



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr E Ohemeng-Appiah

**Respondent:** Profile Security Services Ltd

**Heard via Cloud Video Platform (London Central) On:** 28 and 29 June 2022

**Before:** Employment Judge Davidson  
Ms T Breslin  
Ms J Marshall

## Representation

Claimant: Mr D Scanio, Solicitor Advocate

Respondent: Mr G Baker, Counsel

# JUDGMENT

It is the unanimous decision of the tribunal that the claimant's complaint of race discrimination fails and is hereby dismissed.

The tribunal finds that the claimant acted unreasonably or, alternatively, his claim had no reasonable prospect of success. The claimant is ordered to pay £4000 as contribution to the respondent's costs pursuant to rule 76(1) (a) and rule 76(1) (b) of the Employment Tribunal Rules 2013.

# REASONS

## Issues

1. The issues agreed at a case management hearing on 7 December 2021 were as follows:
  - 1.1. Was the Respondent's decision to reassign the Claimant on 28 May 2021 less favourable treatment because of race?
  - 1.2. The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant's.
  - 1.3. If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated.

- 1.4. The Claimant is relying on a hypothetical comparator.
2. During the course of submissions, the claimant's representative also relied on Krishna G (Nepalese) as a comparator.

### Evidence

3. The tribunal heard evidence from the claimant, Jonathan Ewiah (Security Officer) and Richard Odigie (Security Officer) on behalf of the claimant and from Peter Ely (Regional Manager at the relevant time) and Steve Marsters (Customer Service Manager) on behalf of the respondent.
4. Technical issues meant that the claimant and his witnesses gave evidence by phone, in the case of the claimant and Richard O, without video. All the parties consented to this as it was the only way the case could proceed.

### Facts

5. The respondent provides a wide range of security services nationwide. Within London & the South East region, the respondent has a contract in place with Cushman & Wakefield (the client), to run the security services at various buildings across the region including One King William Street ("1KWS").
6. There are 'permanent' security officers who are assigned to a specific site, although the contract has a mobility clause and there is no right for the officers to remain on that site. Officers often move site for a number of reasons, both for personal reasons and for business reasons. In contrast, there are 'relief' officers who are assigned to various sites to cover absences or vacancies.
7. In line with the industry norms, the client has the right to request the removal of an officer from their site. If this happens, the respondent will then attempt to place the officer in another site.
8. The claimant (who describes himself as black) started working for the respondent on 18 July 2003. On 12 August 2016, he was assigned to 1KWS, as a permanent officer.
9. On 15 February 2018 Joseph Britchfield (White British) joined the Respondent as Security Manager at 1KWS. At this time, there were 3 black security officers in a team of 6. When Joseph Britchfield left the respondent on 28 October 2021, there were 3 black security officers in a team of 6.
10. When Joseph Britchfield was not at the site, he asked the claimant to act as Security Manager in his absence, for which he was paid extra.
11. On 19 May 2021, the claimant was acting as Security Manager in the absence of Joseph Britchfield. There was an incident between Mamadou K and Krishna G regarding use of a radio. The claimant became involved as acting Security Manager.

12. Sophie Mulcahy (Scheduler) received an account of the event from Mamadou, which included an allegation that the claimant had called him 'rubbish' and then apologised. Mamadou stated that he spoke to the building manager at the time. This was passed to Peter Ely who then asked Joseph Britchfield to look into what happened.
13. Joseph Britchfield spoke to two unnamed individuals, Krishna and the claimant. In his report, he summarised the background to the incident. He referred to Krishna's denial of Mamadou's allegation that Krishna shouted, adding that he had never heard Krishna shout. He also reported back on the claimant's account that he was trying to calm Mamadou down, which was contrary to the other evidence he had gathered and the CCTV evidence. He then mentioned that he had spoken to the claimant on previous occasions following informal complaints and a previous formal complaint.
14. On 21 May 2021, Peter Ely asked Steve Marsters to carry out a full investigation. On 25 May 2021, the claimant forwarded his account of the incident, describing the disagreement between Krishna and Mamadou.
15. On 28 May 2021, there was an incident where a tenant of 1KWS (Luke F) came to collect a package from the loading bay cabin. Tenants are required to sign for packages before they are released.
16. There is a conflict of evidence regarding how the incident unfolded. Based on the evidence before us, we find that, Luke F came to pick up his package from the Security Office booth in the loading bay. He waited for the claimant to finish what he was doing. After 7 minutes, Luke F took the package and went back to the lifts to leave the loading bay. The claimant knocked on the window of the security booth and then ran after him to get him to sign for the package.
17. Subsequently, Luke F complained to Joseph Britchfield (copying in the building manager) about the claimant, accusing him of being rude and not giving good customer service. He spoke highly of the team generally but singled out the claimant as letting the team down. He asked to discuss his concerns with him. Joseph Britchfield passed this to Steve Marsters who passed it to Peter Ely.
18. Peter Ely discussed the situation with the building manager. We understand that the building manager asked for the claimant to be removed from 1KWS. We find that the building manager formed this view on the basis of the 28 May incident, not the 19 May incident. The 28 May incident involved a tenant and therefore the building manager was reacting to the complaint from the tenant.
19. Although we find that each incident was relatively minor, it was clear that the tenant felt strongly about how he had been treated and demanded further action.

20. Peter Ely informed Joseph Britchfield that he should tell the claimant that they had received a complaint from the client who had asked for the claimant to be removed from 1KWS and that therefore he was being removed.
21. We did not hear evidence from Joseph Britchfield (who no longer works for the respondent) and Peter Ely was not present at the conversation between the claimant and Joseph Britchfield. The claimant alleges that he was not told the reason he was being removed. However, in his witness statement and in his oral evidence he accepted that Joseph Britchfield told him that there had been a customer complaint including the content of the complaint. He claims that he was told he was being removed temporarily while the investigation was being carried out.
22. The claimant told us that he believed that he could not be removed unless he did something really bad but we find that this is not the case. We also find that the claimant was aware that the client could request his removal and that the respondent would have to implement that request.
23. On 7 June 2021, the claimant wrote to Peter Ely asking for an explanation of why he was removed from site, alleging unfair treatment and targeting by an individual. We take that to mean Luke F although he is not mentioned by name. He did not mention race.
24. On 11 June 2021, there was a disciplinary investigatory meeting with the claimant in relation to the two incidents, conducted by Steve Marsters. Peter Ely asked Steve Marsters to send the papers to Imran Khan (Customer Service Manager) to arrange a disciplinary hearing. In the event, the matter got overlooked for a few months, following which Peter Ely said it was too late to pursue it and the matter was dropped.
25. On 4 July 2021, Peter Ely passed the claimant's grievance to Krisztina Mayer (Customer Service Manager) who contacted the claimant about arranging a grievance hearing following up his email of 7 June 2021. The claimant discussed it with her and confirmed that he did not want to pursue the grievance.
26. After the claimant was removed from site, he was offered other work at a higher rate. He remains employed by the respondent.

*Other officers referred to by the claimant*

27. The claimant draws the tribunal's attention to various other officers, all of whom are black, whom he alleges were also subjected to less favourable treatment by Joseph Britchfield in that they were removed from site for no reason. We deal with these in turn:

- 27.1. Michael K: On 26 November 2020, Michael K, was dismissed for gross misconduct. Steve Marsters found that he had not been working his

full shifts but had been paid for them and his non-attendance put the buildings at risk in the event of an emergency.

27.2. Jonathan Ewiah: Jonathan Ewiah was a relief officer who was not assigned to 1KWS and was not removed from that site. He has since resigned from the respondent.

27.3. Saliou D: Saliou D was removed from 1KWS after a complaint that he had gone missing. There is a dispute whether the complaint came from the claimant or not. In any event, this happened before Joseph Britchfield joined the respondent.

27.4. Daniel A: Daniel A committed an act of negligence with potential health and safety consequences. The client requested his removal and he was removed to another site and still works for the respondent. Joseph Britchfield was not involved in this decision.

27.5. Richard Odigie: Richard Odigie was a relief security guard. We found his witness statement to be self-contradictory, in particular in relation to the length of time he was at 1KWS, which he says was a year and a half. His employment began in July 2020 and he has worked at various sites in that time, unsurprisingly as his role is relief officer. The respondent's position is that he attended the site when he had Covid. The client requested that he went home. He still works for the respondent. Joseph Britchfield was not involved in this decision

27.6. Alex O: One of the claimant's colleagues reported that Alex O attended for work smelling of cannabis. Joseph Britchfield asked Steve Marsters to investigate. He spoke to Alex O who agreed to move to a different site. He is still employed by the respondent.

## Law

28. The relevant law is as follows: Direct discrimination means less favourable treatment in comparison to a comparator because of a protected characteristic. Section 13 of the Equality Act 2010 defines direct discrimination as.

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

29. Section 136(2) and (3) of the Equality Act 2010 provide that:

*If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*

*But subsection (2) does not apply if A shows that A did not contravene the provision.*

30. In *Madarassy v Nomura International plc* [2007] ICR 867, the Court of Appeal held that there must be 'something more' than a difference in treatment

between the claimant and the comparator to show a prima facie case of discrimination.

Determination of the issues

31. We must consider whether the decision to remove the claimant from site was based on his race.
32. Taking Krishna G, as a comparator as put forward on behalf of the claimant, the claimant relies on Joseph Britchfield's email of 21 May 2021 as evidence that Joseph Britchfield treated Krishna more favourably than the claimant. He alleges that Joseph Britchfield added supportive comments about Krishna and prejudicial comments about the claimant. We disagree with this characterisation. The comments relied on are incidental to the main content of the email and, in our view, show that Joseph Britchfield was registering his surprise that Krishna was accused of shouting and added, entirely separately and by way of context about a different aspect of his findings, comments about previous similar problems he had experienced with the claimant.
33. If we are wrong and Joseph Britchfield did treat Krishna more favourably in this regard, we find no evidence that this was related to their respective races. In any event, Joseph Britchfield was not the decision maker removing the claimant from site.
34. Further, we find that Krishna is not an appropriate comparator because he was not in the same circumstances as the claimant. No client complaint had been made against him.
35. We then go on to consider a hypothetical comparator, being somebody in the same circumstances as the claimant but of a different race.
36. The claimant's claim is that Joseph Britchfield was motivated by race and he relies on the way other black employees were treated by Joseph Britchfield to support his allegation, in particular being removed from site for no reason. We note that the claimant would not necessarily be aware of the details in relation to the other employees or the reasons for their removal. The claimant alleges that this shows Joseph Britchfield did not like working with black officers and was looking to remove them when he could.
37. We reject this claim for the following reasons:
  - 37.1. The evidence is that Joseph Britchfield was not involved in the claimant's removal. Peter Ely made the final decision based on the client's request and no allegation of discrimination is made against him or the client.
  - 37.2. We have found Joseph Britchfield was not involved in the treatment of other employees relied on, other than to refer the Alex O complaint to Steve Marsters.

- 37.3. If Joseph Britchfield genuinely did not like working with black officers, we find it surprising he would choose the claimant to deputise for him in his absence.
- 37.4. We note that the racial make-up of the team was the same at the start and the end of Joseph Britchfield's employment. This does not indicate that Joseph Britchfield wanted to remove black officers.
- 37.5. No other evidence of a discriminatory attitude from Joseph Britchfield is put forward.
38. We find no evidence to support the allegation that race was a factor in any part of the decision making process.
39. On the basis of the claimant's witness statement and his oral evidence, we find that the claimant knew that there was a complaint about him and that this was the reason he was removed. We reject his allegation that he was removed without being given a reason.
40. We were taken to various clauses in the contract relating to the right of the respondent to move the claimant to another site and whether notice is required to be given. We find that the client can request the removal of an officer and we find that the claimant was aware of this. The issue before us is limited to whether the decision to remove the claimant was related to his race. We find that it was not.
41. To the extent that the claimant complains that he was treated unreasonably, which we do not accept, we note that unreasonable treatment does not necessarily amount to discriminatory treatment. We have found nothing to suggest that race was a factor in the decision to remove the claimant from 1KSW, or any other treatment he received.
42. We therefore find that the claimant has not shown facts from which we could deduce that his race was the reason for being removed from site. His claim therefore fails and is hereby dismissed.

### Costs

43. Following delivery of the oral judgment, the respondent's representative applied for costs on the grounds that
- 43.1. the claimant had acted unreasonably (Rule 76(1)(a)); and
- 43.2. that the claimant's claim had no reasonable prospect of success (Rule 76(1)(b)).
44. The respondent's costs are in the region of £13,000 but the application is for the amount of £8,000.
45. The respondent relied on a 'without prejudice save as to costs' letter it sent to the claimant's representatives (CAB) as evidence that the claimant was put on notice that there would be a costs application and that it was unreasonable of

him to continue the claim in the light of that letter. Having decided to continue the claim, he was aware that this application would be made.

46. In response, the claimant told the tribunal he did not recall seeing this letter but he confirmed that he had an email address and was being represented by the CAB and was in email contact with them.
47. The respondent also relied on the objective test that the claim had no prospect of success, in particular that the claimant was aware he was being removed from site at the client's request and that this was not the decision of the alleged discriminator, Joseph Britchfield. The respondent also relied on the lack of evidence provided by the claimant of any discriminatory motive of Joseph Britchfield or evidence that he was involved in the other examples of treatment of black officers by the respondent, which formed the central part of the claimant's claim.
48. In response, the claimant argued that there was a difference between losing a claim and the claim not having any prospect of success. A claim may fail but that does not mean it was not arguable and the claimant is entitled to have his allegations heard, even if they are ultimately unsuccessful.
49. Having considered the respondent's application and representations made on behalf of the claimant, we award costs in the amount of £4,000. We have reached this decision on the basis that the claimant's claim was put forward on the grounds that he was removed from the site by Joseph Britchfield for no reason and with no explanation and that the same had happened to other black employees at that site, managed by Joseph Britchfield. It became apparent that the claimant was aware that he was being removed due to a client complaint, which was not Joseph Britchfield's decision. He was also aware that the respondent would have to remove him if the client requested it. It is also apparent that Joseph Britchfield was not involved in the other examples relied on by the claimant. We find that the claimant had no grounds on which to believe that Joseph Britchfield had discriminated against him on the grounds of his race. It is a serious allegation to make and the claimant was unable to show any basis for that allegation to be made against Joseph Britchfield.
50. We took into account the claimant's earnings and note that he is still employed by the respondent. The claimant's representative submitted that the claimant was a minimum wage employee. This is not borne out by his payslips. However, we acknowledge that he is not a high earner and we have not awarded the full amount requested by the respondent for this reason.

#### Reconsideration

51. The claimant, through his representative, requested these written reasons and also appeared to request a reconsideration of the costs decision prior to receiving these written reasons. The claimant has not set out the grounds for requesting a reconsideration of the costs award. He can apply for a reconsideration under Rule 71 of the Employment Tribunal Rules of Procedure



within 14 days of receipt of the written reasons. If he wishes to proceed with the request for reconsideration, he should write to the tribunal within 14 days of receiving these written reasons, setting out the basis of the reconsideration application.

Employment Judge Davidson  
Dated 13 July 2022

WRITTEN REASONS SENT TO THE PARTIES ON  
13/07/2022.

FOR EMPLOYMENT TRIBUNALS

Notes

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

CVP hearing

This has been a remote which has been consented to by the parties. The form of remote hearing was Cloud Video Platform (CVP). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing