# EMPLOYMENT TRIBUNALS

**Claimant:** **Mr M Ibeziako**

**Respondent:** **Staff Call UK Limited**

**Heard at:** **Hull**
**On:** **25-26 May and (deliberations only) 30 June 2022**

**Before:** **Employment Judge Maidment**
**Members:** **Mr DW Fields**
**Mr D Crowe**

**Representation**
**Claimant:** **In person**
**Respondent:** **Mr B Jones, Counsel**

# RESERVED JUDGMENT

The claimant's complaints of victimisation pursuant to Section 27 of the Equality Act fail and are dismissed.

# REASONS

**Issues**

1. The claimant had previously provided services as a care worker through the respondent's employment agency to its clients.

2. The claimant's complaints are all of unlawful victimisation pursuant to Section 27 of the Equality Act 2010. He relies on 2 purported protected acts: firstly, an application by the claimant for a witness order in another employment tribunal complaint pursued against the respondent and secondly on his making a request of the respondent to complete an ACAS discrimination questionnaire.

3. The claimant then alleges three separate detriments: firstly, the refusal to complete the ACAS questionnaire; secondly, a refusal to appoint the claimant to a job for which he applied and, thirdly, a refusal to give the claimant an appeal against this job refusal.

4. These complaints were identified at a preliminary hearing on 17 November 2021. At that point in time, the claimant was also pursuing complaints of direct race discrimination individually against Ms Kerri Milner of the respondent. The claimant since withdrew those complaints. He confirmed at this hearing that no complaints were being pursued against Ms Milner personally and no complaints of direct discrimination against any respondent.

5. The claimant also, he told the tribunal, subsequently sought and obtained permission to amend his claims to make it clear that they were solely brought pursuant to Sections 55/56 of the Equality Act (on the basis that the respondent is an employment services provider) and not under Section 39 dealing with prospective employment. That is what, it appears, he told Employment Judge Wade at a Preliminary Hearing on 4 May 2022. That is how he advanced his case in his written skeleton argument before this tribunal. His claims as originally identified at the first Preliminary Hearing in this case, however, did appear to be ones based on "employment". The tribunal asked Mr Jones, when he made his oral submissions, where it was noted that the claimant was effectively amending his claims to place total reliance on Sections 55/56. He pointed the tribunal to case management orders given by Employment Judge Lancaster at a further Preliminary Hearing on 20 January 2022 where it was recorded that the sole basis upon which the case was proceeding was as a contravention of Section 55. He referred the tribunal to these orders contained in an additional bundle of documents provided by the claimant. However, in the tribunal's deliberations, it has had a chance to review those orders and notes that they relate to 3 separate complaints brought by the claimant against parties other than the respondent in these proceedings. Clearly, the claimant in these proceedings is now seeking to bring his claim pursuant to Sections 55/56. Nevertheless, the tribunal considered it appropriate to consider the claims, in the alternative, pursuant to Section 39 in the absence of those claims ever, it appears, having been formally withdrawn. In doing so, it recognised the primary significance was that complaints of alleged "detriment" could only be brought pursuant to the section dealing with prospective employment.

6. Having identified the issues with the parties, the tribunal addressed a number of further applications the claimant appeared to be making. The first was to allow a recording to be made of this final hearing. On 15 December 2021 the claimant had already made a written application for the hearing to be recorded. The claimant maintained that this was an application to record an earlier preliminary hearing, but clearly, on its face, it was related to the final hearing. Regional Employment Judge Robertson responded on 12

January 2022 refusing this application and stating as follows: "The claimant will be able to make notes of the evidence given during the hearing. His status as an unrepresented party will not inhibit his ability to do so. Many parties before the Tribunal are unrepresented and are able to make notes during the hearing. The claimant has no reason to believe that the tribunal's judgment and, if provided, written reasons will not accurately reflect the evidence given during the hearing."

7. The claimant explained to the tribunal that he was now applying for the hearing to be recorded in case he appealed this tribunal's judgment. He said that previously there had been issues as to who had said what and, without a transcript of the hearing, he would have nothing to support his evidence. He said that he had had issues with this respondent in previous proceedings. He maintained that no prejudice was caused in him being allowed to record the hearing as there would only be a need to request the transcript if there was a "discrepancy in the outcome". The claimant said that he appreciated his duty to keep the recording confidential and for it to be used for the sole purpose of these proceedings. The respondent opposed such application on the basis that the recording of the hearing was not appropriate, not normal practice and that no special circumstances existed. The claimant's anticipation of the possibility of appealing was not justification for the tribunal taking the exceptional approach of allowing a recording.

8. The tribunal, after an adjournment, refused the claimant's application. This was the same application as the earlier application already determined by Regional Employment Judge Robertson. There had been no material change in circumstances since his earlier decision and, in any event, the tribunal would adopt the same reasoning (and refuse the application) if the application had been made for the first time today.

9. The claimant had indicated that he would be seeking a revocation of what he described as a partial deposit order. A further preliminary hearing had taken place on 4 May before Employment Judge Wade to consider applications made by both parties. The respondent's application for a deposit order as a condition of the claimant continuing with the claim was refused. Employment Judge Wade stated that the claim "can be said to have little reasonable prospect," but declined to exercise her discretion to make a deposit order. Before this tribunal the claimant confirmed that he was making no application.

10. The claimant also raised that the respondent ought to have its response struck out as it had since demanded that the claimant should withdraw his claims. The claimant before this tribunal confirmed that he was not making any application regarding the respondent's behaviour.

11. Finally, the claimant wished to make an application to amend the detriments he was complaining of. The amendments requested were set out at paragraphs 19, 20 and 21 of a supplementary witness statement provided by the claimant and were sought to be added in replacement of, rather than supplemental to, the aforementioned detriments which had been identified during the case management process. The tribunal struggled, following discussion with the claimant, to understand the exact meaning of the amendments sought and how the new detriments he wished to assert were materially different from those already pleaded and identified.

12. It was clear that the claimant believed that he had to reformulate his detriments (and indeed he described the amendments as simply a new way of putting his existing case) because Employment Judge Wade had labelled the existing detriments as having no reasonable prospect of success. The tribunal explained to the claimant that, whilst it understood his concern at his complaints being said to have (to be accurate) "little" reasonable prospect of success, no deposit order had been made. A view expressed by another Judge that the claims had "little" reasonable prospect of success would be given no weight or consideration by this tribunal, not least in circumstances where only this tribunal would hear evidence and make relevant findings of fact regarding the matters in dispute. The claimant was at first adamant that he did not wish to pursue the detriments already identified in these proceedings. The tribunal was not, however, prepared to allow the claimant to remove those detriments from the tribunal's consideration in circumstances where it was concerned that the claimant, despite the tribunal's assurances, was acting under a mistaken belief. Ultimately, the tribunal said that it would determine the detriments as previously identified and, in addition, as further identified in the aforementioned paragraphs of the claimant's supplementary statement.

13. The claimant confirmed that, as regards paragraph 19 of that statement, this was not a new detriment but a new way of putting the detriment already pleaded with reference to arrangements made as to whom the respondent would offer employment. The claimant was saying that the respondent had treated the claimant's email of 4 August 2021 to be the same as his application for a job in circumstances where the respondent had application forms which applicants used when applying. The respondent also denied the claimant an opportunity of an appeal - an opportunity to discuss the allegations raised by the respondent in its decision letter of 9 August 2021 refusing him employment.

14. Paragraph 20 related to the terms of employment. He explained that the respondent relied on a purported history of underperformance in not offering him an engagement, whereas the relevant criteria for engaging him were in fact qualifications, experience and skills.

15. Paragraph 21 related to not offering the claimant employment and the imposition of Ms Milner as a decision-maker in this regard to prevent, it was alleged, the claimant from gaining employment.

16. The claimant subsequently maintained that paragraphs 19 and 21 involved issues relating to the respondent's non-compliance with the ACAS Code, which appeared to be a reference to the Code on Disciplinary and Grievance Procedures. He has referred the tribunal to no other relevant ACAS Code.

17. The tribunal confirmed that it would consider those points as potential detriments, although it appeared to the tribunal that such matters were already covered in the claimant's originally pleaded case.

**Evidence**

18. The tribunal had before it an agreed bundle of documents consisting of in excess of 750 pages. The claimant had exchanged with the respondent his witness statement. He also submitted on the first day of the hearing a supplementary witness statement and a written skeleton argument. Much of the supplementary witness statement included matters more accurately categorised as submissions and some of the skeleton argument referred to facts the claimant was seeking to show. Whilst Mr Jones, on the respondent's behalf, was uncomfortable with those documents being accepted as "evidence", the tribunal considered that he had sufficient opportunity to review the documentation and to understand (which the tribunal would also be able to) what amounted to evidence and what was in reality further argument and submissions. The respondent was not prejudiced if the claimant was allowed to confirm and rely on the contents of each of those documents as his evidence in chief. The claimant duly affirmed the aforementioned documents to be true to the best of his knowledge and belief and they stood together as his evidence upon which he was then cross examined. The tribunal then heard, on behalf of the respondent, from Ms Milner.

19. Having considered all relevant evidence, the tribunal makes the findings of fact set out below.

**Facts**

20. The respondent is an employment agency which provides employees/workers to the care sector. The claimant commenced providing services through the respondent from 21 December 2018. He entered into what was stated to be a contract of employment on that date which he signed, albeit with the job title left blank. The respondent countersigned an identical document but with the job title of care support worker inserted. The claimant explained to the tribunal that this was not an accurate title in that he worked as a care assistant providing physical care rather than simply support. It is clear nevertheless that the claimant commenced providing

care services to the respondent's clients and that he did so pursuant to a zero hours contractual arrangement.

21. The tribunal has also seen that the claimant signed a document to confirm that he had read and understood all of the respondent's policies included within the staff handbook and that he had been given access to the respondent's full policy file. The claimant's evidence is that he did not actually see any of those policies and was just asked to sign the sheet. It is the respondent's case that these policies included a policy regarding the rehiring of employees. The tribunal accepts that, even if such policy was within documents accessible to the claimant, it was not read by him.

22. The tribunal has been shown a policy document entitled "Former Employee Rehire Policy". The policy is said within it to apply to former workers who left the respondent on a permanent basis. It then provides that workers whose employment has terminated for a number of listed reasons will not be eligible for rehire. A list then includes workers who have records of misconduct, more than one serious complaint against their record, a history of long-term underperformance and, amongst other things, violation of company policies, illegal and/or unethical behaviour. The policy further provides that the respondent is committed to equal opportunity practices and, when hiring, does not discriminate according to any protected characteristic. Precedence may, however, be given to former workers who apply for positions rather than other candidates. The policy then provides that, when a worker seeks to be rehired, the HR Department reviews personnel records to decide whether the worker is eligible. If they aren't eligible, the HR Department should inform them. The respondent is then said to "hold" the final decision on rehiring any former worker.

23. Ms Milner's evidence was that she put together the rehire policy herself in 2012. In questions from the tribunal, she said that the respondent had never had an HR Department and the reference to one in the document was because she had adopted a policy from a suite of suggested policies obtained from the CQC for the providers of care worker staff.

24. The tribunal, on the balance of evidence, accepts that the respondent did have in place this rehire policy when the claimant commenced providing services to the respondent up to and including the point where his application to provide such services again was rejected 9 August 2021. Ms Milner was a credible witness who sought to answer the claimant's questions factually. The claimant asserts that the rehire policy is a fabrication. There is no evidence to support such assertion. The claimant might not previously have seen the policy, but that does not mean it was not provided or in existence. The tribunal recognises that there is no evidence in terms of document history or its properties to show when it was created, but again Ms Milner has given specific and credible evidence as to its creation in 2012. This appears to be a model document she has obtained to use in the respondent's business as indeed she described.

25. The tribunal has seen records of hours of work performed by the claimant for which he was paid on 22, 23 and 25 December 2018.

26. Having entered into a contract to provide services personally, the claimant then, on his request, asked to provide services through his own service company, Humberside 24 Limited. The claimant, throughout the period he provided services through the respondent, provided similar services through separate arrangements to other clients, including through alternative employment agencies. The tribunal has seen invoices submitted for work the claimant performed for the respondent through his service company from 21 January 2019. Mr Iderson of the respondent assisted the claimant in the production of appropriate invoices.

27. However, from September 2019 the claimant asked to revert to being paid through PAYE directly, rather than through his service company, to which the respondent agreed. The claimant told the tribunal that from 6 September 2019 he had taken up employment with another company. The tribunal has seen payslips in respect of further work performed through the respondent from 18 October 2019.

28. The respondent maintains that during the periods the claimant provided care services through it, there were a number of complaints raised about the claimant or issues of concern raised. Ms Milner told the tribunal that, whilst she did not deal with the complaints herself, she was made aware of them as and when they occurred.

29. The tribunal accepts Ms Milner's evidence. The claimant's case is that all of the complaints have been fabricated. Again, that is an assertion without any evidential basis. On the other hand, taken as a whole certainly, this does not appear to be a series of complaints which are likely to have been fabricated. The tribunal has seen complaints in a variety of formats with complaint forms filled in, electronic logs made and handwritten notes of telephone conversations. They do not give an appearance of having been created or put together with a view to anything other than recording factual accounts. The accounts involve different people with instances of the exact words used quoted. The claimant accepts that he was a party to some of the conversations referred to.

30. The claimant, accepting that some of the complaints referred to matters which could be categorised as serious, maintains that had these complaints in fact been made, then he would have been subject to a formal investigation and disciplinary action. Ms Milner's explanation as to why that did not happen is credible. She explained to the tribunal that it was not unusual for individual care providers and service users not to get on and any complaints of service users were inherently difficult to investigate without triggering a high-level safeguarding investigation which would

involve the service user and other agencies, including potentially the local authority. Therefore, in such instances, it was often regarded as the pragmatic solution for the care provider to be removed from the particular service user and placed elsewhere where a better relationship might be built.

31. Ms Milner was expressly asked why, if there had been such performance concerns, the claimant had not been put through a disciplinary process. She said that the situation in each case appeared to her to have been dealt with without the necessity of a formal disciplinary or investigation process. The respondent did not work directly with the client and/or supervise the claimant on any given shift. It tried to offer clients suitable staff and, other than by instituting a formal safeguarding process, it was unable to follow a full disciplinary process concerning the claimant's actions on a shift. If they could, they would deal with the type of performance concerns raised about the claimant informally, rather than through a safeguarding process. It was not unusual for a care worker to be told that a number of clients would not work with them, but for the individual to be still retained by the respondent and placed with alternative clients or service users where he or she was regarded as a suitable fit. Ms Milner said that, in hindsight, there probably ought to have been a capability process initiated regarding the claimant. Again, her evidence is accepted.

32. The tribunal has seen a complaints form signed by an office manager or administrator of the respondent, Stephanie Watson (later referred to by the surname Burnham), dated 18 January 2019 which, with regard to the claimant, refers to "poor performance - not helpful on ward, argumentative with staff". It was recorded that the client had asked that the claimant not return to them. The tribunal has then been shown a handwritten note, likely to be a contemporaneous note of a discussion Ms Watson then had with the claimant on 18 January. This records the conversation to be about the claimant's conduct on shift, his arguing with the nurse and refusing to carry out instructions given. It was recorded that the claimant denied those allegations.

33. The claimant said that the complaint form was a fabrication and there was no evidence of it having been prepared at the time, rather than for the purposes of these proceedings. He denied he had ever had the aforementioned conversation with Ms Watson.

34. The tribunal has then been shown a printout from the respondent's systems with the heading "Access People Planner". This included a report dated 13 February 2019 that the claimant was not to return to a client, him having refused to work on the floor when asked by a senior. It was recorded that the client had reported to Ms Watson that it did not want the claimant back, noting: "all he wanted to do was sit in the room and look at his phone".

35. The claimant said that he had not been shown this and had not been able to interrogate the respondent's IT systems to examine its authenticity. He agreed that, if someone was refusing to do work, this was a serious issue, but said that he had been allowed to work the next day thus illustrating that no serious issue had occurred with him.

36. The tribunal has then seen a further complaint form dated 30 March 2019, where the claimant is recorded as having left shift at 01:00 leaving the home understaffed and being rude and aggressive to the senior member of staff. It was recorded that the claimant had accused the person of being racist, but had not provided a statement further to that. The client was said not to want the claimant to return and that the claimant was to attend the respondent's office. It was noted that the claimant had not attended the office as directed and had provided no further evidence of racism. It was stated that no further follow-up investigation was required. This document again appears to be signed by Ms Watson. The claimant told the tribunal that he had been treated badly that day and had left his place of work. There had been no complaint from the end user and the respondent was using this information to say that the client had made a complaint. He said that he had sent a text to the respondent about the incident and he had decided to leave. Having since changed his mobile phone, he had no access to such text and the tribunal has not seen it.

37. The tribunal has then seen handwritten records of conversations. The claimant denied having either of these conversations. The first dated 9 September 2019 refers to the claimant needing to greet and show respect to a service user due to that service user's sensitivities and to be able to de-escalate that service user's behaviour. It was recorded that Ms Watson had invited the claimant to change his approach. The note then dated 13 September recorded that the claimant had not taken the end-user out of his place of residence yet. The claimant was recorded as asking what he could do and Ms Watson as suggesting that the service user enjoyed a pint on an evening.

38. The claimant said that these conversations again had not occurred, the incident described had never happened and there was no evidence of any phone call being made to him on these dates.

39. A further complaint form appeared to have been completed by Ms Watson on 8 October 2019 recording that the claimant had sat down all night and refused to take direction. The client had requested that the claimant did not return. No follow-up action or investigation was said to be required. The claimant categorised this complaint as bogus.

40. A further handwritten note of 8 October 2019 recorded that the claimant had been telephoned to discuss a complaint that he refused to do any cleaning and to assist a resident and wanted to remain in one service user's room all

night. The claimant was said to have asserted that he knew his rights and that he was there to care for someone on a one-to-one basis and not to be a cleaner. The outcome was recorded as "no further action". The claimant again maintained that this conversation had never happened.

41. On 18 October 2019 a complaint form was completed by Stephanie Burnham in respect of a complaint of that day. This stated that the claimant was intimidating, stood over people and spoke over people constantly. There was reference to him shouting. It was recorded that the client did not want the claimant to return. It was noted that the claimant had been spoken to on 22 October and denied the allegations. The claimant was then recorded as having been removed from the care of this particular client with his last shift being 22 October 2019 following consulting CQC guidelines. Ms Burnham made a separate handwritten telephone note of 22 October stating that she had asked the claimant to the office to discuss the complaint. The claimant acknowledged that he didn't take a resident out as he did not like to sit in pubs. He denied he was on his phone constantly. He denied raising his voice and arguing with the service user. It was recorded that the claimant had raised his voice and attempted to shout over Ms Burnham. He had also laughed at comments raised and accused her of being racist "as this is the only reason she brings these complaints to him and not white carers".

42. Despite the claimant's denials, as already referred to, these events are more likely than not to have occurred. The accusation without any evidential basis that they have been completely fabricated and are bogus is untenable.

43. The tribunal has been referred to a letter from Ms Milner to the claimant dated 25 November 2019 enclosing an appeal letter in respect of a complaint by the claimant of "race and indirect discrimination". She noted that, as per the claimant's request in an email of 15 November 2019, his details had been removed from the "as and when availability list" and the claimant would no longer be contacted for short notice work – as opposed to longer placements. She noted that the respondent would, however, keep his details and should an ongoing client with needs that matched his skills and availability contact the respondent for care services, they would contact him with the possibility of work. She continued that as the allegations he had made were of a very serious nature and he was continuing with the complaints through alternative channels, the respondent would only now communicate through the official channels as regards to this complaint. Given that the claimant's contractual arrangements with the respondent continued at and beyond this point, the tribunal does not consider that this correspondence undermines the respondent's stated position, set out below, on a later decision not to rehire him.

44. The claimant's engagement with the respondent ended in fact on 13 November 2020 after a letter giving notice had been emailed to the claimant on 13 October 2020. This recorded that government guidance during the

coronavirus pandemic had called for the care industry to stop agency workers travelling between homes to help slow down the spread of infection. The respondent had explored a variety of options to increase the need for their care workers, but their efforts had been unsuccessful. The respondent therefore concluded that it had to reduce its workforce and regretfully the claimant's position "within our availability listings will be eliminated". The letter went on to say that the respondent had looked at the availability and flexibility of their workforce and also taken into account previous complaints brought by clients in making their decision as to whose contracts to terminate. This letter sent to the claimant was not the standard form of letter sent at this time to another 88 care workers whose engagements were also being terminated. The standard template provided that the decision was no reflection on the work they had undertaken. Ms Milner had changed the template for the letter to be sent to the claimant because of the particular circumstances of his engagement – his lack of availability (he was no longer doing short notice work) and the aforementioned record of complaints.

45. The claimant has brought and pursued a number of separate employment tribunal proceedings against the respondent. In one set of proceedings, the claimant made various applications to the tribunal on 7 July 2021. These included an application for costs on the basis of the respondent's unreasonable and vexatious conduct and an application for a witness order in respect of a Mr Okonkwo. It was said that this individual, as a care assistant employed by the respondent, would be able to support the claimant's complaints. The claimant told the tribunal that the respondent had told this individual that he must not support the claimant and had summoned him to a disciplinary hearing. It was put to the claimant, on behalf of the respondent, that that individual had been told that payslips were confidential and ought not to be supplied to claimant, but that the respondent had never told the individual that he would get into trouble for supporting the claimant. The claimant did not accept this.

46. In cross-examining Ms Milner, the claimant read from an email which was not in the tribunal bundle and which he said was a letter of 22 July 2021 from the respondent's solicitor confirming that Mr Okonkwo was summoned to a disciplinary hearing because he supported the claimant's complaints of discrimination. The tribunal asked the claimant to show Mr Jones the document from which he was quoting. Mr Jones commented to the tribunal that what he had been shown was an extract from the document rather than the full correspondence. Nevertheless, the tribunal asked Ms Milner to address the quoted passage of the letter. She said that Mr Okonkwo was brought into the office by Stephanie Watson rather than herself. In other tribunal proceedings brought by the claimant, documents had been provided from him to the claimant with details of the names of clients and locations where Mr Okonkwo had worked. He had therefore been brought into the office to be spoken to about data protection and safeguarding requirements. The claimant suggested to her that all Mr Okonkwo had provided to him was a payslip with no mention of a place of work. Ms Milner's position was that the documents the claimant had in his possession

gave details of client names and dates when Mr Okonkwo had worked with them. She said that Mr Okonkwo was not in fact disciplined.

47. The tribunal told the claimant that if he wished to place this correspondence before the tribunal in evidence he would have to provide a full unredacted copy of the letter (which he said he had) and make an application for it to be admitted – and obviously quickly if that was his intention given the stage the tribunal was at in this hearing, towards the end of Ms Milner's cross-examination. After a break for lunch, which was taken shortly thereafter, the claimant made no application to admit this correspondence.

48. After the end of the reserved hearing and prior to the tribunal deliberating, the tribunal has received the claimant's "application for further disclosure" which provides that full correspondence from solicitors acting on behalf of the respondent dated 22 July 2021. In the relevant passage the solicitors confirm "on the record that the sole reason Mr Okonkwo was summonsed to her [Ms Milner's] office was due to the fact that the Claimant sent documents to the Tribunal and the Respondents which showed that Mr Okonkwo had breached the respondent's confidentiality and data protection policies. The Respondents met with him on 29 June 2021 to discuss the breach by way of a formal disciplinary. After the meeting, Mr Okonkwo was sent a follow-up letter reiterating the need for 100% confidentiality in relation to the Respondent's clients. It was noted that no further action would be taken."

49. The tribunal notes that the claimant is now seeking to make an application, effectively to allow this further disclosure. Whilst irregular to do so, the tribunal has considered the wording of the document and does not consider that there is any inconsistency in Ms Milner's evidence and what is quoted by her solicitors. The letter does not show or suggest that disciplinary action (as opposed to being potentially considered) was taken against Mr Okonkwo, nor that the respondent's concern was anything other than a possible breach of confidentiality. There is no evidence that Mr Okonkwo was subjected to disciplinary action because it was believed that he might give evidence in support of the claimant.

50. On 30 July 2021 the claimant emailed Ms Milner noting that coronavirus restrictions had been lifted and asking for an appointment to register for work with the respondent or alternatively for them to send him an application pack. He reminded her that the Equality Act 2010 placed a legal obligation on the respondent not to discriminate or victimise any job applicant. He asked to receive a response by noon on Monday 2 August. He also asked not to be contacted by the respondent's legal representative on an administrative matter such as this as he felt he was being harassed when the respondent used its legal representative to contact him. He emphasised that he was approaching the respondent as a job applicant.

51. Friday 30 July was a non-working day for Ms Milner, who first saw the claimant's email on the following Monday.

52. The claimant emailed Ms Milner on Tuesday 3 August with the subject heading: "ACAS Discrimination Questionnaire Attached". He referred to himself as the "Claimant" and asked that he not be contacted by the respondent's legal representative as there was no reason to do so "until this matter is finally lodged to the Employment Tribunal".

53. The claimant identified himself as a job applicant, referring to his email of 30 July asking Ms Milner to send a registration pack. He said that it seemed to him that she was avoiding registering him as a worker because he was black or was still maintaining a stereotypical view she had against him, that view being that he was lacking skills and experience required to work for the respondent. He said he was sending the ACAS discrimination questionnaire to her because she was the owner of the respondent who made decisions on whom to employ. He then set out his personal contact details, noted the protected characteristic involved to be race and, under the heading of "description of treatment", set out how he had applied for work. He noted that Ms Milner had not replied to his email and no reason had been provided. He asserted that this was to deny him an opportunity because he was black. He referred to having experienced direct race discrimination under Section 13 of the Act. Having provided further details about the treatment complained of, he then requested Ms Milner to confirm to him by 10 August 2021 when she would be able to send him the response to this questionnaire. He said he would take a refusal as the trigger to starting ACAS conciliation with a view to bringing an employment tribunal complaint. He said that that is not what he would like to do, but he would be forced to do so if she continued to refuse to engage in the recruitment and ACAS discrimination process after receiving this information. He reiterated that there was no need for Ms Milner to use her legal representative to contact him "until this matter is finally lodged to the Employment Tribunal"

54. The claimant, before the tribunal, maintained that he was using the ACAS questionnaire as a means of raising a complaint as he considered this to be the only way in which he could get a response from Ms Milner. He maintained that there was an obligation on the respondent to respond to the ACAS questionnaire because of an (unspecified) obligation under the Care Act and with the CQC to respond to allegations of discriminatory treatment.

55. Ms Milner, having taken legal advice, wrote to the claimant by email of 9 August. She told the tribunal that she personally replied as the claimant's initial request had been addressed to her and he had indeed said that he did not wish to hear back from a legal representative. The claimant sought to suggest to her that she would not normally deal with the recruitment of new workers and ordinarily this would be undertaken by Ms Raywood and Mr Iderson. She said that they were no longer with the company (they had left in July and February 2020 respectively). Ms Watson would normally

appoint new workers, but this was a case of a rehire and the enquiry had been directly addressed to herself. Ms Milner said that she was the registered manager and refuted the claimant's suggestion that, within the structure of the respondent, she was subordinate to her husband, Mr David Milner. They were both directors. The legal advice she received was that there was no legal obligation to respond to a discrimination questionnaire.

56. She confirmed in cross-examination that by the time she replied she was indeed aware of the claimant's 3 August email and was aware that he had made an application for a witness order on 7 July.

57. In her reply of 9 August, she said that the respondent had to unfortunately advise the claimant that he had not been selected for further consideration for employment. She stated, as a reason, that the claimant on joining the respondent had been provided with policy documentation which included the Former Employee Rehire Policy. She referred to having had to reduce the workforce by around 89 people in October 2020. In his case, the decision to let him go was based on two factors, firstly that he had significantly limited his availability for work in November 2019 when he had notified the respondent that he was no longer prepared to be on their "as and when" rota. The other factor was that he had been the subject of several complaints. She referred to the termination letter of 13 October 2020.

58. She noted that the claimant had applied again to register with the respondent and that they had looked at his application in the context of the rehire policy. Ms Milner stated that it was clear that he was ineligible for rehire. She said that, for example, he was undoubtedly someone who had more than one complaint against his record, him being well aware that there were in fact at least 6 complaints during his time with the respondent. Furthermore, (and not that it was necessary, she stated) they believed there were other categories which would render him ineligible, such as a history of long-term underperformance and violation of company policies, illegal or unethical behaviour. The policy made it clear that the respondent held the final decision, there was no right of appeal and no further correspondence, she said, would be entered into.

59. She finally noted that he had sent a discrimination questionnaire. She stated: "We are not obliged to complete this and will not be doing so. However, we believe that the explanation we set out in this letter clearly refutes the suggestion that we were motivated by any discriminatory intent. For the avoidance of doubt however your allegations are denied."

60. In her evidence Ms Milner referred to the tone and language of the claimant's discrimination questionnaire which led her to believe that this was not an attempt to ask genuine questions of discrimination in the workplace, but simply a precursor to an inevitable claim being filed by the claimant in the employment tribunal. She said that, in her view, the purpose was not to

ask legitimate questions, but to accuse the respondent of discrimination and to harass it.

61. In cross-examination, Ms Milner said that she would not reply to any job applicant's questionnaire in this sort of form. She read the claimant's questionnaire document, but hadn't in fact yet had a chance to read his earlier job application before this came through. She had to decide on whether to rehire the claimant before she could consider the questionnaire, albeit, again, she proceeded to read this document. She did not call the claimant to discuss it, but replied in the aforementioned letter, after legal advice, with the rejection of the claimant's job application. There was no right of appeal under the rehiring policy. There was therefore no question of her offering any right of appeal or entering into a debate about the grounds on which she believed that he fell into a category of persons who would not be rehired. She said that there were examples of other people who had not been rehired and where she had replied in a similar manner and without offering any right of appeal. She did not suggest to the claimant that he might apply again at some point in the future because she said she was following the terms of the rehiring policy. The claimant was not eligible to be rehired.

62. The claimant sought to appeal against the refusal to offer him a job by email of 10 August 2021. Allegations of race discrimination were made in it. Ms Milner did not respond allowing any form of appeal.

**Applicable law**

63. Pursuant to section 27 of the Equality Act 2010:

> *"(1) A person (A) victimises another person (B) if A subjects B to a detriment because –*
>
> *(a) B does a protected act; ….*
>
> (b) Sub-paragraph (2) of this section provides:
>
> *(2) Each of the following is a protected act –*
>
> *bringing proceedings under this Act;*
> *giving evidence or information in connection with proceedings under this Act;*
> *doing any other thing for the purposes of or in connection with this Act;*
> *making an allegation (whether or not express) that A or another person has contravened this Act*

64. Mr Jones points out to the tribunal that whereas the cause of action for employees and job applicants pursuant to Section 39 of the Equality Act includes discrimination in the arrangements made for deciding to whom to

offer employment, the terms on which employment is offered, a failure to offer employment and "any other detriment", the right to complain of "any other detriment" is not replicated in Section 55 which deals with discrimination by those concerned with the provision of an employment service – the Section of the Act expressly relied upon by the claimant. The tribunal, as already explained, has considered the claimant as still having a live claim pursuant to Section 39.

65. In this case, there is no dispute that the claimant indeed did a protected act by his seeking a witness order in ongoing employment tribunal proceedings where it was alleged that he had been unlawfully discriminated against by the respondent for reasons relating to race. Mr Jones also accepts that the submission of the discrimination questionnaire amounted to a protected act.

66. As regards the meaning of "detriment" the tribunal refers to the case of **Chief Constable of West Yorkshire Police –v- Khan [2001] 1 WLR** where it was said that the term has been given a wide meaning by the Courts and quoting the case of **Ministry of Defence –v- Jeremiah [1980] QB 87** where is was said that *"a detriment exists if a reasonable worker would or might take the view that the [treatment] was in all the circumstances to his detriment".* The tribunal also refers to **Derbyshire & others –v- St Helen's Metropolitan Borough Council [2007] ICR 841** where the case of **Shamoon –v- Chief Constable of The Royal Ulster Constabulary [2003] ICR 337** was quoted with approval. In **Shamoon** Lord Hope stated as follows:

> *"… the word 'detriment' draws this limitation on its broad and ordinary meaning from its context and from the other words with which it is associated… the Court or Tribunal must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he has thereby been disadvantaged in the circumstances in which he had thereafter to work.*
>
> *But once this requirement is satisfied the only other limitation that can be read into the words is that indicated by Brightman LJ as he put it in the **Ministry of Defence –v- Jeremiah [1980] QB 87** one must take all the circumstances into account. This is a test of materiality. Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment? An unjustified sense of grievance cannot amount to 'detriment' ….."*

67. To succeed in a complaint of victimisation, the detriment must be "because" of the protected act. This requires knowledge of the protected act. Again, that is not disputed by the respondent.

68. For guidance, the tribunal considers the words of Lord Nicholls in **Nagarajan –v- London Regional Transport [1999] IRLR 572** where he stated at paragraphs 18 and 19:

> *"Thus far I have been considering the position under s.1(1)(a). I can*

*see no reason to apply a different approach to s.2. "On [racial] grounds" in s.1(1)(a) and "by reason that" in s.2(1) are interchangeable expressions in this context. The key question under s.2 is the same as under s.1(1)(a): Why did the complainant receive less favourable treatment? The considerations mentioned above regarding direct discrimination under s.1(1)(a) are correspondingly appropriate under s.2. If the answer to this question is that the discriminator treated the person victimised less favourably by reason of his having done one of the acts ("protected acts") listed in s.2(1), the case falls within the section. It does so even if the discriminator did not consciously realise that, for example, he was prejudiced because the job applicant had previously brought claims against him under the Act…. Although victimisation has a ring of conscious targeting this is an insufficient basis for excluding cases of unrecognised prejudice from the scope of s.2. Such an exclusion would partially undermine the protection s.2 seeks to give those who have sought to rely on the Act or been involved in the operation of the Act in other ways.*

*Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision. A variety of phrases, with shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases as well as subtle distinctions, are better avoided so far as possible. If racial grounds or protected acts had a significant influence on the outcome discrimination is made out. Read in context, that was the industrial tribunal's finding in the present case. The tribunal found that the interviewers were "consciously or subconsciously influenced by the fact that the applicant had previously brought tribunal proceedings against the respondent"."*

69. In the **Khan** case Lord Nicholls put forward that the "by reason that" element *"does not raise a question of causation as that expression is usually understood. Causation is a slippery word, but normally it is used to describe a legal exercise. From the many events leading up to the crucial happening, the court selects one or more of them which the law regards as causative of the happening. Sometimes the court may look for the "operative" cause, or the "effective" cause. Sometimes it may apply a "but for" approach. For the reasons I sought to explain in* ***Nagarajan –v- London Regional Transport****, a causation exercise of this type is not required either by section 1(1)(a) or section 2. The phrases "on racial grounds" and "by reason that" denote a different exercise: Why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact."*

70. It is again clear from the authorities that a person claiming victimisation need not show that the detrimental treatment was meted out solely by reason of

the protected act. If protected acts have a "significant influence" on the employer's decision making, discrimination would be made out. It is further clear from authorities, including that of **Igen Limited –v- Wong [2005] ICR 931**, that for an influence to be "significant" it does not have to be of great importance. A significant influence is rather *"an influence which is more than trivial. We find it hard to believe that the principle of equal treatment would be breached by the merely trivial."* The tribunal refers to such case also as regards how the burden of proof operates in complaints of discrimination and victimisation.

71. It is recognised that employees may lose protection from victimisation because the detriment is inflicted, not because they have carried out a protected act, but because of the manner in which they have carried it out - see the principle established in **Martin v Devonshires Solicitors 2011 ICR 352** where it was said that there may be a feature of the protected act which can properly be treated as separable, such as the manner in which the protected act was carried out. It was recognised there that the distinction made is subtle, but such fine lines have to be drawn, as per Underhill J, "if the anti-– victimisation provisions, important as they are, are to be confined to their proper effect and not to become an instrument of oppression".

72. Applying the aforementioned legal principles to the facts as found, the tribunal reaches the following conclusions.

## Conclusions

73. The respondent accepts that the claimant's application for a witness order in a separate tribunal complaint he brought of unlawful discrimination amounted to a protected act. Similarly, it is accepted that the claimant's request to the respondent to complete an ACAS discrimination questionnaire constituted a protected act.

74. There is then no dispute that the refusal to appoint the claimant to the job he applied for amounted to detrimental treatment. The tribunal concludes that the respondent's refusal to allow the claimant an appeal against the refusal of employment might cause a reasonable worker to conclude that he was being disadvantaged. This too is a detriment. The tribunal agrees with the respondent that a refusal to respond to the ACAS discrimination questionnaire is not capable of being actionable as a detriment pursuant to Sections 55 and 56 of the Equality Act which just allows for a legal cause of action to arise in respect of the arrangements for selection, the terms of an offer or a failure to offer work. However, the tribunal has determined that such complaint ought also to be considered pursuant to Section 39, which does allow for detrimental treatment to be actionable. Again, a reasonable worker might take the view that he was being disadvantaged in this questionnaire not being responded to.

75. The claimant in his amended complaints relies also on the respondent's treatment of his email of 4 August as his job application, on the respondent looking at issues of previous conduct rather than his skills, experience and qualifications, the imposition of Ms Milner as the effective decision-maker in refusing his application for work and the refusal to allow the claimant an

opportunity to discuss the allegations made against him in the 9 August letter. As already suggested, these were predominantly, on the claimant's own explanation, alternative ways of putting the same complaint, but in any event the tribunal is prepared to treat them as potential additional forms of detrimental treatment.

76. The tribunal's concentration is then on the issue of the "reason why".

77. Ms Milner was aware of both protected acts prior to all of the detrimental treatment complained of by the claimant. The reliance by the claimant on his seeking of a witness order rather than, for instance, his assertions regarding the respondent's behaviour supporting his costs application in the same correspondence (or indeed the earlier tribunal complaint itself) is curious. The tribunal has no basis for concluding that the witness order application might have caused the respondent particular upset or alarm so as to cause it to wish to retaliate, when the claimant sought further work. In her witness statement, Ms Milner referred to the tone and language of the claimant's discrimination questionnaire which led her to believe that this was not an attempt to ask genuine questions of discrimination in the workplace, but simply a precursor to an inevitable tribunal claim. She said that in her view the purpose was not to ask legitimate questions, but to accuse the respondent of discrimination and to harass it. Given the content of the questionnaire, that view is supportable. The claimant had hardly given any time for the respondent to consider his application before making allegations, rather than genuine enquiries or attempts to obtain information. The tribunal concludes that the act of the raising of potential discrimination is in these circumstances distinguishable from the timing, context and way in which the claimant phrased his questionnaire submission.

78. The tribunal deals first with the complaint regarding the refusal of an offer of work/employment.

79. The claimant seeking a witness order in separate proceedings was not in Ms Milner's mind when she made the decision that the claimant would not be offered further work. It would perhaps have been odd, again, if this particular application rather than any other of the many applications and complaints the claimant had made, would be the reason for a refusal to offer future work. The tribunal has made reference to the person in respect of whom the witness order was sought and how that individual was dealt with internally and why. There is nothing within that which could reasonably cause the tribunal to conclude that Ms Milner was likely to refuse the claimant's employment because of this application. There is no basis for the tribunal concluding that the claimant's application should be rejected because of his discrimination questionnaire. Ms Milner had read it before the rejection letter was sent, but in no sense whatsoever, on the evidence before the tribunal, did that cause her to refuse to offer future work to him.

80. For her, the answer to his enquiry lay straightforwardly in the respondent's re-hire policy. The claimant's difficulty is that the success of this complaint is largely conditional upon the tribunal finding that the respondent did not have the re-hire policy it asserts was in place and that the matters of

concern raised in respect of the claimant's previous work for the respondent were fabricated. The tribunal has rejected these assertions of the claimant.

81. The claimant has not shown facts from which the tribunal could reasonably conclude the refusal of an offer of work to have been unfavourable treatment because of his protected acts. The tribunal is satisfied that the respondent has provided an explanation that the decision not to offer him future work was in no sense whatsoever related to the protected acts.

82. The claimant was refused an offer of future work on Ms Milner's genuine consideration of the re-hire policy and that the claimant did not fulfil the criteria for employment to be offered. She genuinely believed that the claimant had exhibited behaviour which was a cause for concern in a number of instances as set out above. These were not fabricated and the respondent's failure to take formal disciplinary action in respect of them at the time they occurred does not contradict there being real concerns or undermine the stance Ms Milner took in refusing to offer further work. The concerns had been relevant to the respondent when the claimant's services were initially terminated some time previously. The tribunal has accepted Ms Milner's explanation that, pragmatically, the claimant could be removed from working with a particular service user in the hope that he would get on better with another. Pursuing a formal process was problematical in the context of complaints arising from, at times, vulnerable service users and where a formal safeguarding enquiry might be launched. The respondent chose not to "hit the red button" as Mr Jones put it in submissions, but, again, the fact of the concerns and of Ms Milner's regard to them when she considered whether to re-hire the claimant was genuine.

83. The tribunal can understand the claimant's position that he feels he has lost an opportunity for future employment because of complaints which were never viewed as disciplinary matters or subject to any formal investigation at the time. The claimant's complaint is in essence that the respondent had been lax in the past in initiating disciplinary procedures or doing a thorough job in investigating concerns, but that is far removed from evidence of victimisation for the subsequent protected acts.

84. Ms Milner treated the claimant's email of, in fact 30 July, as a job application, despite the respondent having application forms and packs for prospective workers to complete. Nevertheless, she genuinely thought that the email was his application for work and reasonably so. She looked at the claimant's past conduct rather than his skills, experience and qualifications in rejecting him for an offer of future work purely because the respondent's policy, on her accurate interpretation, was not to re-hire workers who had been with the respondent previously where there had been concerns raised about them.

85. The claimant maintains that Ms Milner imposed herself as the decision-maker on the refusal to offer him work. It is not clear how this was felt to be detrimental treatment – presumably the claimant believes that others within the respondent would not have had strict regard to the re-hire policy. There is no evidence of that. The reality is rather that the claimant was asking for

a personal response to a letter he addressed to her rather than one from the respondent's legal advisers in ongoing tribunal proceedings. Certainly, Ms Milner dealt with the matter and responded to the claimant because she thought that was what the claimant expected and, in any event, was appropriate given that the request for work had been addressed to her.

86. Job applicants are not generally given a right of appeal against decisions not to engage them and there is no statutory code of practice that recommends employers to afford that opportunity. Feedback may of course be sought by individuals to understand better the reasons for their rejection, but again this is ordinarily given at an employer's discretion in the absence of them having a policy in place to provide such feedback. Certainly, the respondent had none and there is no evidence of any practice of it allowing appeals. The claimant not being given an ability to appeal against his rejection or an opportunity, years after the event, to discuss the issues of concern which were preventing his re-hire is completely unsurprising. There had never been any disciplinary findings to appeal against. It is certainly not behaviour on its own which might cause the tribunal to draw an adverse inference.

87. In any event, the tribunal accepts Ms Milner's evidence that her refusal to allow a form of appeal or further discussion on her decision not to rehire the claimant was based on this not being allowed for under the re-hire policy, which contained no right of appeal. The policy referred to the employer's decision being final and that is how she saw it. She took this view at the time she notified him of the rejection of his application for work. When he did seek to appeal, this was ignored on the basis of the claimant having already been told that the decision was final. In no sense whatsoever was the decision not to allow an appeal influenced by either protected act.

88. The final alleged detriment is the refusal to respond to the discrimination questionnaire itself. That claim may indeed work conceptually. It is possible that there was a refusal to reply to a discrimination questionnaire because of it being an assertion of unlawful discrimination and/or some other act done with reference to the Equality Act 2010. Again, however, the tribunal accepts Ms Milner's explanation that she did not reply to the questionnaire because of the legal advice she obtained to the effect that there was no obligation to respond to such questionnaire. That would have been an accurate statement of the legal position, the tribunal has no basis for doubting that such advice given and, in any event, accepts that Ms Milner determined not to respond to the questionnaire on the basis of legal advice.

89. It is wrong to suggest that there was no reply at all to the questionnaire. Ms Milner, when she wrote to the claimant explaining the decision not to re-hire him, referred to the questionnaire, to there being no obligation to respond to such a request but in any event gave the explanation which had been provided for the decision not to re-hire the claimant and denied the allegations, which the claimant had made. Indeed, the questionnaire was not simply a neutral form of enquiry, but on the claimant's own evidence, a complaint.

90. From Ms Milner's evidence, it can be concluded that the refusal to respond to the questionnaire was at least in some respect influenced by the nature of the questionnaire. Whilst she would not have replied in any event, based on the legal advice that she was not obliged to (and that was the operative "reason why"), she believed from the tone and language used that this was not an attempt to ask genuine questions. Again, the claimant himself accepts that it was a complaint. In so far as it constituted a material influence, it was the tone and context of the questionnaire which was in Ms Milner's mind, not the making of the protected act itself.

91. At times the claimant has wished to concentrate on a number of matters which the tribunal has considered, but where such points have not taken the claimant's case any further. This included allegations regarding the written contractual arrangements within the bundle of documents and whether there was any fabrication or inaccuracy regarding job title. The claimant wished to explore in some detail changes to his employment status over the period he provided services through the respondent. The point the claimant seemed to be making was that, for a period, he had provided services through a limited company and therefore matters of concern ought to have been raised with that limited company and not him. Any concerns therefore were about the company and not him. The tribunal is clear that the re-hire policy was not in some way limited so that it could only apply to employees or workers with a direct contractual relationship with the respondent. Certainly, Ms Milner genuinely believed that policy applied to the individual providing services to the end user regardless of his exact contractual status. The claimant wished to explore in detail the relationship between Ms Milner and her husband in terms of authority within the business. He raised that he had asked her not to contact the respondent's solicitors, yet she did. The claimant could not impose such a restriction on Ms Milner and Ms Milner was faced with correspondence which clearly might have led to legal proceedings.

92. In respect of all the asserted detriments, the tribunal is entirely satisfied with the respondent's explanation for its treatment of the claimant and that it was in no sense whatsoever related to his protected acts.

Employment Judge Maidment
Date 27 July 2022

Reserved Judgment & Reasons Sent to The Parties On
Date 1 August 2022