



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Ms Dorelle Cryer-Whitehead v Chief Constable of Thames Valley Police

Heard at: Bury St Edmunds (Hybrid)

On: 25 April - 3 May 2022

Before: Employment Judge Laidler
Mr A Chinn - Shaw
Mr R Allen
(all in the tribunal)

Appearances

For the Claimant: In person (attending the tribunal)

For the Respondent: Mr S Margo, Counsel (attending for cross examination of the claimant and then on CVP)

JUDGMENT

1. The complaint relating to the investigation of the way the claimant's trade union duties were recorded has been brought out of time, it is not just and equitable to extend time and those claims are dismissed.
2. In the alternative the claims would have been dismissed as the claimant was not treated less favourably on the grounds of her race.
3. The claims in relation to the claimant's move into the canteen area in September 2018 are dismissed as the claimant was not treated less favourably on the grounds of her race.

REASONS

1. The ET1 in this case was received on 20 January 2019. The issues were set out by EJ King following a Case Management hearing on 10 June 2020 and were seen at page 105-106 of the Tribunal bundle. The issues had already been identified but in more narrative form by EJ Bloom on 19 October 2019. The issues to be determined were as follows:

The issues

2. Time limits / limitation issues

- (i) Were all the claimant's complaints presented within the time limits set out in sections 123(1)(a) & (b) of the Equality Act 2010 ("EQA")? Dealing with this issue may involve consideration of subsidiary issues including whether there was an act and/or conduct extending over a period, and/or a series of similar acts or failures; whether time should be extended on a "just and equitable" basis; when the treatment complained about occurred; etc.
- (ii) In particular the respondent submits that the first incident from 15th December 2015 is out of time.

Section 13 Equality Act 2010: Direct discrimination because of race

- (iii) Has the respondent subjected the claimant to the following treatment:
 - a. Police Sergeant Nicola Corani-Young commencing a disciplinary investigation in early 2016 into the Claimant's conduct under the terms of the Respondent's Police Staff Disciplinary Policy;
 - b. Inspector Kelly Gardener submitting a complaint to Superintendent Mark Johns in respect of the Claimant's conduct;
 - c. Superintendent Mark Johns passing the complaint to Ken Cooney, Branch Secretary for the Claimant's trade union, UNISON; and
 - d. Emma Tolvanen advising the Claimant's line managers to deal with the Claimant's conduct through the Respondent's Police Staff Disciplinary Policy
- (iv) Was that treatment "less favourable treatment", i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The claimant relies on the comparator of Peter Crane.
- v If not was this because of the claimant's race and/or because of the protected characteristic of race more generally?

Section 13 Equality Act 2010: Direct discrimination because of race

- (vi) Has the respondent subjected the claimant to the following treatment:
 - a. Failing to provide her with a private office and/or requiring her to work in a shared office space during the period September 2018 to 10/11 April 2019

The claimant believes that the following parties were involved In that process Rod Wassel, Property Services Project Manager for MK Infrastructure Project, Ruth Moxon, Steve Avil and HR Business partners Tina Spackman and/or Helen Milne.

- (vii) Was that treatment "less favourable treatment", i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The claimant relies on the comparator of David Smith (provided a private office in October 2018) and Patricia Herkes (provided a private office in December 2018).
 - (viii) If so, was this because of the claimant's race and/or because of the protected characteristic of race more generally?
 - (ix) If the claimant succeeds. in whole or part, the Tribunal will be concerned with issues of remedy and in particular the following:
 - a. Should the Tribunal make a declaration,
 - b. What, if any, award of compensation should be made?
 - c. Are there any appropriate recommendations the Tribunal could make?
3. It is recorded in the case management summary that the claimant's claim was identified to be brought on the grounds of her colour being black. She describes herself in her grievance as white/black Caribbean
 4. Paragraph 6 of the summary sent out by EJ King recorded how the claimant had submitted a few days before that hearing an application to amend to include claims of victimisation and disability discrimination. Judge King explained to her that the application could not be dealt with at that hearing due to there being insufficient time and lack of notice of the application. It also lacked detail. It was recommended to the claimant to take legal advice. She was told she would need to particularise the application to make it clear what these claims were, when they arose and the factual matters relied upon if she wished to pursue the application. No such application was pursued so the issues remained as identified at the 10 June 2020 hearing. They were discussed at the outset of this hearing and all parties agreed that they remained the issues.
 5. The respondent's police officer witnesses are referred to in these reasons by the rank held by them at the time of the acts complained of even though some have been promoted or retired.
 6. The tribunal heard from the Claimant and the following on behalf of the respondent:

Inspector Kelly Gardner (now Detective Superintendent)

Ruth Moxon

Emma Tolvanen (no longer employed by the respondent)

Rod Wassell (retired)

Superintendent Mark Johns (Retired)

7. It had been agreed that the respondent's witnesses could give evidence over the Cloud Video Platform (CVP) and the claimant attend the tribunal hearing centre in person. Counsel for the respondent attended to conduct the claimant's cross examination otherwise was also on CVP.
8. The tribunal had bundles of approximately 965 pages.
9. From the evidence heard the tribunal finds the following facts

The Facts

10. The respondent is the UK's largest non-Metropolitan force covering over 2,200 square miles and three counties, serving a population of over 2.34 million people. Milton Keynes police station where the claimant was based was and is the largest of the force's operational stations. At the time of the acts complained of Emma Tolvanen was the Human Resource Adviser within the Employment Relations Team providing HR advice and support to officers and staff based at Milton Keynes and Aylesbury local policing areas. Emma Tolvanen's first line manager was Liza Nicklin followed by Heather Presland and Norma Brown was Head of Business Partnership (People), so Emma Tolvanen's third line manager. Other local policing areas had their own HR advisers.
11. The respondent employed over 7,000 people divided nearly equally between police officers and civilian staff. Officers are Crown servants and police staff are generally employees for employment law purposes. As a result, those two categories are subject to different policies and procedures. There were also different heads of HR in respect of officers and staff. In December 2015 at the date of one of the acts complained of Superintendent Mark Johns was the Head of HR for police staff. He was responsible for the line management of both full time UNISON representatives, one of whom was Ken Cooney.
12. The claimant commenced employment on 9 September 2002. She was employed as a crime/criminal researcher. In 2008 she was offered the role of neighbourhood policing co-ordinator later referred to as Administrator. The claimant has a disability of chronic psoriatic arthritis predominantly in her feet, spine and hands and to avoid pain in her hands by excessive typing has had the benefit of voice activated software.

13. In or around 2014 the claimant became a UNISON steward and was asked to take responsibility for disabled members' interests, serving on the disability working group. She had basic accreditation training in January 2014 focusing on how to represent members. She became a member of two UNISON regional groups for disabled members and black members.
14. Under the respondent's Facilities Agreement with UNISON branch representatives and stewards were provided with an allowance of 12 paid days per year called 'facilities time' during which they were permitted to carry out UNISON activities in normal duty time. The part-time branch stewards had to maintain a record of their facilities time on the respondent's PeTal system, obtain prior approval of their line managers before undertaking any trade union activities and account for the facilities time on the respondent's Duty Management System, referred to as DMS, and not exceed the maximum allowance of days.

The trade union event - 1 December 2015.

15. Inspector Kelly Gardner was the claimant's second line manager and PS Nicola Corani-Young was her immediate line manager. Kelly Gardner saw a bus parked at the back gates of the police station and noticed the claimant and several others boarding it. She was interested to know why the bus was parked there and where it was going. PS Corani-Young checked the time recording system which showed the claimant as working that day and she did not know that the claimant was not coming in. Inspector Gardner contacted Professional Standards for advice. The Tribunal accepts her evidence that they advise on a range of matters and that she wanted advice on how to proceed. It is accepted that she had not thought at this stage that any misconduct had taken place. The Tribunal saw her handwritten note of 4 December 2015 that her concerns were about the event as a whole and whether it was authorised. She was seeking advice and at this stage the decision was that fact finding needed to take place.
16. Ken Cooney, the UNISON branch secretary, came under Superintendent Johns' line management. Having been advised about the trip by Inspector Gardner Superintendent Johns felt he had to discuss what had occurred with Ken Cooney. He called him on 3 December and they later met.
17. On 4 December 2015 Mr Cooney sent a draft to Superintendent Johns of the letter he proposed to send to his union members later that day confirming what they had agreed at their meeting as to how to deal with the way in which the stewards' time was recorded that day. This was to be that all who had attended should retrospectively book the day as annual leave and to do so in future when no formal UNISON business was being dealt with. Superintendent Johns was very clear and the Tribunal accepts that was the end of the matter so far as he and Ken Cooney were concerned about the way the stewards generally had recorded their time for that day.
18. Inspector Gardner felt however that there was potential of a persistent failing on the claimant's part to seek permission to undertake UNISON work

and time record appropriately. In cross-examination she stated that Nicky Corani-Young by looking into the DMS system saw there may have been some other irregularities with regard to UNISON activities being recorded by the claimant which made them question whether things were in order and it did highlight to them that they probably needed to be more aware of what UNISON allowed stewards to do.

19. On 7 December 2015 Ken Cooney advised that the claimant had resigned from her trade union role and he understood that Inspector Gardner may have identified other discrepancies. The office was getting data from the region to see what regional commitments the claimant may have had. As the agreement regarding the recording of annual leave only related to 1 December he was content that any other discrepancies should be dealt with by Inspector Gardner as she saw fit. Heather Presland confirmed to Inspector Gardner on 11 December 2015 that if the claimant had taken more time than she should for UNISON duties that was a local issue to investigate.
20. On or about 5 January 2016 Inspector Gardner asked PS Seagrove to start making fact finding enquiries. A fact-finding report was seen in the bundle at page 307 and she identified various areas of concern:
 - 20.1 The use of duty time to attend UNISON events as regional delegate, specifying in particular 6-9 February 2015; 7-10 October 2015 and 4 December 2015;
 - 20.2 The failure to seek authorisation from line managers;
 - 20.3 The failure to keep records in line with policy; and
 - 20.4 A breach of the Code of Ethics.
21. This was submitted to Heather Presland for a "severity assessment" and she assessed it as misconduct. This was also subject to a peer review.
22. On 2 February 2016 the claimant was served with notice of an investigation with the allegations set out as in the fact-finding report. The claimant was advised that PS Seagrove would investigate and then the matter would be referred back to Ms Presland to take the decision on the next steps.
23. The claimant had some health issues and was off work for approximately six months returning on 12 July 2016. She was interviewed on 27 July 2016 and accompanied by Caroline Raine, UNISON area organiser. PS Seagrove's report was dated 12 August 2016. She found at the core of the matter was 'universal understanding of the UNISON, Staff Association and Support Networks Policy and its application'. Her findings demonstrated a lack of understanding of the relevant policies generally. The claimant had thought that her attendance at UNISON events as a Regional Representative came under her allocated 12 days for UNISON work. No checks seemed to have been done to ensure she was attending in her own

time. The Policy provided no clear definition for when or for what the 12 days can be used. The requirement to seek authorisation to attend events appeared to be a 'grey area' and at no time had the claimant been told she could not attend. The claimant had not submitted worksheets to the UNISON branch secretary but this seemed to be widely known about and no action had been taken. In conclusion much of the claimant's actions were found to have been motivated not by dishonesty but lack of understanding of the policy.

24. In an outcome letter of 3 August 2016, the decision was to take the matter no further but to give the claimant management advice. The meeting at which that was given took place on 22 September 2016 and it was set out in writing on 3 October 2016.
25. On 27 October 2016 the claimant submitted a grievance stating she believed she had been subjected to direct race discrimination by the investigation "which has resulted in disciplinary sanctions being taken against me". She compared herself to Peter Crane who is her comparator in these proceedings. She alleged that he faced no investigation or disciplinary action for the same circumstances which led to her being investigated. The resolution the claimant sought was set out as settling the matter amicably outside of the Tribunal, an apology, the disciplinary sanction to be removed and a settlement of £15,000.
26. Superintendent Yvonne Hitch was assigned to investigate and she met the claimant with Caroline Lake, Regional Organiser of UNISON on 22 February 2017. Her outcome was dated 27 September 2017 and her findings included but were not limited to the following:
 - 26.1 She did find the claimant to have been treated differently to others on the bus but not due to race but "because her second line manager on finding that there was a policy believed the claimant may not have been following it",
 - 26.2 that not sufficient thought was given to the fact that the claimant was the only person to be investigated and how this could be perceived based on the fact the claimant is BME member of staff.
 - 26.3 The claimant had a personal responsibility to understand the policy, that the local branch of UNISON appeared to have a laissez-faire approach to record keeping.
 - 26.4 The basis for the investigation was flawed as this should have been managed by the claimant's line manager sitting down and discussing the matter with her.
 - 26.5 The investigation was flawed, in particular in that PS Seagrove had a very tight focus on policy rather than the individual.
 - 26.6 She could not, however, find any evidence of direct discrimination on the basis of race.

27. There were 13 recommendations at the end of the report including an apology from the Head of People Directorate recognising the distress caused to the claimant and the removal of management advice from the claimant's record. The claimant did not appeal the grievance outcome. Throughout 2017 to 2018 there were discussions about the outcome the claimant was seeking and who would give the apology. In emails around about 15 May 2018 (page 560) there was correspondence passing between the respondent and the claimant's Trade Union representative setting out how the recommendations could be implemented.
28. On 26 October 2018 Norma Brown, following a meeting with the claimant and Caroline Lake, stated in her email various points that had arisen at their meeting and that she still had "some work to do and will come back to you shortly".
29. The claimant invoked ACAS Early Conciliation on 9 November 2018 with the Certificate being issued on 23 December 2018.
30. As already stated the claimant compares her treatment with that of Peter Crane. The Tribunal is satisfied that Inspector Gardner had no knowledge of Peter Crane when she first spoke to Superintendent Johns either regarding his actions or his existence on the bus. Emma Tolvanen did not know of his existence until these proceedings and did not know of his ethnicity. Superintendent Johns likewise had no knowledge of the ethnicity of the claimant.

The move to the canteen and the failure to provide the claimant with a private office.

31. The Tribunal saw correspondence from Ruth Moxon on 2 February 2017 sent to Nicola Corani-Young about the project to rewire Milton Keynes station due to commence May or June. It was to the whole station block, being carried out block by block and she set out how she believed the works might impact on the claimant. It would involve two moves, one to vacate her current office and decamp with others to the canteen and the second to move back into a refurbished office. The move into the canteen would include several other teams in an open plan office. She would like to assess the claimant's current office to understand her storage requirements and the second move would involve the claimant relocating permanently to a different office space. In reply Nicola Corani-Young flagged up the reasonable adjustments that were in place for the claimant which included Dragon voice activated software which the claimant required a quite environment to be able to use and also a particular chair and desk.
32. On 7 February Ruth Moxon met with the claimant to discuss her role and what she needed. This is dealt with at paragraph 18 of her witness statement. She was shown the voice activated software and saw the claimant's curved desk and dedicated chair and the size of these. The claimant was to take her existing furniture to the canteen and Ruth Moxon discussed how they could look to dividing the canteen space into softly badged quite and noisy 'zones' with the claimant in a quiet zone, acoustic

screen dividers around the claimant to create a booth, locating the claimant at the furthest desk away from noise, locating the claimant where there was less footfall and having a policy of keeping noise to a minimum. It was then identified that the file upgrade room admin office might be available after completion of the rewiring. The claimant was shown this room and was happy with it.

33. There was talk about whether another occupational health referral was needed but Nicola Corani-Young did not believe that this was necessary as reasonable adjustments had already been made for the claimant and it was known what equipment was needed. She suggested however a further DSE assessment.
34. Rod Wassell had first contact with the claimant on or about 16 February 2017 at which time he introduced himself and explained the process. Dawn Seaward was identified as someone who would do the DSE assessment. In an email of 28 February 2017 to Ruth Moxon, Rod Wassell and Nicola Corani – Young Ms Seaward confirmed she had reviewed the DSE self – assessment package completed by the claimant following their recent correspondence. She confirmed the use of the voice activated software which being quite sensitive can be affected by noises around her. Sometimes that makes the system crash. It would therefore be better for the claimant to be in a single occupancy office. She also confirmed the information about the claimant's chair set up to support her neck.
35. Ruth Moxon was off on planned medical leave from 16 July to 13 September and Rod Wassell, the project manager, was dealing with the project in her absence with the assistance of others. The move to the shared office took place on 10 September 2018.
36. There was ongoing correspondence between Ruth Moxon on her return and the claimant with Ruth Moxon trying to reassure herself that the claimant was managing. On 28 September 2018 the claimant advised that she was unable to use the voice activated software until the last hour of the working day due to noise. Ruth Moxon replied the same day asking if she thought sound boards would help but the claimant did not believe that sound boards would. She was carefully managing her time and leaving longer documents to work on later in the day when it was quieter and felt that she had a 'manageable situation' but that if it changed then she would hope they could revisit other potential solutions. The claimant never raised further issues with Ruth Moxon.
37. David Smith was to be a new employee who is blind or partially sighted and has the assistance of a guide dog. He was to be in the office two days a week. Nita Pankhania advised on 7 September that she had just recruited him and that he would be working in Milton Keynes. The correspondence was passed to Steve Avil one of the respondent's Force Move Co-ordinators and Rod Wassell. Although they had been briefed by Ruth Moxon before her planned absence, she could not have advised them about Mr Smith as his recruitment would not have been known to her. When she returned, however, she was enquiring of Natalie Hall whether a certain office used by

the Field Intel Unit was available and Steve Avil on 6 November notified there was an office on 2nd floor of B block which could accommodate Mr Smith on a temporary basis. It is accepted that the room found was to be shared by Mr Smith with Nita Pankania and other members of their immediate team on different days of the week as work determined. The Tribunal accepts the evidence of Ruth Moxon that there is no evidence that anyone in property services knew Mr Smith's ethnicity.

38. With regard to Patricia Herkes, there was an email from Tina Owen of occupational health to Rod Wassell of 3 October 2018 which explained that the claimant had mobility issues, struggled to use the stairs and would need to be accommodated on the ground floor. Rod Wassell took the decision to allocate her into a small study room in B block. It was not private but was to be used by members of the local policing area who had access to it at all times. This was confirmed in an email from Ruth Moxon on 18 December 2018.
39. The claimant lodged a grievance on this issue on 16 November 2018. The resolution she sought was to understand why David Smith's disability was prioritised over hers. Her grievance made no reference to the issue of race.

Relevant Law

40. Equality Act 2010

23 Comparison by reference to circumstances

(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

123 Time limits

(1) Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of—

- (a) the period of 3 months starting with the date of the act to which the complaint relates, or
- (b) such other period as the employment tribunal thinks just and equitable.

...

(3) For the purposes of this section—

- (a) conduct extending over a period is to be treated as done at the end of the period;
- (b) failure to do something is to be treated as occurring when the person in question decided on it.

The Tribunal's conclusions

Time limits

41. The ET1 was received on 20 January 2019. The first issues arise from the bus trip on 1 December 2015. The last act of alleged discriminatory treatment in the Tribunal's list of issues was PS Nicola Corani-Young commencing a disciplinary investigation which was 2 February 2016. The claim therefore should have been instigated by 1 May 2016 but was not issued until 20 January 2019 with the claimant not invoking ACAS Early Conciliation until 9 November 2018 and the certificate issued on 23 December 2018. Although it was not one of the Tribunal's issues and it must confine its deliberations to the issues before it, if it was suggested that the last act was the giving of management advice that was 3 October 2016 when it was given in writing. The claimant did not give evidence in her witness statement as to why it had not been possible to put in the claim in time and why it would be just and equitable to extend time. She does mention various family health issues but not that they prevented her putting the claim in.
42. In answer to questions in cross examination she firstly stated she did not know of the existence of employment tribunals but then accepted that she was aware that they existed and had a general awareness that you could bring discrimination complaints to the employment tribunal. She did not know about time limits. She had relied upon UNISON to advise her and had been told she had to go through the employer's process before taking any action to bring the complaint to the employment tribunal. She had not researched the matter herself or looked on any websites as her position was that if you are a UNISON representative but then take representing upon yourself or ask someone else to act for you, the union will no longer represent you. The tribunal did not find the claimant's evidence credible in this respect as she did concede she was aware of the ability to take discrimination complaints to the employment tribunal yet made no enquiries of her own about how to do so and the time limits. She had UNISON representation throughout and particularly Caroline Lake, a Regional Organiser.
43. After her grievance was upheld, in part, considerable time was spent in discussion as to how to carry out the recommendations put forward by Superintendent Hitch but time was however running from the last of the acts complained of.
44. The office move was a separate matter with different individuals involved and although in time cannot possibly form part of a continuing course of conduct. The claimant has put forward no valid reason why it would be just and equitable to extend time.
45. The events that followed 1 December 2015 are significantly out of time and it is not just and equitable to extend time.

46. In the alternative, if those matters were in time, the claimant has not established facts from which the tribunal could conclude that she was treated less favourably on the grounds of her race. She was investigated because her line manager looked at the DMS and was concerned not only with the lack of recording on 1 December 2015 but that of other union activities carried out by the claimant. That is what led to the investigation. The line manager did not know of the existence or have line management responsibility over Mr Crane which is why she did not investigate him.
47. Inspector Gardner did not submit a complaint to Superintendent Mark Johns, she raised concerns about the trip being taken by UNISON officials. There was in fact a genuine concern as the union representatives had recorded their time differently. This led to Ken Cooney's email of 4 December 2015 confirming it should be recorded retrospectively as annual leave. Superintendent Johns did not pass a complaint about the claimant to Ken Cooney, he raised general concerns with him about the trip and how the absences had been recorded. They reached an agreement that it would all be recorded as annual leave. The tribunal accepts, and it was quite clear from the Superintendent's evidence, that his concerns were all about 1 December 2015 and the people on the bus.
48. Emma Tolvanen did not advise the line managers to deal with the matter under the Disciplinary Policy. Inspector Gardner asked PS Seagrove to complete a fact finding. Heather Presland conducted a Severity Assessment and assessed it as misconduct. The disciplinary investigation went beyond the 1 December 2015 trip to look at other irregularities. The tribunal has already found that Mr Crane is not a proper comparator as those looking into the claimant did not know of his existence and it is not known if there were any discrepancies in his time recording. To be a true comparator section 23 of the Equality Act 2010 requires that: "There must be no material difference between the circumstances", and that would require someone to have been on the bus and when their line manager looked into how they had recorded that event they found other discrepancies. There is no evidence that that was the case here.
49. In relation to the office move, this was brought as a case of race discrimination relying on the comparators of Mr Smith and Miss Herkes. However, the way the claimant's evidence was given and the questions put to the respondent's witnesses, it seemed that the claimant's case was rather that their disabilities were treated more favourably than hers. This was not however a claim of disability discrimination, there being no such complaint before this tribunal.
50. Property Services had worked to ensure that the claimant had her reasonable adjustments when it was necessary for the move to the canteen. Ruth Moxon had kept in touch with the claimant and understood the claimant to be managing. They had heard nothing further from her since the email of 28 September 2018 when she said that was in fact the case. They were faced with David Smith about to join and Patricia Herkes needing a ground floor office, both employees that they needed to accommodate. More enquiries were needed to be made of their needs as these were not

known to the individuals concerned. The claimant's needs were. There was no need to refer the claimant again to Occupational Health as the respondent knew the adjustment she required and they had been provided to her and continued to be, in the canteen. That Patricia Herkes and Mr Smith were treated as they were was because of the immediate need to accommodate them in an office not because of their race. The key decision makers were not even aware of their race but were only aware of the adjustments that they required.

51. It follows from these conclusions that the claims of race discrimination fail and are dismissed.

Employment Judge Laidler

Date: 19 August 2022

Sent to the parties on: 10 September 2022

N Gotecha

For the Tribunal Office