Manager was repeated. It was not appropriate for her to raise the issue and the inference was it was racially motivated.

(v) 13 January 2020 – 17 January 2020. Whilst in a discussion with Richard Neilson and the claimant Dr McArdle accused students of committing theft within the University premises. She said "I've heard of things disappearing from academics' tables from their offices". A number of students are international students and persons of colour and the claimant felt that this comment had racial undertones. A similar allegation was made by Dr McArdle against the claimant.

For the Respondent

55. Even if true the quoted comment attributed to Dr McArdle does not contain any allegation. It was not reasonable to infer that any allegations made about theft were related to race or ethnicity or for the claimant to have perceived them as such. The claimant in his grievance did not relate the comments ascribed to Dr McArdle to be about international students or about race (J87). The claimant accuses Dr McArdle of putting "*everyone in the same basket"* and makes the comment that her alleged comment also includes her own husband who was a student (in the claimant's own words). That would contradict his own argument that this comment was being made about international students and related to race.

For the Claimant

56. In the context of the comment the undertone was racial. He was accused and considers that being a matter of race discrimination and him being included with "foreign students" which displayed prejudice.

(vi) 27 January 2020 – the claimant had a meeting with Iain Harold (Manager) and Dr Karen McArdle who unfairly criticised his work and made him feel that he was not doing his job properly. The specific work for which he was being criticised for was tidiness regarding computer systems being installed in various rooms. The person who installed the computer systems was of white ethnicity and came under no such criticism.

For the Respondent

57. Reference was made to the claimant's grievance on this matter (J87) which contained no discriminatory inference. The allegation relates to tidying cables and him being the only IT person on site and was not an unreasonable request. There was nothing to link him being asked to tidy cables with his race.

For the Claimant

58. This was an incident of Iain Harold backing up Karen McArdle on the issue of untidy cables. She was prejudiced and the cables in any event were in a locked cupboard and out of sight and view. He was being targeted because of views held by Karen McArdle.

(vii) 27 January 2020. Shortly after a meeting between Iain Harold, Dr Karen McArdle and the claimant, the claimant had a further private meeting with the claimant (in error for Karen McArdle) *which resulted in a bitter argument. The claimant had to take time off work due to the stress and anxiety that had been caused to him. Dr McArdle would never have dealt with a white colleague in the same manner.*

For the Respondent

59. This allegation seemed to relate to a "bitter argument" which was a two way matter and nothing indicated that it was related to race. There was no race related reason as to why there was an argument.

For the Claimant

60. The claimant's performance was good and any criticism unreasonable and targeted because of the views of Dr McArdle. Her prejudice was not taken seriously by the respondent.

(viii) 17 April 2020 – the respondent(s) Susan White (HR Partner) tried to extend the claimant's time on probation without reasonable excuse. This came shortly after the claimant had raised his first grievance pertaining to discrimination. This would have opened up the possibility of the claimant's job being brought to an end at the end of probation.

For the Respondent

61. It was submitted that extending time on probation was favourable rather than less favourable treatment because it provided the claimant with more protection. In any event it was undisputed that there were issues between the claimant and the respondents at the time e.g. lateness, disputes about Dr McArdle being able to direct his duties, the claimant resisting instruction to carry out tasks (tidy IT cables) so if an inference was drawn that is non-discriminatory even on the claimant's own narrative.

For the Claimant

62. The attempt to extend probation was against the back history of racist incidents. Extension of probation was not reflective of the work being carried out by the claimant. Support could have been provided albeit not on probation. The claimant considered he had passed probation and this was a step to remove him from his position. This was done on the back of racially motivated criticism supported by Susan White. Reference was made to correspondence at J112-122.

(ix) *June 2019 - 27 January 2020. Whenever the claimant was away from his desk, Dr Karen McArdle would start looking for him to see what he was doing. He felt that he was constantly being watched and harassed. On a few occasions Dr McArdle even attempted to open the door of the disabled restroom when it's clearly visible it's occupied by the claimant. There were other student staff and external clients of white ethnicity who could move around freely without such scrutiny.*

For the Respondents

63. There was nothing in this allegation to say it was racially motivated. It was not clear how the claimant could be identified through a locked door. The particulars were insufficient to indicate even in the absence of explanation that unlawful harassment took place.

For the Claimant

64. The claimant was harassed by being watched and part of the narrative of racial motivation. The fact that it was Ms McArdle trying to open the door was evidenced by very few people being in the Department and her having a distinctive perfume. The behaviour was unreasonable and related to race.

(x) *June 19 – 27 January 2020 – throughout his employment the claimant has felt that he has been talked down to rudely and in disrespectful manner by Karen in front of other staff and external clients. Karen has also been swearing and cussing at all IT personnel and their services within the University and the claimant being the only AV/IT personnel on site he felt that this was an abuse hurled directly towards him. He felt harassed and bullied by it. There were other students, staff and external clients of white ethnicity who could move around freely without such treatment.*

For the Respondents

65. Even if true the criticism appeared to be directed to all IT personnel and was inconsistent with and precluded any inference that the conduct was related to the claimant's race.

For the Claimant

66. The IT personnel included the claimant and him being talked down to in a disrespectful manner was evidence of racial motivation.

Victimisation under section 27 of the Equality Act 2020.

67. The particulars of victimisation given by the claimant in the Further and Better Particulars are:-

> *38 The claimant relies on section 27 of the Equality Act 2020 and complains of victimisation.*
>
> *39 The claimant submitted a grievance containing elements of discrimination and harassment. The grievance that the claimant raised was dismissed entirely. Amongst other issues, the claimant felt demonised and picked on. He felt thoroughly harassed and was eventually dismissed. The claimant raised a second grievance which was not looked into at all.*

For the Respondents

68. Reference was made to the original grievance lodged by the claimant (J81/92). In the preamble reference was made to "*Iain Harold and David Walton who were my Manager and Team Leader respectively are pressured by Karen into bullying, harassing and discriminating against me*" and that he feels *"discriminated against in order to force me into resigning …"* However no details are given as to what alleged acts made the claimant feel harassed and nor does he explain how any alleged detriment was linked to his protected act in raising a grievance alleging discrimination and harassment.

69. It was accepted that making an allegation that the claimant had been subject to discrimination and harassment is a protected act but submitted that the claimant had failed to explain the detriment he alleges he was subjected to. It is not victimisation for a grievance not to be upheld.

70. In the claimant's Further and Better Particulars (paragraph 13) it was stated that the "*respondents believed that the claimant was being dishonest with regards to his attendance at the grievance appeal meeting. Therefore the respondents were unwilling to hear the claimant's second grievance given that the claimant's honesty was under question".* The suspension of the claimant's second grievance stemmed by the claimant's own admission from a belief in him being dishonest rather than any victimisation.

For the Claimant

71. It was submitted that the grievance was based on discriminatory treatment and none of that was upheld. That was the protected act. Because the claimant had lodged the grievance acts subsequent to 23 March 2020 were acts of victimisation. It was submitted that the dismissal was an act of victimisation and was discriminatory.

72. It was also submitted that the failure to deal with the second grievance raised was also victimisation. There was ample opportunity to deal with the matter and that was a breach of the respondent's guidance.

General

For the Respondents

73. It was submitted that the application for strike out was primarily based on the claimant's failure to link any alleged unfavourable treatment with any alleged discrimination, harassment or victimisation because of the claimant's race. References to comparators were unspecific and generalised and nothing was pled to show the reason why the alleged less favourable treatment was

because of, or related to, race or having raised concerns. It was not necessary for the Tribunal to determine any matters of fact to dispose of the strike out application. If any matters were found to be on the claimant's own narration nothing to do with unlawful discrimination then other allegations were undermined. This was a case where the Tribunal could properly strike out the discrimination claims in full as having no reasonable prospect of success.

For the Claimant

74. It was submitted that the respondents' approach was to take a very narrow interpretation of the pleadings. The pleadings were not to be a narration of all the evidence and there could always be further matters made out in oral testimony. The pleadings should be considered in a broader way. There were disputed issues of fact to be considered. The individual respondents not named within the pleadings could easily be identified from the facts of the case and the documents produced.

Deposit Order
Under Rule 39(1) of the Tribunal Rules of Procedure

75. The application by the respondent was that in the event the application for strike out was not upheld the Tribunal should make a Deposit Order of £1,000 in respect of each claim which the Tribunal considered had *"little reasonable prospect of success".*

Relevant Law
Deposit Order

76. Again there was no dispute on the tests to be applied by a Tribunal in an application for a Deposit Order. It was acknowledged that the test was not as rigorous as that for strike out and that a Tribunal has a greater leeway when considering whether or not to order a deposit. It was not wrong for a Tribunal

to make a provisional assessment of credibility in such an application (**Van Rensburg v Royal Borough of Kingston Upon Thames** UKEAT/0096/07; UKEAT/0095/07 and **Ezsias v North Glamorgan NHS Trust** [2007] EWCA Civ 330).

77. The EAT in **Tree v South East Coastal Ambulance Service** UKEAT/0043/17 expressed in obiter that similar considerations will potentially arise in exercise of discretion in Strike Out Orders because a deposit may be a significant deterrent to the pursuit of a claim.

78. If a Tribunal considers that a specific argument or allegation has little reasonable prospect of success then it may order a deposit to be paid not exceeding £1,000 as a condition of continuing to advance that argument or allegation. Again whether or not to make a Deposit Order is a matter of discretion and does not follow automatically from a finding that a claim has little reasonable prospect of success.

79. Prior to making a decision on a deposit a Tribunal must make reasonable enquiries into the paying party's ability to pay the deposit and take that into account when fixing the level of the deposit. It is not the purpose of a Deposit Order to make it difficult for the paying party to find the sum payable or to make it difficult to access justice or effect strike out via the back door (**H v Ishmail** UKEAT/0021/16). However while the amount of a Deposit Order should reflect the parties' means it should also be high enough to stand as a warning that the matter had little reasonable prospect of success. In **O'Keefe v Cardiff and Vale University Local Health Board** ET Case No 1602248/15 a Deposit Order of £100 for each of 2 grounds of claim which it was considered had little reasonable prospect of success was set on the reasoning that while the claimant did not have a current source of income the level of the award was sufficiently high to bring home the limitations of the claim.

Submissions on deposit order

80. Essentially the parties' submissions on the Deposit Order were in line with those made on the application for strike out. The respondents' position was that for the same reasons given, failing strike out, then a Deposit Order should be made. Similarly the claimant's position was that for the same reasons given in the application for strike out no Deposit Order should be made.

81. As far as the claimant's means were concerned he was not present at the Hearing and so was unable to be questioned. Mr Singh provided information to the effect that the claimant was single and had no current dependants; was still out of work and in receipt of benefits; and was in receipt of legal aid in respect of advice and assistance in relation to this claim. He lived in rented accommodation. The claimant's position was that he would be unable to pay anything by way of deposit were an Order to be made.

Application for Anonymity

82. It should be recorded that Mr Singh advised at conclusion of the hearing that the claimant would wish to seek an order for anonymity. His position was that the claimant had made a number of unsuccessful applications for employment and he considered that these proceedings may be hampering his ability to obtain work. The reasoning was that it was easy for prospective employers to make a search through the internet on prospective employees and in the case of the claimant be able to find reference to these proceedings on a Register of Judgments.

83. No advance warning was made of this application which required to be under Rule 50 of the Tribunal Rules of Procedure which advises that:-

> "A Tribunal may at any stage of proceedings, on its own initiative or an application, make an Order with a view to preventing or restricting the public disclosure of any aspect of those proceedings so far as it considers necessary in the interests of justice or in order to protect

the Convention rights of any person or in the circumstances identified in section 10A of the Employment Tribunals Act".

84. I considered intimation should be provided to the respondents who should have a reasonable opportunity to consider and if so advised respond to the application. In any event I did not consider that at this stage of the proceedings there was any record of this case on the Register of Judgments as no Judgment had been made. There had been a previous preliminary hearing in the case but that would not appear on the Tribunal Register. Accordingly if the claimant was unable to obtain employment there was no evidence that the reason for that was because his name was appearing on an Employment Tribunal Register of Judgments.

85. Also there was no evidence suggesting that the reason the claimant was unable to obtain employment was because of his involvement in these proceedings. It appeared that there was only a suspicion being advanced as to the reason why the claimant was not gaining employment.

86. On Convention rights it was stated that the right to respect for private life under Article 8 of ECHR was a consideration. That is a qualified right. In such applications I am obliged to give *"full weight to the principle of open justice and to the Convention right of freedom of expression".* I considered the paucity of evidence forming the basis of the application did not overcome the weight to be given to those matters or justify anonymisation in the interests of justice. I did advise that it would not prevent the claimant making a further application which should be intimated to the respondents if the circumstances changed.

Conclusions

Case of victimisation under s27 of the Equality Act.

87. I find it convenient to deal firstly with the complaint of victimisation under section 27(1) of the Equality Act which advises that the claimant seeking to establish that he or she has been victimised must show two things: first, that

he or she has been subjected to a detriment; and secondly that he or she was subjected to that detriment because of a protected act. The following are "protected acts" for the purpose of section 27(1) :-

- bringing proceedings under the Equality Act
- giving evidence or information in connection with proceedings under the Equality Act
- doing any other thing for the purposes of or in connection with the Equality Act, and
- making an allegation (whether or not express) that A or another person has contravened the Equality Act

88. The position of the claimant is that the lodging of the original grievance on 23 March 2020 was a "protected act". That grievance states in the preamble *"I feel that Iain Harold and David Walton who are my Manager and Team Leader respectively are pressured by Karen into bullying, harassing and discriminating against me"* and that because of a grudge held against him by Karen McArdle *"I feel harassed, bullied and discriminated against in order to force me into resigning which I feel is leading towards systematic constructive dismissal".* It could be said therefore that the grievance with this reference to "*discrimination"* is "*making an allegation (whether or not express) that A or another person has contravened this Act".*

89. However in the ET1 lodged by the claimant (J3/21) he makes no allegation that any detriment which occurred after 23 March 2020 was because he had lodged the grievance.

90. In the Further and Better Particulars (J42/50) under that part which deals with "*victimisation"* the claimant simply states:-

> *"The claimant submitted a grievance containing elements of discrimination and harassment. The grievance that the claimant raised was dismissed entirely. Amongst other issues the claimant felt demonised and picked on. He felt thoroughly harassed and was eventually dismissed. The claimant raised a second grievance which was not looked into at all".*

91. This gives no indication of any "*detriment"* because he had lodged a grievance. He states that the grievance was dismissed entirely but fails to state that the reason for its dismissal or any part of the grievance was because he had lodged the grievance. He gives no detail of why he *"felt demonised and picked on"* or why he "*felt thoroughly harassed and was eventually dismissed"* other than a feeling that was the case.

92. It was stated in submission for the claimant that the dismissal was an act of victimisation. In the preliminary hearing of 17 December 2021 the claimant was advised that Further and Better Particulars ordered should set out *"which incidents are simply background and which incidents either on their own or taken with others amount to race discrimination (and why)"* The particulars give background and then seek to specify particular matters which would amount to discrimination. There is no clear statement within that part dealing with the complaint of victimisation that dismissal was an act of victimisation under s27 of the Equality Act.

93. The ET1 puts the dismissal on the basis that the respondent believed that the claimant was being dishonest in stating that he was "*not behind the camera"* at his stage 2 appeal hearing when in fact he was. The ET3 response does not aver that the dismissal was occasioned because he had lodged a grievance. The "Background" section on unfair dismissal states that "*real motivation"* for dismissal was the "*fall out* " with Dr McArdle and *"the fact that the claimant raised grievances pertaining to race discrimination"* but that is concerned with the case under s94 of ERA.

94. There is no clear narration of the claim of victimisation because of lodging a grievance. More fundamentally there is no narration of the circumstances which would cause the claimant to believe that he was being subjected to a detriment such as dismissal because he had lodged the grievance. There is nothing in the pleadings to suggest that the dismissal was "*because of"* the protected act. No facts are pled which would cause that belief. The disciplinary proceedings only came after the stage 2 grievance appeal hearing of 17 December 2020 when the issue of the claimant's alleged pretended attendance at that remote hearing was raised. The claimant in his ET3 agrees that was the issue investigated and there is nothing pled which would form a basis to suggest that the real reason for the investigation and dismissal was the raising of a grievance rather than the issue of pretended attendance.

95. The failure to investigate the second grievance was also submitted to be an act of victimisation but again there was nothing stated as to why the claimant believes that this failure to investigate was because of the protected act. Paragraph 13 of the Further and Better Particulars narrates why it was that the respondent did not hear the second grievance *"given that the claimant's honesty was under question".* That is a very different reason from any issue of victimisation under section 27 of the Equality Act. In any event the employer respondent did not refuse to hear the second grievance but to deal firstly with the disciplinary matter and that was in line with their policy.

96. The claimant includes Dean Philips as an individual respondent. There is nothing in the Further and Better Particulars or the initiating ET1 which would indicate what part of the case is levelled against that individual. I was advised at the hearing that he was included because he heard and did not uphold the original grievance (J93-98). The dismissal of that grievance is not mentioned as an act of direct discrimination or harassment in the matters listed.. It can only be that the case against this respondent is that he victimised the claimant for bringing the grievance in the first instance. However there is no attempt to explain why the claimant believes Dean Philips victimised him. It is not enough in my view to simply say that the

grievance was dismissed therefore the person adjudicating on the grievance must have victimised the claimant.

97. Similarly I was advised that the inclusion of Hulda Sveinsdottir was because she heard the and dismissed the stage 1 appeal on the grievance outcome. She is not named in any allegation. That is not one of the listed maters of direct discrimination or harassment and so must be claimed as an act of victimisation. Again there is nothing pled as a basis from which it could be inferred that the dismissal of the stage 1 appeal by the 3rd respondent was because the claimant had raised a grievance.

98. As stated it was said at the hearing that the dismissal was to be taken to be an act of victimisation. I was advised that the reason for the inclusion of Rob Donelson and Elizabeth Rattray as individual respondents was because they formed the disciplinary panel which decided that the claimant should be dismissed. The reason they gave for dismissal (J72/73) was that they found the assertion by the claimant that he did not participate in the stage 2 grievance appeal hearing was false and that when making that assertion he made a statement he knew to be false. Those individuals are not mentioned in relation to any of the allegations of direct discrimination or harassment. Again it must be that the case against them is one of victimisation under s27 of the Equality Act because he lodged a grievance. But there is nothing suggested that might link either of those individuals with the original grievance or any basis given for the view that the claimant was subject to a detriment because of the lodging of that original grievance.

99. The same position relates to the inclusion of Brian Henderson and Debbie Dyker who it was said investigated the alleged misconduct leading to the disciplinary hearing. Again she is not named in any allegation; there is no inclusion of the investigation being an act of direct discrimination or harassment and so her inclusion must relate to victimisation; and there is nothing pled or any basis given to infer that the 7th respondent subjected the claimant to a detriment because he had lodged the original grievance.

100. That is also true of the inclusion of Tracey Slaven who I was advised heard and turned down the appeal against dismissal. She is not named in any allegation; there is no inclusion of the appeal being dismissed as an act of direct discrimination or harassment and so inclusion must relate to victimisation; and there is nothing pled or any basis given to infer that the 12th respondent subjected the claimant to the detriment of turning down the appeal against dismissal because he had lodged the original grievance.

101. Within the Further and Better Particulars on the issue of victimisation it is stated *"The claimant raised a second grievance which was not looked into at all".* It was agreed that the respondent's disciplinary policy (in line with ACAS guidance) stated that there was a discretion for the employer respondent to suspend a grievance pending the outcome of disciplinary procedure. That was not a disputed fact. Again there is no mention of the second grievance not being considered within the allegations of direct discrimination or harassment. From information at the hearing it would appear that the claimant believed either Brian Henderson or Rob Donelson considered it would be appropriate to suspend any hearing on the second grievance pending the disciplinary hearing. Again it must be that the case against them as respondents is one of victimisation (by process of elimination rather than any direct pleading). Again there is no pled basis upon which the claimant comes to the belief that he was subject to a detriment by these individuals because of the protected act. No link is made in the case provided.

102. Given the lack of any material which would form the basis of any belief that the employer respondent or the individuals mentioned had subjected the claimant to a detriment (dismissing the original grievance/dismissing him/not hearing the second grievance) because he had lodged the original grievance I consider that the case of victimisation under 27 of the Equality Act has no reasonable prospect of success and should be struck out and for the reasons given that the 3rd, 6th, 7th 9th,11th, 12th and 13th respondents be dismissed from the claims.

Claims of direct discrimination under s13 of Equality Act.

103. S13(1) of the Equality Act provides that direct discrimination occurs if "because of a protected characteristic" a person (A) treats a person (B) less favourably than A treats or would treat others.

104. On a consideration of the competing submissions made on these claims my view is that the claim of direct discrimination which has no reasonable prospect of success is that listed at (iv) at Table A (J45) which advises that Dr McArdle allegedly offered information about travel allowances to PhD students and excluded the claimant from this discussion. In this respect the claimant is naming a comparator in materially different circumstances given that he is not a student but employee of the 1st respondent in the position of an Audio/IT Technician. There appears a clear difference between the claimant's position and that of PhD students and the discriminatory inference that the difference in treatment was because of the claimant's race does not arise.

105. As far as the other allegations of less favourable treatment are concerned the claimant can construct a hypothetical comparator. It would appear in these instances there are disputes on factual matters which would require to be resolved. However there is force in the submission that the matters listed are examples of "*unreasonable behaviour which tell us nothing about whether they resulted from discriminatory conduct"* and given that there is difficulty in ascertaining how it is that the claimant believes that any less favourable treatment was because of his race I would take the view that these claims have little reasonable prospect of success. The claimant will have to rely on inferences arising. While it is not apparent from the matters listed that an inference can be made to support a finding of discrimination I am conscious of the high hurdle that has to be cleared in strike out of a discrimination case. In those circumstances I would regard these assertions as having little reasonable prospect of success in proving direct discrimination and so subject to a Deposit Order.

106. These particular matters include named the named individuals Dr Karen McArdle and David Walton. Given these claims are not being struck out they require to remain as listed respondents.

Claims of Harassment under section 26(1) of the Equality Act 2010

107. Under section 26 of the Equality Act 2010 “a person (A) harasses another (B) if –

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of

(i) violating B’s dignity or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B

In deciding whether the conduct has the effect referred to above then “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”

108. It is the case that to succeed in a claim of harassment there requires to be set out and articulated a link between the relevant protected characteristic (in this case race) and the conduct which it is asserted violates dignity or creates the intimidating, hostile, degrading, humiliating or offensive environment.

109. The claimant lists 10 matters which he claims amount to harassment of him.

110. Again the essential criticism is that the lists simply indicate a number of matters where the claimant was unhappy with the respondents' behaviour and labels this as harassment.

111. I would not regard item (i) as having a reasonable prospect of success. That particular matter contains no detail of alleged criticisms made of the claimant. There is no specification given of what it was that the claimant regarded as being a criticism and no information supplied to the respondents as to what it was that amounted to a criticism. I do not regard this vague assertion as having any reasonable prospect of success in demonstrating harassment.

112. I also take the same view of that matter set out at (vii) wherein the claimant mentions a meeting with Iain Harold and Dr Karen McArdle and that after that meeting a "*bitter argument"* ensued with Dr McArdle. However there was no detail given of the reason for the argument to justify any inference arising that there was harassment of the claimant. There is no detail given as to what was said which would violate his dignity or create the prohibited environment for him. He states that he was upset as a result and took time off but given there is no information given about the reason for the argument there is no possibility of deciding if this matter could be related to the protected characteristic.

113. I take the same view as to the assertion in (x). It is stated that the claimant *"has felt that he has been talked down to rudely and in disrespectful manner by Karen in front of other staff and external clients".* No detail is given as to what was said and the words used to consider that he had been *"talked down to rudely and in disrespectful manner".* Also the allegation that Dr McArdle had been "*swearing and cussing at all IT personnel and their services …"* was not indicative of the treatment being related to the protected characteristic. There is no assertion that only those of a particular ethnicity or national origin or nationality were treated in this way. The allegation is against all IT personnel.

114. In relation to those 3 matters therefore at I would consider that there was no reasonable prospect of success in the claims.

115. So far as the other 7 matters are concerned I take the view that there are factual issues which need resolved. However again there is little reasonable prospect of success given the difficulty in determining how it is that the unwanted conduct related to the protected characteristic. Again I am conscious of the high hurdle to be cleared in strike out.

116. So far as individual respondents are concerned in this claim again Dr Karen McArdle and David Walton are named and as they are included in the incidents of harassment which are not dismissed as having no reasonable prospect of success they must remain in the claim.

117. In this section there is also reference to Iain Harold at allegation (vi) and Susan White (HR partner) at allegation (viii) which allegations are not struck out and so those individuals require to remain as respondents in respect of those claims.

Individual Respondents

118. I do not consider that it would be appropriate to dismiss the remaining 2nd,8th,10th and 14th individual respondents from the claim on the submission that would be in accordance with the overriding objective. It may be that the employer respondent accepts vicarious responsibility for the actings of these individuals and not rely on the statutory defence but I do not consider that alone would mean that individual respondents should be dismissed from the claims. A claimant is entitled to bring claims against individuals notwithstanding. It may be that in certain cases it would not be conform to the overriding objective to have individual respondents remain in the claim were it to complicate matters or lengthen proceedings considerably. However in this case these individuals will be relevant witnesses in any event and given the employer respondent's position there would be no need for them to be separately represented.

Summary

119. That would mean that the claim of victimisation is struck out as having no reasonable prospect of success; that the claim of direct discrimination on the grounds of the less favourable treatment at (iv) of Table A is struck out as having no reasonable prospect of success and the remaining matters at (i)-(iii) and (v)-(viii) remain but are judged as having little reasonable prospect of success; that the claim of harassment at (i), (vii) and (x) of Table B are struck out but those at (ii)-(vi) and (viii)-(ix) remain but are judged as having little reasonable prospect of success.

120. Also the 3rd, 6th, 7th 9th,11th,12th and 13th individual respondents are dismissed from the claims (along with the 4th and 5th respondents against whom the claims are withdrawn).

Deposit Order

121. A Deposit Order can be made in respect of each allegation which is judged as having "*little reasonable prospect of success"* and in this case there are 14 such matters.

122. That means that a party may be ordered to pay a deposit not exceeding £1,000 as a condition of continuing to advance each of those allegations or arguments.

123. Clearly each of those allegations might take some time to be resolved in evidence. The purpose of a Deposit Order is to identify claims of little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs if the claims fail (**Hemdan v Ishmail and another** [2017] ICR 486.

124. Of course it is necessary to take into account the paying party's ability to pay a deposit. In this case I was advised that the claimant was on benefits living

in rented accommodation and was in receipt of legal aid for assistance in this claim. Essentially it was said that the claimant could not afford to pay a Deposit Order.

125. No information was available other than that described. No information was given on the claimant's outgoings. He is making a search for employment. I did consider that it would be appropriate to make a Deposit Order of some amount rather than none. I agree with the sentiment that some amount should be deposited to bring home the *"limitations of the claims"* and considered that a nominal amount of £50 in respect of each claim would be appropriate giving a total Deposit Order of £700. Accordingly the Judgment is for a Deposit Order of £50 in respect of each of the separate allegations and would require to be paid by 27 July 2022.

126. If the claimant fails to pay the deposit in respect of any specific allegation to which the Deposit Order relates then the specific allegation shall be struck out. In making any payment of less than the total sum of £700 the claimant should specify the allegation in respect of which deposit is paid.

127. On any view the claim for unfair dismissal under s 94 of ERA remains. Once the position on the lodging of deposits is clarified it would be appropriate for parties to advise the Tribunal of their views on future procedure.

Employment Judge J Young

Date of Judgment: 25 May 2022

Date sent to parties: 26 May 2022