



EMPLOYMENT TRIBUNALS

Claimant: Mr O Itiokiet

Respondent: B & M Retail Limited

Heard at: Manchester

On: 4, 5 and 6 April 2022

Before: Employment Judge Benson
Mr D Williamson
Mt T Walker

REPRESENTATION:

Claimant: Ms Powell (a friend)

Respondent: Mr T Wilkinson of Counsel

JUDGMENT

Judgment having been sent to the parties on 29 April 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Claims and Issues

1. This is a claim brought by the claimant, Mr Itiokiet, against the respondent. The claims brought are of race discrimination, being claims of direct discrimination, harassment and victimisation. A List of Issues was agreed at a previous case management hearing, and with one amendment (which is discussed below) the list was approved and used for today's hearing. The List of Issues is set out below:

Jurisdiction

- (1) Are any of the claimant's complaints out of time? In particular, are any complaints raised about matters which arose prior to 27 June 2020

(three months before submission of the claim plus the relevant early conciliation period)?

- (2) If so, were they part of conduct extending over a period and therefore within time and/or would it be just and equitable to extend time?

Harassment contrary to s.26 Equality Act 2010

- (3) Did the respondent engage in unwanted conduct? The claimant relies on the following alleged acts of unwanted conduct:
- a. The failure to investigate the claimant's grievance dated 10 March 2020;
 - b. The sending of Ms Langley's email dated 30 June 2020;
 - c. The decision to invite the claimant to a disciplinary hearing on 30 June 2020, and
 - d. The failure to investigate the claimant's grievance dated 1 July 2020.
- (4) If so, was that conduct related to race?
- (5) If so, did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
- (6) If not, did the conduct have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant having regard to the circumstances, the claimant's perception and whether it was reasonable for the conduct to have had that effect?

Direct race discrimination contrary to s.13 Equality Act 2010

- (7) The claimant identifies as black British.
- (8) Was the claimant treated less favourably than his white comparators, Neil Burrows and Craig Berry? The claimant relies on the following alleged acts of less favourable treatment (if not amounting to harassment – see section 212(1)):
- a. The failure to investigate the claimant's grievance dated 10 March 2020;
 - b. The decision to invite the claimant to a disciplinary hearing on 30 June 2020.

- (9) If so, has the claimant proven facts from which the Tribunal could conclude that the reason for that less favourable treatment was the claimant's race?
- (10) If so, can the respondent nevertheless show that there was no contravention of section 13?

Victimisation contrary to s.27 Equality Act 2010

- (11) The respondent accepts that the claimant did a protected act on three occasions
 - a. In presenting his claims to the Employment Tribunal in 2018 in case numbers 2403372/2018 and 2404034/2018;
 - b. In making his grievance of 10 March 2020, and
 - c. In making his grievance of 1 July 2020.

Did the claimant also do a protected act in:

- d. sending his email of 18 February 2020 seeking support for promotion?
- (12) Can the claimant prove facts from which the Tribunal could conclude that he was subjected to a detriment because he did a protected act? The claimant relies on the following alleged detriments:
 - a. The failure to promote the claimant on the occasion when John Boswell was promoted;
 - b. The failure to investigate the claimant's grievance dated 10 March 2020
 - c. Carol Langley's reference to the claimant as a "difficult character" in her email dated 30 June 2020;
 - d. The decision to invite the claimant to a disciplinary hearing on 30 June 2020, and
 - e. The failure to investigate the claimant's grievance dated 1 July 2020.

- (13) If so, can the respondent show that there was no contravention of section 27?

Remedy

- (14) If the claim succeeds what is the appropriate remedy in terms of

- a. A declaration;
- b. Compensation for injured feelings;
- c. Compensation for financial losses, if any;
- d. Interest, and
- e. If sought, a recommendation?

Applications to amend

2. At the outset of the hearing the claimant drew the attention of the Tribunal to his application to amend the claim dated 9 March 2022 to include a claim of constructive unfair dismissal. This was the first occasion that this matter had been raised with the Tribunal and the respondent objected to such amendment and had provided its written objections.

3. We proceeded to hear submissions from Ms Powell as to the basis of the application, and from Mr Wilkinson in response. For the reasons provided at the time, we concluded that it was in the interests of justice to refuse the application bearing in mind the balance of hardship which would be caused to the respondent in allowing it to proceed. We weighed up all the factors in **Selkent Bus Co Limited v Moore [1996] UKEAT 151** including nature of the amendment, the timing of the application, the reasons for the delay, time issues and potential merits.

4. The respondent also sought an amendment to the List of Issues. At the case management hearing before Employment Judge Franey, the List of Issues had been set out in the Order and the parties were given the opportunity to object to it. The concession had been made by the respondent that the bringing of the grievance on 10 March 2020 was a protected act for the purposes of the victimisation claim. Mr Wilkinson sought to withdraw this concession, and he did so by way of an application to amend. Again, having heard representations from Ms Powell and Mr Wilkinson, the principles in **Selkent** were applied and the Tribunal concluded that it was in the interests of justice, and balancing the hardship to both parties to allow the amendment such that it was a matter which would be determined by the Tribunal during the course of these proceedings as opposed to a concession on the part of the respondent.

Evidence and Submissions

5. The Tribunal heard evidence from the claimant and had a statement from Mr M Murray who was the claimant's trade union representative. Unfortunately, Mr Murray was unable to attend the hearing as he was on holiday. It became apparent whilst Mr Murray was attempting to connect to the hearing, in order that his evidence could be given by CVP, that he was in Portugal, and permission had not been obtained for him to give evidence from abroad. We discussed this with Ms Powell and confirmed that the options were that the matter proceeded without Mr Murray's

oral evidence but with his written witness statement, though the Tribunal would have to assess what weight to be attached to that statement, or the hearing be adjourned such that Mr Murray could attend to give evidence. That might involve an application for costs being made. Ms Powell on behalf of the claimant confirmed that they wished to proceed with the hearing.

6. The respondent's witnesses were Mr I Prescott, the Transport Manager; Mr J Massey, a Shift Manager; Mr R Salisbury, Recycling Manager; Ms C Langley, HR Advisor and Ms N Payne, People Business Partner. Ms Payne gave evidence by CVP as she was suffering from COVID at the time.

7. The parties both provided written submissions supplemented by oral submissions. Time was given to Ms Powell to consider Mr Wilkinson's submissions overnight and prepare.

8. During the course of cross examination of the claimant, he alleged that following the disciplinary hearing Mr Salata had an off the record conversation with him in which he had told the claimant that Ms Langley was pursuing him because of the claim he had brought against the company for race discrimination. This was the first time this comment had been made in these proceedings. It did not appear in the claim form, or in the claimant's witness statement or during the grievance process. The claimant said that it had been said in the presence of Mr Murray who, for the reasons above, was unable to give evidence. Although Mr Murray refers to the events of that meeting in his witness statement, he does not refer to this alleged conversation, and we felt that this would have been a crucial conversation and would have been referred to by Mr Murray in that statement and in the other documents that we have referred to, had it occurred. On the balance of probabilities, we find that this conversation did not happen.

Findings of Fact

9. The claimant was employed as a Warehouse Operative with the respondent between 4 May 2014 and his resignation on 13 September 2021. He worked in the recycle department. He describes himself as black British.

10. In 2018 he commenced Employment Tribunal proceedings against the respondent alleging race discrimination. These proceedings, from the claimant's evidence, were allegations that the difference in treatment that he believed he had been subjected to since he commenced employment, was related to his race. This view arose out of a comment allegedly made by a colleague following an altercation with the claimant in which the colleague had used the "n" word and although it had been reported to management at the time, they had not told the claimant about it. He became aware of it at a later date and commenced proceedings.

11. During the claimant's employment he had raised six or seven grievances, one of which was upheld. Following the upholding of that grievance, he had been given the opportunity to move shifts or departments which he had not taken up as he did not believe that he should be the person required to move. He accepted that there had been a breakdown in relationships with his colleagues.

12. In July 2019 a position of supervisor was advertised internally in the respondent's business. The claimant applied for that role by an email of 9 June 2019.

13. On 10 June 2019 the claimant emailed Mr Salisbury and said that he would like to suspend the application for a supervisor job. He was not therefore taken forward in the process, and a colleague (Mr John Boswell) was promoted to supervisor in July 2019. The claimant's reason for withdrawing his application was that he did not think he would get the role because he had not in the past. He did not apply for a second supervisory role which was advertised in December 2020.

14. The claimant's proceedings before the Tribunal were settled by way of a Settlement Agreement in January 2020. Neither Mr Massey nor Mr Prescott knew about these proceedings or their settlement. Mr Salisbury was aware of them, as was Ms Langley.

15. On 18 February 2020 the claimant emailed his manager, Mr Salisbury, which was copied to a number of people including his solicitor, making it clear that he was seeking promotion to supervisor or a key colleague position when opportunities arose in the future. This email does not refer to the claimant's race or any discrimination issues relating to race. It references having applied for vacancies in the past but not having been interviewed. The claimant accepted in evidence that this email was not accusing anybody of discriminating against him as he saw this as a clean slate. Its purpose was to ask that he was treated fairly in the future.

16. On 24 February 2020 the claimant was alerted to his car being vandalised outside his home. A video was sent to him, which he accessed on his phone whilst in work. The claimant showed the footage of his car being vandalised to a number of colleagues. These were Messrs Petrov, Uciniak, Conroy and Whalley.

17. On 2 March 2020 the respondent became aware that the claimant had shown colleagues the footage and he had implicated Mr Burrows and Mr Berry in the vandalism. This came to the management's attention as there was an altercation when Mr Burrows challenged the claimant about implicating him.

18. On 3 March 2020 Mr Rigby, a Recycling Manager, spoke informally with the claimant and told him not to show the video to anybody else, and not to use his mobile phone during work hours, which was in contravention of the company's policies.

19. On 6 March 2020 Mr Burrows raised a grievance complaining that the claimant had implicated him in the vandalism of his car and on 7 March 2020, Mr Berry also submitted a similar grievance. He complained about the claimant's attitude towards him which he said was making him feel stressed and victimised and he considered that he was being victimised by the claimant as he was unwilling to give evidence in support of the claimant in a previous claim. They both alleged that the claimant was intimidating them and that he was causing a bad atmosphere in the workplace.

20. On 10 March 2020 the claimant raised a grievance in respect of Mr Burrows' threatening and aggressive behaviour towards him. He alleged that Mr Burrows had approached him in an aggressive manner, verbally attacking him, was in his personal space and shouting and was extremely antagonistic in language, tone and body language. He alleged that his supervisor and others were present. There was no allegation or mention of race or race discrimination within the grievance.

21. On 20 March 2020 Mr Massey, who was appointed to consider the grievances raised by Mr Burrows and Mr Berry, met with them and obtained their versions of events. Mr Burrows also stated that he considered he was being victimised by the claimant because of him not being willing to support the claimant in a previous claim.

22. There were a number of delays arising from the claimant's sickness absence, and self-isolation which meant that it was not until 22 May 2020 that Mr Massey interviewed the claimant as part of his consideration of Mr Berry and Mr Burrows' grievances. The claimant's version of events, in summary, was that it was not him who suggested that it was Mr Berry and Mr Burrows in the video of his car being vandalised but other colleagues, specifically Mr Petrov and Mr Whalley.

23. Thereafter Mr Massey held meetings with Mr Petrov, Mr Bailey and Mr Uciniak. He also obtained written statements from Mr Conroy and Mr Whalley. Mr Petrov, Mr Whalley and Mr Conroy all denied suggesting it was Mr Berry and Mr Burrows. They said that the suggestion came from the claimant. Mr Bailey had not seen the video.

24. On 9 June 2020 Mr Massey wrote to Mr Burrows and Mr Berry upholding their grievances. The reasons are in letters dated 9 June 2020. He found that it was the claimant who had expressed the view that it was Mr Berry and Mr Burrows who appeared in the video vandalising his car.

25. Shortly after the grievance was raised Mr Prescott, who was the Transport Manager, was appointed to consider the claimant's grievance. He had no previous dealings with the claimant. He did not meet the claimant until 28 May as a result of the claimant's sickness and other absences. The claimant repeated his allegation in relation to Mr Burrows and stated that Mr Burrows had also sworn at him. He did not ask Mr Massey whether there was any CCTV available. Mr Prescott made enquiries of the Security Department about CCTV which may have recorded the events between the claimant and Mr Burrows, but was told that they were only kept for 30 days. He only did this on 30 May 2020. Although the claimant was of the view that they were kept for three months, there was no evidence of this. The claimant said Mr Bailey and Mr Boswell had witnessed the incident, and maybe Mr Whalley.

26. Mr Prescott had a further interview with Mr Burrows on 31 May 2020 to obtain his version of events, which were that he had approached the claimant and asked if he had anything to say to him. The claimant had smirked and so he told him to keep his name out of his mouth. He denied the claimant's suggestion that he had been aggressive, threatening or swore. He accepted he had spoken in a louder voice than normal.

27. Mr Prescott obtained a statement from Mr Bailey and asked Mr Salisbury to obtain statements from Mr Boswell and Mr Whalley. In summary, these statements said very little. Mr Bailey did not reference any shouting and he said he heard normal conversation. Mr Whalley said he heard loud shouting but did not know what was said and by whom. Mr Boswell said that Mr Burrows said something to the claimant, but he could not remember what was said.

28. Mr Prescott's investigation was cursory at best. He did not enquire further of the witnesses, either by speaking with them or asking for clarification, even though they were matters which required follow-up, for instance who it was who Mr Whalley said was shouting loudly.

29. On 10 June 2020 Mr Prescott wrote to the claimant with his outcome letter. He did not uphold the claimant's grievance for the reasons set out in his letter dated 10 June 2020. Essentially, he accepted that something had happened with Mr Burrows but there was insufficient evidence to uphold the allegations that Mr Burrows had been threatening towards him. He considered that there had been a breakdown in the relationship between Mr Burrows and the claimant and recommended possible mediation.

30. Separately, Mr Massey considered that the claimant's conduct in making false allegations against his colleagues and using a mobile phone whilst at work showed a disciplinary case to answer, and on 11 June 2020 the claimant was invited to a disciplinary hearing. The allegations which he faced were that on 23 and 24 February 2020 he showed a video of his car being damaged to colleagues stating that Mr Burrows and Mr Berry were responsible. Further that he used his mobile phone whilst at work.

31. After concern was expressed by the claimant about the person who was appointed to consider the disciplinary process, the respondent agreed that a manager who had no contact or no involvement with the claimant previously, Mr Pawel Salata, would be appointed to conduct the disciplinary hearing. The hearing was arranged to take place on 30 June 2020.

32. Early that morning, Mr Salata emailed Ms Langley, the HR adviser, with some queries in relation to the investigation including the statements and evidence which had been provided. Ms Langley responded when she got into work. He asked about various matters, the majority of which were answered by her. These included the significance of a witness statement being undated, confusion about one of the dates when the claimant was alleged to have shown the video and the delay (which Ms Langley explained was because of the claimant's absences and grievances) in holding the disciplinary hearing and clarification about the name of one of the witnesses.

33. In addition to providing the information requested, she also made comments about the claimant that were her personal opinion and provided background about the claimant. These included the comment: "Obe is a very complicated and difficult character and this will be his 7th grievance over a 2 year period as he feels he is discriminated against and bullied. He has been offered shift changes and a move in department but does not accept any of this, which is not understandable if you feel

so discriminated and bullied. Over that 2 year period only one of his grievances has been upheld.”

34. We do not accept as alleged by Ms Langley that she had been asked for background information about the claimant by Mr Salata in an earlier call. There is no reference to this in either of the emails and under cross examination and questions from the Tribunal Ms Langley’s evidence about this was unconvincing.

35. Ms Langley had known and dealt with the claimant for five years. He had raised a number of unsuccessful grievances and had made Ms Langley’s life difficult. He would not attend meetings without a union representative, and it had to be a specific representative (Mr Murray), who was often not available. These included return to work meetings and welfare meetings. This was in our view the catalyst for her providing Mr Salata with the background to the claimant and her views upon him. Although she was aware of the previous tribunal proceedings it was the difficulties she had and continued to have in managing the claimant over the years which we find caused her to provide the information to Mr Salata in that email.

36. Mr Murray accompanied the claimant at the disciplinary hearing when Mr Salata discussed the allegations with the claimant. Mr Salata thereafter confirmed by letter dated 1 July that he had considered all facts and decided that no further action would be taken, but reminded the claimant that should there be any further issues of performance or conduct of that nature, appropriate investigations and possible disciplinary action may be taken.

37. On 1 July 2020 the claimant raised a further grievance contending that he had been victimised and treated unfairly because of his race. The allegations were made against 12 employees of the business and related to the events of 23 and 24 February and the grievance and disciplinary proceedings which followed. The claimant continued to deny that he had suggested that it was Mr Berry or Mr Burrows in the video footage.

38. From 1 July 2020 to 20 September 2020 the claimant was absent through sickness, and from 27 September 2020 to 25 October 2020 the claimant was absent on holiday. During this period, there was discussion as to who was to conduct the claimant’s further grievance. After discussion it was agreed that Mr Steele, an external solicitor, would investigate and consider the grievance. The claimant’s concerns (raised by Ms Powell in these proceedings) were that Mr Steele was not independent and had a conflict of interest as he had represented the company in Employment Tribunal proceedings. However, at the time, the claimant accepted that Mr Steele should proceed to conduct the grievance investigation. The claimant had no other criticism of this investigation.

39. On 18 November 2020 Mr Steele held a grievance meeting with the claimant.

40. Mr Steele then proceeded to interview eight witnesses, and on 12 January 2021 provided the grievance outcome by way of a letter. The claimant’s grievances were not upheld. Mr Steele provided a detailed outcome letter with his reasons in respect of each person about whom the claimant complained. He found that it was the claimant who had suggested to his colleagues that it was Mr Berry and Mr

Burrows who appeared in the video and further that the grievance and disciplinary processes which followed were not racially motivated or discriminatory. He could not make sense of the allegations the claimant had made against three of the people he complained about. He found that the bringing disciplinary proceedings were appropriate based upon the findings that the claimant had made false allegations against colleagues and had used his mobile phone whilst on shift. His conclusion was that the allegations were part of a longstanding grievance which the claimant had against the respondent, Mr Berry and Mr Burrows. He considered that the claimant had a deep-seated resentment towards the respondent which arose in part because he believed he had not been promoted because of his race. Mr Steele concluded that the relationship which the claimant had with his colleagues had broken down and made a number of recommendations.

41. The claimant appealed the grievance outcome on 15 January 2021 but without providing any detail. That detail was submitted by way of his grounds of appeal on 9 May 2021. He put forward that two false allegations had been made against him which had not resulted in disciplinary action and therefore his matter should be reopened. These were expanded upon in an appeal meeting which was held with Christine Finnigan, the Shared Services Manager on 11 June 2021. An appeal outcome letter was delivered on 28 July 2021, and the original decision of Mr Steele was upheld. Her reasons were set out in the outcome letter and she concluded that there were legitimate concerns about the claimant's conduct which resulted in the disciplinary proceedings and it was appropriate that these matters were considered, particularly in relation to using his mobile phone whilst on shift. She noted that in respect of the allegation of making false allegations, Mr Salata had not issued any form of disciplinary sanction. She found that Mr Burrows allegations against the claimant were investigated and upheld.

42. On 13 September 2021 the claimant resigned from his employment.

Facts from which inferences can be drawn

43. We have also considered whether there are any facts from which we can draw inferences to support the claimant's case. Ms Powell submitted that we should draw inferences that there was an ongoing culture of discrimination within the respondent from the fact that there had been a previous racially discriminatory incident, which was embodied in the previous proceedings which were issued. Although proceedings were issued, they were settled and there has been no finding by a Tribunal in relation to this allegation.

44. During the hearing the claimant explained that his claim had arisen out of one racist comment, which we referred to above, which he alleges was said by an employee of the respondent. The claimant says that he was not told about this comment when it was reported to management. That employee is not one who appears as a colleague involved in the present allegations.

45. We do not consider that we can draw inferences from these facts that there was an ongoing culture of discrimination.

The Law

Direct Discrimination

46. Section 13 of the EQA provides that a person (a) discriminated against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

47. Section 23 (1) provides that on a comparison of cases for the purposes of section 13...there must be no material differences between the circumstances relating to each case.

Harassment

48. Section 40(1)(a) prohibits harassment of an employee. The definition of harassment appears in section 26, for which disability is a relevant protected characteristic, and so far as material reads as follows:

(1) 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...

(4) In deciding whether conduct has the effect referred to sub-section (1)(b), each of the following must be taken into account –

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

49. Chapter 7 of the EHRC Code deals with harassment.

Victimisation

50. Section 27 EQA provides protection against victimisation.

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

(a) B does a protected act, or

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

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

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

Burden of Proof

51. The Equality Act 2010 provides for a shifting burden of proof. Section 136 so far as material provides as follows:

(2) 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.

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

52. Consequently it is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the Act. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention.

Discussion and Conclusions

53. Our conclusions are as follows:

Harassment contrary to s.26 Equality Act 2010

54. The claimant relies upon the following unwanted conduct:

The failure to investigate the claimant’s grievance dated 10 March 2020;

55. We consider that Mr Prescott's failure to properly investigate the grievance raised by the claimant was unwanted conduct. His approach fell well short of what the claimant could have expected when he raised his concerns. Mr Prescott did not follow up on some of the comments made in the statements and did not appear to consider that it might be a situation where the witnesses were deliberately not wanting to get involved. Further, he displayed a lack of curiosity in not looking at the CCTV earlier. A manager would have been aware that CCTV is not retained forever and Mr Prescott could have secured it when he was first appointed to investigate.

56. There is no evidence, however, that the failure to investigate this grievance was related to the claimant's race. The burden is on the claimant not just to prove that there has been unwanted conduct but that there is some evidence which could show that the claimant's race played a part in Mr Prescott's approach to the investigation. He has not done so. Ms Powell's submission that the fact that there was a previous allegation of race discrimination which resulted in proceedings which were settled, is not in itself sufficient to discharge that burden such that the respondent has to show that the conduct was not related to race.

57. As we have mentioned above, we have considered whether there are any inferences which we can draw to make that link to the claimant's race as we are aware that often there is no direct evidence of discrimination, but for the reasons given we cannot.

58. This claim therefore fails, and it is not necessary for us to consider the remainder of section 26.

The sending of Ms Langley's email dated 30 June 2020;

59. The second allegation of harassment was the sending of Ms Langley's email of 30 June. We considered that at the time the claimant saw the email from Ms Langley it amounted to unwanted conduct. The comments were not pleasant for the claimant to see in writing, and the personal opinions were a clumsy attempt to influence Mr Salata. However, we do not consider that the conduct of Ms Langley was related to the claimant's race. The claimant has again been unable to show facts from which we could conclude that race played a part in her emailing Mr Salata. In any event, Mr Salata found in the claimant's favour and no disciplinary action was taken.

60. As we have stated above and for the reasons above, we consider that Ms Langley's motivation was the difficulties in managing the HR issues relating to the claimant over a long period and not related to race.

The decision to invite the claimant to a disciplinary hearing on 30 June 2020

61. The respondent accepts that this amounted to unwanted conduct. Mr Massey had carried out an investigation into the claimant's conduct and there were grounds upon which disciplinary action could reasonably be taken based upon the evidence. The claimant has not however discharged the burden of showing that the decision was related to race, for the same reasons as above.

The failure to investigate the claimant's grievance dated 1 July 2020.

62. The only issue raised by the claimant or his representative as to why he considered that there was a failure to investigate this grievance was that Mr Steele, who he says was not independent was appointed to investigate. We consider that in a situation where the claimant agreed to having Mr Steele conduct the grievance, it cannot be said that this conduct was unwanted. As such there was no unwanted conduct and this claim fails.

63. All claims of harassment fail and are dismissed.

Direct race discrimination contrary to s.13 Equality Act 2010

64. The claimant identifies as black British. The claimant relies upon two white comparators (Neil Burrows and Craig Berry). We must consider whether the claimant was treated less favourably than Mr Burrows or Mr Berry in the ways alleged by the claimant and if so whether that treatment was because of the claimant's race.

The failure to investigate the claimant's grievance dated 10 March 2020

65. We consider that there was less favourable treatment of the claimant compared with Mr Berry and Mr Burrows. All raised grievances, but the manner and approach by taking Mr Massey to the investigation was markedly different than that of Mr Prescott. Mr Massey met with the witnesses involved with the incident and questioned and challenged their versions of events. Mr Prescott asked for statements in relation to the witnesses to the incident, he was provided with written statements which were lacking in detail, and he failed to follow these up or make any further enquiries even though they may have assisted him in obtaining an independent view as to what had happened.

66. Although the outcome for the claimant may have remained the same, the process was less favourable than that undertaken for Mr Berry and Mr Burrows. Mr Prescott was however unaware of the claimant's previous Tribunal claim and had no involvement with the claimant or his work. The claimant has not shown any other evidence from which we could conclude that the reason Mr Prescott's failure to properly investigate the claimant's grievance was because of the claimant's race. For that reason, he has not discharged the burden and this claim fails.

The decision to invite the claimant to a disciplinary hearing on 30 June 2020.

67. We consider that this allegation is inextricably linked to the investigation of the two grievances in which we have found that there was less favourable treatment. Both Mr Burrows and the claimant had brought grievances against each other about their respective conduct. Both would, if there was a case to answer, have likely resulted in disciplinary proceedings being undertaken. The difference was that the claimant's investigation was poor. This led to a different and less favourable outcome for the claimant compared to that of Mr Burrows. We consider therefore that there was less favourable treatment. However, again there are no facts from

which we could conclude that this was because of the claimant's race for the reasons given above. Mr Massey who made that decision to invite the claimant to the disciplinary hearing was not aware of the previous proceedings and there was no evidence that race played any part in his decision. For that reason, the burden is not discharged and this claim fails.

Victimisation contrary to s.27 Equality Act 2010

68. The claimant relies upon four alleged protected acts. Two of these were accepted by the respondent to amount to protected acts under section 27, being the presentation of claims to the Employment Tribunal in 2018 (2403372/2018 and 2404034/2018) and bringing his grievance on 1 July 2020.

69. The remaining two alleged protected acts are disputed by the respondent.

70. The first is the sending of the email of 18 February seeking support for promotion. The claimant alleges that his email of 18 February was a complaint of discrimination. Our factual findings concerning the content of this email are set out above. There is no mention of discrimination in it and nothing which persuades us that it can amount to a protected act under section 27 of the Equality Act.

71. The second protected act is the grievance of 10 March. Again, we are of the same view in respect of the grievance of 10 March. Our finding concerning the contents of the grievance are set out above. The claimant accepted that race or discrimination was not referred to and he did not want to raise those issues. The grievance does not fall within the requirements of section 27 Equality Act and as such cannot amount to a protected act.

72. What we must go on to consider is whether any of the detriments that the claimant relies upon occurred; if so whether any of them amount to a detriment, and if so, were they because he had carried out any of the acts which we have found were protected. For the first four of these the protected act is the bringing of original Tribunal proceedings in 2018.

The failure to promote the claimant on the occasion when John Boswell was promoted

73. We find that this was not a detriment. The claimant withdrew his application and Mr Boswell was appointed. There was no failure to promote. That claim fails.

The failure to investigate the claimant's grievance dated 10 March 2020

74. We agree that this was a detriment to the claimant for the reasons previously set out. The only protected act that can be relied upon is the bringing of the earlier tribunal proceedings, and we accept that Mr Prescott did not know about them. Mr Prescott made his decisions independently of HR and could not have been influenced by them. As such we find that the claimant has not shown that the failure was because of the protected act. This claim fails.

Carol Langley's reference to the claimant as a "difficult character" in her email dated 30 June 2020

75. Although we consider that there was a clumsy attempt to influence Mr Salata, it failed as Mr Salata dismissed the disciplinary allegations which were brought against the claimant. It is therefore difficult to see the disadvantage or detriment which the claimant suffered. Had this comment been made before the decision to take the matter to disciplinary hearing had been made, we could have seen the disadvantage of having to go through such a process, but it was not. As such, this claim fails.

76. In any event, for the reasons we have given previously, we do not consider that the claimant has shown that the comment was made by Ms Langley because he had previously brought proceedings.

The decision to invite the claimant to a disciplinary hearing on 30 June 2020

77. We consider that being invited to attend a disciplinary hearing amounts to a detriment, even if it is an opportunity for an employee to have his say and explain his version of events. It is a stressful situation where an employee has been warned that disciplinary consequences could follow. The protected act relied upon is the earlier tribunal proceedings. Mr Massey did not know about these proceedings. Again, we find that the claimant has not shown us any facts from which we could conclude that there has been victimisation. As such, this claim fails.

The failure to investigate the claimant's grievance dated 1 July 2020.

78. The claimant relies upon two protected acts in respect of this detriment; the earlier proceedings and secondly the grievance of 1 July 2020. For the reasons given above we do not find that there was a failure to investigate this grievance. Although the claimant has during these proceedings raised concerns that Mr Steele was independent and there was a conflict, he participated in the process having agreed that Mr Steele could proceed. This is the only criticism he has of this grievance. In any event, from the evidence we have seen, the investigation was detailed and thorough. There was no failure to investigate and as such there was no detriment to the claimant. Further, other than Mr Steele's knowledge of both the previous proceedings and the grievance, the claimant has not shown us any facts from which we could conclude that these had any influence on the investigation or its outcome. This claim fails.

79. All claims of victimisation fail and are dismissed.

Jurisdiction

80. As none of the claims have succeeded, it is unnecessary to make any determination in relation to the time issue.

Employment Judge Benson

Date: 6 September 2022

JUDGMENT AND REASONS SENT TO THE PARTIES ON
6 SEPTEMBER 2022

FOR THE TRIBUNAL OFFICE

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