



EMPLOYMENT TRIBUNALS

Claimant: Miss T Manyinyire

Respondent: Birchester Care Limited

Heard at: Watford

On: 10, 11 & 12 August 2022

Before: Employment Judge Maxwell
Ms K Turquoise
Mr T Maclean

Appearances

For the claimant: in person

For the respondent: Ms Taleb, Counsel

REASONS

1. Further to judgement and reasons given orally on 12 August 2022, followed by judgement in writing sent to the parties on 30 August 2022, these written reasons are provided pursuant to the Respondent's request.

Preliminary

Claim

2. The Claimant presented her claim form on 17 May 2020. The claims pursued were not entirely clear and this was discussed at a preliminary hearing for case management before EJ Michell on 22 April 2021. The Respondent conceded her claim comprised complaints of direct race discrimination and an order was made for further particulars to be provided by the Claimant in writing, which she did.
3. The Claimant had originally sought to bring a claim against Andrew Barker, the Respondent's Operations and Compliance Manager, in his personal capacity. She did not, however, engage in ACAS conciliation with respect to Mr Barker. At the hearing before EJ Michell, the Claimant withdrew her claim against Mr Barker. The claim against him not then having been dismissed, we do that now.

Issues

4. The parties agreed a list of issues, which reflects the Claimant's particularised claim and includes the following detriments, which are said to be less favourable treatment because of her race:
 - 4.1 Mr Barker, on 24 February 2021, asking why audits had not been completed and asked, "what exactly do you do in this home?";
 - 4.2 Mr Barker, on 25 February 2021, demanding the Claimant input data into a system in a pressured environment, stating "[if] something goes wrong I will hold you solely responsible";
 - 4.3 Mr Barker, on 25 February 2021, requesting the Claimant remain at work after a 10-hour shift;
 - 4.4 Mr Barker, on 26 February 2021, querying why a task was not finished and asking, "is there anything that you actually know or do in this home?";
 - 4.5 Mr Barker, mid-morning on 28 February, shouting at the Claimant and stating, "You don't know what you are doing; Is there anything that you know; you know nothing; why were those mattresses on static; you are completely clueless?";
 - 4.6 Mr Barker, on the afternoon of 28 February, dismissing the Claimant and stating, "You and me know you are useless at this job, now get out of here go get your bag and don't ever get back here again; you are useless at this job."; and
 - 4.7 Mr Barker, following the dismissal, marching the Claimant from the office, and watching as she left the building.

Timetable

5. A timetable was agreed at the beginning of the hearing:
 - 5.1 Day 1 - Tribunal reading until 12pm, Claimant's evidence from 12 pm until 4 pm;
 - 5.2 Day 2 - Respondent's witness evidence from 10 am until 1 pm, closing submissions from 2 pm;
 - 5.3 Day 3 - Tribunal deliberation, judgement and reasons, followed by remedy if appropriate.

Documents & Evidence

6. We were provided with:
 - 6.1 an agreed bundle of documents running to page 189;
 - 6.2 an agreed cast list;
 - 6.3 an agreed chronology;

6.4 witness statements from:

for the Claimant

6.4.1 the Claimant;

6.4.2 Akim Bande, Nurse Manager at St Andrew's Healthcare;

6.4.3 Jenny Poole, Head of Healthcare at HMP Stocken;

6.4.4 Costa Mundandi, Advanced Nurse Practitioner;

for the Respondent

6.4.5 Andrew Barker, Operations and Compliance Manager;

6.4.6 Rebecca Cunningham, Administrator;

6.4.7 Susan Hinde, Administrator.

7. the Claimant's witnesses did not attend to give evidence. Their statements did not include a declaration of truth and only that from Mr Mundandi had a handwritten signature. They were, in any event, in the nature of character witnesses and could not speak to the matters about which the parties are in dispute.

Facts

8. In this case there was a significant factual dispute between the Claimant and Mr Barker about what he said to her on 24, 25, 26 and 28 February 2020. On the whole, we found the Claimant to be a more credible witness than Mr Barker. The Claimant impressed us as being a calm, measured and methodical witness. She gave, for the most part, direct answers to questions, albeit these were on occasions somewhat verbose. Furthermore, her account of events tended to make a great deal of sense, not only in terms of explaining her own behaviour but also that of Mr Barker. Whilst she may not have intended to do this, it appeared to us that in many instances her detailed account of her own words and actions provided the foundation for, at times, an exasperated response from Mr Barker. The version of events put forward by Mr Barker on the other hand, frequently lacked credibility. His description of a sequence of events leading to the point when the Claimant happily agreed to leave the Respondent to become a missionary, stretched credulity. He also put forward unrealistic and unnecessary denials. He disputed having asked the Claimant what she did in the home, or finding her frustrating to deal with, when it seems to us that was overwhelmingly likely. Probed on his own account of the last material conversation he advanced an unrealistic meaning for "cut our losses" as being go our separate ways and did not adequately explain why he had brought the notice period forward or acted with such haste (agreeing termination in 2 minutes).

Background

9. The Claimant is a nurse, originally from Zimbabwe. For the purposes of her race discrimination claim she describes herself as black. She is highly experienced, with a number of specialities and also a career history in management. The Claimant started her employment with the Respondent on 1 December 2018.
10. The Respondent operates two care homes, providing residential care for older people, including those with dementia. The Claimant was employed at the Respondent's Shire Lodge care home as Deputy Manager. She reported to the Home Manager, Sharon Goodall.
11. The Claimant was not provided with a job description, although this does not appear to have been a concern for her contemporaneously. At this hearing she agreed her role included the following duties and we find that was so:
 - 11.1 Ensuring the correct, ordering, receiving, booking in, storing and administration of all medication including (if applicable) injections and monitoring the results of any treatment;
 - 11.2 Involvement in the overall clinical governance for the home and wider management audits on a weekly and monthly basis;
 - 11.3 Ensuring all recording systems and organisational documentation are of high standard and kept up to date;
 - 11.4 Preparing and maintaining resident records including the production of care plans and risk assessments for individual residents; and
 - 11.5 Line management responsibilities and clinical oversight for the rest of the nursing team.
12. As far as care plans were concerned, these were generally completed by Ms Goodall. Given one of the Claimant's specialities was mental health, she was instructed to carry out the mental capacity assessments. In the grievance, which the Claimant attached to her claim form, she set out a history which included the absence of an induction at the beginning of her employment, together with a lack of training in her management role or clinical appraisals. This was not, however, a concern for her contemporaneously. Rather, it was a reaction to her perception of unfair criticism and discrimination in the circumstances surrounding the termination of her employment. The Claimant's employment appears to have proceeded in a, reasonably, satisfactory way on both sides until the events about which she complains in these proceedings. We were not referred to any earlier written complaint or grievance the Claimant had raised with the Respondent. Whilst she was employed as a manager, given a shortage of nurses being available, very often (circa 75% of the time) she was working on the floor as a nurse providing care, rather than carrying out management duties.

December 2019

13. In December 2019, the Claimant took a period of leave. During this time, she attended her son's wedding. She also travelled to Zimbabwe following the death of her father.

January 2020

14. In January 2020 and whilst the Claimant was still on leave, the Respondent's Shire Lodge care home was subject to a regulatory inspection by the Care Quality Commission ("CQC"). In connection with this, various text messages were sent to the Claimant while she was away, asking her where particular documents were. In 4 out of 5 key areas the rating given to the Respondent was "requires improvement". This then triggered the prospect of a further inspection that would be carried out by the Clinical Commissioning Group ("CCG"), which amongst other things controlled the flow of public funds.
15. The Claimant came back to work in late January 2020. In her evidence at the Tribunal the Claimant said she did not return until late February 2020. We note, however, in her grievance written far closer in time to these events, she refers to working the last three days in January. We think that document a better guide.

February 2020

16. Mr Barker commenced his employment with the Respondent on 17 February 2020. He was employed as Operations and Compliance Manager. His role included leading with key stakeholders, not least the CQC. He had been tasked with assisting the Respondent's preparation for the upcoming further inspection by CCG and taking steps necessary to ensure future compliance with the required standard
17. Somewhat surprisingly, in his witness statement, Mr Barker says of January inspection to which he was the not a party:

As a result of this rating, substantial further work was required from Ms Manyinyire, as Deputy Manager

It is difficult to understand why the Claimant should be singled out in this way. In the course of giving evidence at the Tribunal, Mr Barker conceded that others, including the home manager Ms Goodall also had a responsibility and would be required to take steps in this regard.

18. Mr Barker attended at Shire Lodge for the first time on about 20 February 2020. He spoke with Ms Goodall and was briefly introduced to the Claimant. On this day, according to Mr Barker, Ms Goodall raised concerns about the Claimant's performance. No such concern had ever been raised with the Claimant, nor was it documented. We did not consider his uncorroborated evidence on this point sufficient to make a finding on the balance of probabilities.
19. The Claimant relies upon Ms Goodall as a comparator. She says that Mr Barker treated Ms Goodall with dignity and respect throughout all of their dealings. It is clear, however, the Claimant had a very limited opportunity to witness any interaction between these two. The only time Mr Barker and Ms Goodall were in attendance together was on this one occasion on about 20 February 2020. During this time Ms Goodall was showing Mr Barker around the home. The Claimant was not privy to their conversation. Indeed, aside from a brief hello, the Claimant had no interaction with Mr Barker before the contested events, the subject matter of this claim.

24 February 2020

20. Mr Barker attended Shire Lodge again on 24 February 2020. At this point Ms Goodall had begun a period of sick leave. In her absence, Mr Barker looked to the Claimant.
21. Mr Barker's working assumption was that the Claimant's duties largely mirrored those of Ms Goodall and in the absence of the Home Manager, the Deputy Manager would step in. The Claimant's approach to her job was a different one. She had discrete duties, for example carrying out mental health assessments. Although she knew how to prepare general care plans (i.e. the necessary content) she did not do this at Shire Lodge, instead it was done by Ms Goodall and senior carers. The Claimant was not familiar with how to enter data onto the Respondent's IT systems, again this was something done by Ms Goodall and others. The Claimant was often put on the rota to carry out care duties, rather than management. Furthermore, the Claimant's prior experience was working in large public sector organisations, with more formalised procedures and defined job roles. She did not consider herself to be acting up as Home Manager in the absence of Ms Goodall. In order for that position to be arrived at, the Claimant told us she would expect the Respondent to seek expressions of interest, to carry out interviews, to make an appointment and for a pay increment to be made. This difference in perception about the scope of the Claimant's role was an immediate source of friction. Mr Barker went to the Claimant with the same enquiries he would have taken up with Ms Goodall, had she been present. The Claimant could not answer these questions but thought that was a satisfactory position, given she was not herself the Home Manager. Mr Barker on the other hand, was disappointed each time the Claimant could not help him.
22. Coming back to the 24th, both the Claimant and Mr Barker in their witness statements, focus upon whether the comment she alleges was made. It is overwhelmingly likely and our finding is that they had spoken a number of times during that day about various matters relating to the upcoming inspection. Because the role the Claimant carried out was in practice narrower and more limited than that which Mr Barker anticipated, she was unable to provide many helpful responses. As the day went on, Mr Barker was increasingly irked by the responses he received.
23. A point came when Mr Barker asked the Claimant about the completion of the care plan audits. The Claimant's response included that Ms Goodall had dealt with these. Mr Barker then asked the Claimant specifically about the audit which should have taken place in December. The Claimant replied that she had been on leave in December. Mr Barker then responded "What about the January audits? Why did you not complete them? What exactly do you do?" The obvious reason for Mr Barker to say these things is that he thought the Claimant should have carried out the audits and that she was seeking to pass this responsibility off to Ms Goodall. The Claimant then went on to tell Mr Barker that she had been in Zimbabwe burying her father. Mr Barker did not respond to this information. He did not, as he suggested during this hearing, tell the Claimant about losing his own father. Mr Barker was focused on the task in hand. This was not the first time he had been sent into a care home where the CQC had made findings of the sort it did here, indeed he had experience of worse ratings. He was

concerned to prepare for the inspection and deal with any improvements required. He was thinking about the business and not the Claimant's feelings.

24. The Claimant went on to say to Mr Barker that she had been working as a nurse rather than a manager. She added "It's not difficult to verify this information; why don't you just check the rota" and "if my manager knows there are important audits to be completed and she puts me on the rota to look after residents as the second nurse what do you expect me to do? Can I refuse?". Whilst we accept the Claimant's tone was moderate, nonetheless she was robust in disagreeing with Mr Barker. We find it likely he took this as her trying to minimise her responsibility.
25. The Claimant took great offence at Mr Barker's questions about the December and January audits. She felt she was being blamed unfairly for matters over which she had no control. She believed Mr Barker was trying to make her feel as though she was useless. This behaviour coupled with Mr Barker disregarding what she said about her father, led her to believe that he disliked her. She now believes this is because of her race. Our conclusion, however, is that Mr Barker responded in the way that he did because he thought the Claimant was at fault in connection with the audits, and was trying to avoid any responsibility for this. We pause to make it clear that we do not find she was at fault, we have simply made a finding about what was in the mind of Mr Barker at this point.
26. In her evidence, the Claimant said that unlike others, she embraced criticism and saw this as an opportunity to improve. In our view, this was not entirely realistic. The Claimant later told us that the one thing she could not abide was injustice. It seems to us, the Claimant would only accept and embrace criticism she agreed with.

25 February 2020

27. On 25 February 2020, the Claimant spent some time in the morning completing audits. During this time, Mr Barker phoned her and asked if she had entered data for new residents onto the Respondent's IT system. The Claimant said she understood that another employee, Paige, was going to do that. Mr Barker responded "who said Paige was going to put the information? If CQC comes here and something goes wrong, I am going to hold you solely responsible" and "You have to input the data yourself, you are the one who have agreed for these residents to come". The Claimant then told Mr Barker she had not done this data entry task before. Mr Barker was surprised and disappointed to be told by the Claimant, who was Deputy Manager, that she did not know how to use the Respondent's IT systems. He believed she was responsible to enter information onto the system about residents she had admitted into the home. The Claimant's view was that such matters were the responsibility of others. This reflects a difference between what Mr Barker, not unreasonably, might expect of a Deputy Manager and the role the Claimant had actually been carrying out.
28. At this hearing the Claimant said she had no training with respect to the Respondent's IT systems. When she was cross-examined, however, she conceded attending a training session where this was taught. She then said that the 6 or 7 other people in attendance were her juniors and the inference she drew was that the training was not intended for her. This was a somewhat

curious and self-serving approach. If the Claimant was asked to attend a training session, then it would be reasonable to expect her to pay attention and engage with this. We do not see why her seniority makes any difference. If she were not required to do the training, then there would be no reason for her to attend. The Claimant said that in other workplaces data entry has been undertaken by dedicated staff. This may be the case in a large NHS hospital but in a small private care home setting, we can see that staff may need to be more flexible. In her evidence, the Claimant repeatedly compared, unfavourably, the way the Respondent dealt with matters and the way such things had been handled by her former employers.

29. After having been told by the Claimant that she did not know how to use the IT system, Mr Barker asked her to log on and he talked her through it. Later that afternoon, the Claimant told Mr Barker she was feeling tired and would carry on with this task the following day. She says from his reaction it was apparent he was unhappy with this but, grudgingly, allowed her to go. She complains of being required to work after already having completed a 10 hour shift. In cross-examination the Claimant conceded her shift had only been eight and a half hours and that Mr Barker may have been unaware of how long she was working. Our conclusion is that Mr Barker did express some disappointment when the Claimant indicated that she wished to stop. This was because the task needed to be completed, he felt it was something the Claimant should have done previously and he was very surprised at having to teach her how to use the system. It was understood she would start again on this task the following morning.

26 February 2020

30. The Claimant went back in on 26 February 2020 but found she was unable to access the IT system. She asked one colleague for help and when that person could not assist, the Claimant then started working on the audits instead. Thereafter, she left to undertake other duties. When the Claimant returned to Shire Lodge, Mr Barker was there. He said "You said to me you would be here at 7am to complete this document and you have done nothing all day". He said this because their common understanding had been the Claimant would return to this task and yet she had not.
31. Mr Barker was asking the Claimant questions, which she could not answer. At one point he said "is there anything that you do know". From Mr Barker's perspective, she was asked to come in to complete a specific task and instead of that had done something else. The Claimant began to feel unwell.
32. Ms Cunningham was requested by Mr Barker to sit in on one of the meetings he had with the Claimant that day. Unfortunately, her recollection of this is very vague. Ms Cunningham could say little more than that she did not recall Mr Barker saying anything untoward. We did not find her evidence helpful.
33. The Claimant had been in touch with her GP and arranged an appointment. She showed a text message about this appointment to Mr Barker and was allowed to leave work early to attend this. Mr Barker asked if she would be back at work the following day. He reminded her that an inspection was taking place on the 28th

and he really needed her to come in because the Home Manager was off sick. The Claimant told him that she was not on the rota to work that day.

34. Mr Barker was, repeatedly, surprised or disappointed by what the Claimant was saying to him. He was attempting, urgently, to prepare for the inspection that was due to take place. In the absence of Ms Goodall, he needed to rely upon the Claimant. This created a difficult situation. The Claimant believed that unreasonable criticisms and demands were being made of her. Mr Barker believed the Claimant seemed not to understand or accept responsibility for basic components of her job. Once again, for the avoidance of doubt, we do not make any finding that Mr Barker was right in his beliefs about the Claimant. We are, simply, making a finding about what was in his mind at the time.

28 February 2020

35. On the morning of 28 February 2020, the Claimant sent an email to one of the Respondent's administrators, Susan Hinde, asking what her notice period was. Unsurprisingly, Ms Hinde, construed this as an indication the Claimant may be about to resign. Again we pause to note, we accept the Claimant's evidence that she had no immediate intention to leave her employment, rather she was going to look for new employment first. That does not mean, however, that others might not, reasonably, construe her intentions differently. Ms Hinde immediately contacted Mr Whitehead, who was a director of the Respondent. Mr Barker reported to Mr Whitehead. It would seem surprising if in these circumstances (i.e. the day a CCG inspection was taking place, when the Home Manager was on sick leave and the Deputy Manager indicated an intention to resign) Mr Whitehead did not appraise Mr Barker of the situation. Unfortunately the evidence about this communication only came out during a point in the hearing after which Mr Barker had given his evidence and left. We could not, therefore, ask him about this. On the balance of probabilities, we think it likely Mr Whitehead told Mr Barker of the Claimant's enquiry about her notice period.
36. We find, Mr Barker had rather mixed feelings about the Claimant by this point. On the one hand, especially the absence of Ms Goodall, he needed a manager to assist with the CCG inspection. On the other hand, he very much doubted the extent to which the Claimant would be helpful and part of the solution to any problems found.
37. The Claimant spent much of that day with the CCG inspector, as the latter worked her way around the home carrying out observations. This included requests being made by the inspector to see relevant documentation. Unfortunately, the Claimant was unable to find much of what the inspector wanted. Whilst it was not unreasonable for the inspector to expect the Deputy Manager to know where this information was and how to obtain it, in fact she did not. This is not a criticism of the Claimant, rather it is a reflection of the limited way in practice she carried out the Deputy Manager role, with which the Home Manager had at the time been satisfied. During the course of the inspection, separately from documentation, the inspector found a number of matters that were unsatisfactory. This included problems with the pressure mattresses, peg feed, catheter, record keeping, nutrition and hydration and tissue viability. Many of these are nursing matters, which the Claimant should readily have understood.

38. It became increasingly clear to Mr Barker that the inspection was not going well. He spoke to the Claimant in the reception area and asked her how she thought it was going. The Claimant said there had been a difficulty with static mattresses but she thought everything else was going well. In her evidence at the Tribunal, the Claimant did not say this reflected her actual view. Rather she described her approach to inspections, which she said included remaining positive and she did not wish to cause alarm.
39. From Mr Barker's perspective, the Claimant seemed to be adopting a wholly unrealistic position. We think this was a pivotal moment. Mr Barker's concerns about the Claimant had grown over the course of the few days they had been working together. At this stage, when it was quite clear the home had many problems and was about to receive an adverse inspection outcome, recording serious concerns, the Claimant seemed oblivious to the situation. From his perspective, the Claimant was minimising her own responsibilities or faults, ignoring clear problems and he had little confidence she could help the business going forward.
40. Mr Barker erupted. He said "you don't know what you are doing do you?", "you are completely clueless", "is there anything that you know?", "You say you think its going well and yet this inspector is giving the home another warning, what type of deputy manager are you?" and "You don't know anything?" Mr Barker's flow was stemmed when the inspector returned.
41. The Claimant, Mr Barker and the inspector went into an office, where there was further discussion and a search for relevant documentation. During this, the Claimant spent much of the time staring, blankly, at a computer screen. She was unable to find what the inspector wanted. This was partly because of her unfamiliarity with the IT system and partly because she was turning over in her mind the recent outburst by Mr Barker.
42. The meeting became increasingly uncomfortable. A point was arrived at when Mr Barker asked the inspector to step outside for a moment so he might speak with the Claimant. Mr Barker then proceeded to say to the Claimant "You and me now know that you are useless at this job, now get out of here, go get your bag, and don't ever get back here again, you are useless at this job".
43. Mr Barker followed the Claimant out of the building. The Claimant felt humiliated by this. It reminded her of occasions when she had seen nurses marched out of hospitals, when they had been suspected of fraud or violence.
44. Shortly after her dismissal, the Claimant received a phone call from one of the agency nurses, who said Mr Barker had gathered the staff and told them he had kicked the Claimant out because she was useless.

Grievance

45. On 9 March 2020, the Claimant submitted her grievance. She subsequently relied upon this as setting out her complaint of race discrimination in the Tribunal.

Law

46. In the employment field and so far as material, section 39 of the **Equality Act 2010** ("EqA") provides:

(2) An employer (A) must not discriminate against an employee of A's (B) -

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

47. As to the meaning of any other detriment, the employee must establish that by reason of the act or acts complained of a reasonable worker might take the view that they had thereby been disadvantaged in the circumstances in which they had thereafter to work. An unjustified sense of grievance cannot amount to a detriment for these purposes; see **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 HL**.

48. EqA section 13(1) provides:

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

49. The Tribunal must consider whether:

49.1 the claimant received less favourable treatment;

49.2 if so, whether that was because of a protected characteristic.

50. The question of whether there was less favourable treatment is answered by comparing the way in which the claimant was treated with the way in which others have been treated, or would have been treated. This exercise may involve looking at the treatment of a real comparator, or how a hypothetical comparator is likely to have been treated. In making this comparison we must be sure to compare like with like and particular to apply EqA section 23(1), which provides:

(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.

51. Evidence of the treatment of an actual comparator who is not close enough to satisfy the statutory definition may nonetheless be of assistance since it may help to inform a finding of how a hypothetical comparator would have been treated.

52. As to whether any less favourable treatment was because of the claimant's protected characteristic:
- 52.1 direct evidence of discrimination is rare and it will frequently be necessary for employment tribunals to draw inferences from the primary facts;
- 52.2 if we are satisfied that the claimant's protected characteristic was one of the reasons for the treatment complained of, it will be sufficient if that reason had a significant influence on the outcome, it need not be the sole or principal reason;
53. In the absence of a real comparator and as an alternative to constructing a hypothetical comparator, in an appropriate case it may be sufficient to answer the "reason why" question - why did the claimant receive the treatment complained of.
54. The definition in EqA section 13 makes no reference to the protected characteristic of any particular person, and discrimination may occur when A is discriminated against because of a protected characteristic that A does not possess; this is sometimes known as 'discrimination by association'.
55. The burden of proof is addressed in EqA section 136, which so far as material provides:
- (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 occurred.**
56. When considering whether the claimant has satisfied the initial burden of proving facts from which a Tribunal might find discrimination, the Tribunal must consider the entirety of the evidence, whether adduced by the claimant or respondent; **see Laing v Manchester City Council [2006] IRLR 748 EAT.**
57. Furthermore, a simple difference in treatment as between the claimant and his comparators and a difference in protected characteristic will not suffice to shift the burden; see **Madarassy v Nomura [2007] IRLR 246 CA.**
58. The burden of proof provisions will add little in a case where the ET can make clear findings of a fact as to why an act or omission was done or not; see **Martin v Devonshires Solicitors [2011] IRLR 352 EAT**, per Underhill P:
- 39. This submission betrays a misconception which has become all too common about the role of the burden of proof provisions in discrimination cases. Those provisions are important in circumstances where there is room for doubt as to the facts necessary to establish discrimination generally, that is, facts about the respondent's motivation (in the sense defined above) because of the notorious difficulty of knowing what goes on inside someone else's head "the devil himself knoweth not the mind of man" (per Brian CJ, YB 17 Ed IV f.1, pl. 2). But they have no bearing where the tribunal is in a position to make positive findings on the evidence one way or the other, and still less where there**

is no real dispute about the respondent's motivation and what is in issue is its correct characterisation in law [...]

Conclusion

Detriments

59. We have found the Respondent did each of the following detriments:
- 59.1 Mr Barker, on 24 February 2020, asking why audits had not been completed and asked, "what exactly do you do in this home?";
 - 59.2 Mr Barker, on 25 February 2020, demanding the Claimant input data into a system in a pressured environment, stating "[if] something goes wrong I will hold you solely responsible";
 - 59.3 Mr Barker, on 26 February 2020, querying why a task was not finished and asking, "is there anything that you actually know or do in this home?";
 - 59.4 Mr Barker, mid-morning on 28 February, shouting at the Claimant and stating, "You don't know what you are doing; [sic] Is there anything that you know; you know nothing; why were those mattresses on static; you are completely clueless?";
 - 59.5 Mr Barker, on the afternoon of 28 February, dismissing the Claimant and stating, "You and me [sic] know you are useless at this job, now get out of here go get your bag and don't ever get back here again; you are useless at this job."; and
 - 59.6 Mr Barker, following the dismissal, marching the Claimant from the office, and watching as she left the building.
60. The Respondent did not do the alleged detriment:
- 60.1 Mr Barker, on 25 February 2020, requesting the Claimant remain at work after a 10-hour shift.

The Claimant had not worked a 10 hour shift. When she indicated she wished to leave because she was tired, Mr Barker agreed.

Less favourable because of race

61. With respect to the detriments found, we have gone to consider in each case whether this was less favourable treatment because of race.
62. There is no actual comparator, who satisfies EqA section 23. There is very little evidence of the interaction between Mr Barker and Ms Goodall. Furthermore and in any event, a relevant comparator would be a Manager (whether Home or Deputy) working with Mr Barker in preparation for and during a CCG inspection, who responded to questions and was unable to help, in the same way as the Claimant. Ms Goodall was not in that position. Any comparator must, therefore, be hypothetical.

63. The question then, is whether a hypothetical white Home or Deputy Manager, working with Mr Barker in the same way as Claimant and responding to him as she did on each occasion, would have been treated in the same way.
64. With respect to all of the detriments before 28 February 2020, we are satisfied that a hypothetical white comparator would have been treated in the same way. In each case, Mr Barker acted for the reasons we have set out above.
65. There was a complete mismatch between the role Mr Barker understood and expected the Claimant to be carrying out as Deputy Manager and that she in fact carried out. She was, repeatedly, unable to provide answers or information in response to his enquiries. What the Claimant did say gave him the impression that she was seeking to minimise her responsibility for the management of the home. He found this exasperating, and that reaction was reflected in his comments and questions to her. The Claimant subjectively believed that her treatment was all very unfair. Mr Barker's approach was, however, understandable given his perspective and expectations. Notwithstanding Mr Barker advanced no positive explanation for what we have found he did say between 24 and 26 February 2020, on those earlier occasions we are satisfied non-discriminatory reasons emerge from the primary facts.
66. We have come to a different conclusion, however, with respect to events of 28 February 2020. Whilst it might have been possible for Mr Barker to misremember what he said to the Claimant in the course of their first three days working together, the difference between his account and hers for the 28th is far too great to be accounted for in this way. He must know that what he told us about this was untrue.
67. As set out above, Mr Barker erupted following the Claimant's response to his question about how she thought the inspection was going. A short time later, following the interlude at the computer screen, he summarily dismissed her in a further tirade. Notwithstanding understandable frustration on the part of Mr Barker, his reaction was wholly excessive. If, as appears to have been the case, Mr Barker believed the Claimant was unable to contribute any more or indeed had become an obstacle to this inspection, then the obvious course would have been to suspend her, before considering disciplinary proceedings. The Claimant was a regulated professional. Dismissal would have potentially serious ramifications for her position. Must Barker must have known he could not, properly at least, simply terminate the Claimant's employment there and then.
68. The torrent of invective and Claimant's summary dismissal on 28 February 2020, was wholly inappropriate and excessive. An explanation is called for and none has been given. We note that when inviting us to prefer Mr Barker's account of what happened, Ms Taleb urged us to find it implausible he would have said or done that alleged because it would have been so inflammatory. Having found he did behave in that way, the question then is why. The extremity of his words and deeds suggest that another factor was contributing to the level of his response. An inference we could draw in the circumstances is that the Claimant's race was part of the reason why Mr Barker felt able to deal with her as he then did.
69. We are, therefore, satisfied the Claimant's grossly excessive treatment on 28 February 2020 and Mr Barker having lied about that are facts from which in the

absence of an explanation we could be satisfied there was discrimination because of race. On the earlier days the difference between the Claimant and Mr Barker as to the comments made by the latter might be put down to a variance in their recollection. On 28 February 2020, Mr Barker delivered a stream of invective and the told her to get out. We do not believe he does now, genuinely, recall this as the Claimant agreeing to leave and being happy about it. The reference to missionary work is something he heard from others and has added to his account of this day, which is false. Accordingly the burden shifts to the Respondent to show that the treatment complained of was in no sense whatsoever because of race. The Respondent has failed to discharge that burden.

70. In all circumstances we find that the three detriments done on 28 February 2020 were less favourable treatment because of race.

EJ Maxwell

Date: 4 October 2022.

Sent to the parties on:

6/10/2022

For the Tribunal Office:

N Gotecha