EMPLOYMENT TRIBUNALS

Claimant: **Mr I Acquah**

Respondent: **Governing Body of Canterbury Campus**

Heard at: **East London Hearing Centre (via CVP)**

On: **16 and 17 September 2022**

Before: **Employment Judge Hallen**
Members: **Ms A. Berry**
Ms M. Daniels

Representation

Claimant: In person
Respondent: Mr C. Adjei of counsel

JUDGMENT having been sent to the parties on 28 September 2022 and reasons having been requested by the Claimant on 28 September 2022 in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

Background and Issues

1. The Claimant worked as a Teaching Assistant for the Respondent between 15 January 2020 and 28 February 2020 (about a month and a half) as an agency worker supplied to the Respondent by an agency called Teach 360 Limited. At a preliminary hearing before Employment Judge Taylor on 16 September 2021 he submitted that the Respondent was liable for harassment because it had failed to safeguard him as a 'worker' from harassment by a third party, and this failure itself was related to the relevant protected characteristic of race. He said he was racially harassed contrary to section 26 of the Equality Act 2010 (EqA) and that the Respondent was liable for harassment for failing to safeguard him from harassment. Judge Taylor at this hearing adjudged that the Claimant's contention had little reasonable prospect of success and ordered him to pay a deposit of £30 if he wished to pursue the claim which deposit was paid by the Claimant.

2. At a hearing on 2 February 2022, the Respondent's application for a strike out of this claim was refused by Employment Judge Gardiner and he gave directions to the parties to prepare for this substantive hearing. He also identified the claim made by the Claimant which was harassment related to race (EqA 2010 section 26). The issues for this Tribunal were, did the Respondent fail to safeguard the Claimant from being verbally and racially

abused by a pupil on 4 February 2020 by: failing to carry out a risk assessment following an alleged earlier incident of racial abuse involving the same pupil or if a risk assessment was undertaken, failing to share the result of that risk assessment with the Claimant before the incident on 4 February 2020? If so, was that unwanted conduct? If so, did it relate to the Claimant's race (this being Black British)? 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? If not, did it have that effect? The Tribunal was required to take into account the Claimant's perception, the other circumstances of the case and whether it was reasonable for the conduct to have that effect? At the hearing, we permitted the Claimant to argue that the alleged failure of the Respondent to provide him with safeguarding training as part of his induction training at the commencement of his service was a failure to safeguard the Claimant from harassment by a third party.

3. The Tribunal had an agreed bundle of documents in front of it. The Claimant gave evidence. He also asked us to read the witness statement of AR who he said was a former teacher at the school. We read the statement but said to the Claimant at the hearing that as AR did not attend the hearing to be cross examined or asked questions by the Tribunal, the evidence in the witness statement would carry less weight. The Respondents called two witnesses. They were Suzie McShane, the Assistant Head Teacher of the Canterbury Campus ("School") and Carla Chandler, the Executive Headteacher of Melbury College, which includes the Canterbury Campus. All witnesses prepared written witness statements and were subject to cross examination and questions from the Tribunal.

Facts

4. The Claimant was retained by the Respondent via an agency as a Teaching Assistant to support a classroom teacher at a Pupil Referral Unit which the Respondent ran on behalf of Merton Council. The School at which the Claimant worked for just over a month and a half is part of a Pupil Referral Unit which takes on pupils aged 11-16 years who for a variety of reasons do not have a place, or who are not well suited for a place, in a mainstream school. These reasons include pupils who have been excluded or who are at risk of exclusion from a mainstream school or to have an assessment for an Educational Health Care Plan. The School has about 50 pupils. The School pupils are challenging and vulnerable pupils who have a range of complex behavioural and emotional issues. The Claimant who had prior experience as a Teaching Assistant was aware of this when he agreed to work at the school via the agency. In addition, he was provided with induction training by Ms VF on 29 January 2020, which was organised by Ms McShane by email on 27 January 2020. Although the Claimant sought to persuade us that he was not provided with such training and that this amounted to a failure to safeguard him from harassment by a third party (pupil X) by the Respondent, we did not accept his argument or his evidence. After the first day of the hearing, we ordered the Respondent to provide us with additional documents that Ms McShane referred to in her oral evidence as confirming the induction training provided to the Claimant on his first day of service. After this disclosure on day two of the hearing, it was clear to us that such training was provided to the Claimant despite his denial. The documentary evidence in the form of an email from Ms McShane to Ms VF on 27 January 2020, a diary note from Ms VF's diary showing the provision of the training, a training log naming the Claimant as well as Ms McShane's evidence that the Claimant would not have been able to work at the School without the training confirmed that the training had been provided to the Claimant.

5. In relation to the incident that the Claimant said occurred on 4 February 2020 at which he was called a 'black c….' by pupil X, we did not accept his account of events. Neither did we accept that pupil X had used such a racial slur. Rather, we accepted the account given to us by the Respondent. This account was supported by relatively contemporaneous notes taken by Ms McShane shortly after the incident such as a note of the 'Restorative Justice' meeting on 4 February 2020 which was part of the first stage of the Respondent's mediation process to which the Claimant agreed to be part of to resolve the issues he had with pupil X following the altercation on 4 February 2020. This note was in the bundle as was Ms McShane's note of events which was provided to Ms Chandler on 11 March 2020 and the pupil log of the incident dated 4 February. This log was an extract of the full log of behaviour incidents related to pupil X's conduct at the School from December 2019 to February 2020.

6. At about 10.20am on 4 February 2020 (which at the end of the first lesson of the day) Ms McShane was standing close to the main stairwell outside of Room 2 when she heard someone shouting quite loudly "fat c…." at least twice. The stairwell was about 1.3 meters wide and without any sound dampening. She could hear quite clearly over the background noise which was relatively low compared to the shouting. Ms McShane recognised the people involved when they came down the stairs, they were one of the School's pupils (pupil X) (who was shouting) and the Claimant. The Claimant asked pupil X several times "What did you call me?" Ms McShane did not speak to the pupil immediately. The pupil was taken aside and spoken to by JS (Lead Teaching Assistant). Ms JS heard what Ms McShane had heard.

7. Ms McShane spoke to the Claimant about the incident. The Claimant said he was not sure what pupil X had called him but that maybe it was "black c…". Ms McShane was sure of what had been said and she told the Claimant she had heard "fat c…". The issue about the word used was only between "fat", which I heard" and "black", which the Claimant said he thought he heard - he was not sure at the time of the incident. The Claimant explained the background to the incident which involved the Claimant intervening when pupil X took property that did not belong to him during an Art Class. The Art Class teacher, CW, verified the background but did not hear the shouting outside of the classroom.

8. About 30 minutes after the incident, Ms JS told Ms McShane the Pupil was prepared to apologise for his bad language. Ms McShane spoke with the Claimant again and told him the pupil was prepared to apologise. Ms McShane asked the Claimant if he would be prepared to participate in a restorative justice meeting which he said he would. The Claimant accepted that the pupil had called him "fat" rather than "black" and agreed to meet him.

9. The restorative justice meeting took place shortly afterwards at about 11.00am. Ms McShane oversaw the meeting which the Claimant, the pupil and Ms JS attended. The meeting went well. The Claimant explained that he thought he had heard the Pupil use a racist term but was prepared to move on the basis that he had not - this came across as the Claimant accepting that he was or must have been mistaken as to the use of any racist language. The pupil apologised for swearing and the two of them discussed the background that led to the incident. The meeting worked and the Claimant and the pupil shook hands and ended on good terms.

10. The incident and how it was dealt with were reflected in the behaviour log for the pupil. The entry for 4 February 2020 was made by Ms CW. If the pupil's verbal abuse on 4 February 2020 had been racial, or considered to have been racial, Ms McShane said and the Tribunal accepted that this would have been recorded as such in the pupil's behaviour

log. Ms McShane gave evidence which we accepted that recording of racial verbal abuse was a special requirement of the School's Behaviour Policy. As Ms McShane explained to us, there was no racial context to the pupil's conduct and the Claimant accepted that at the time in the Restorative Justice meeting. Accordingly, no racial element was recorded in the pupil's behaviour log.

11. Ms McShane gave evidence which the Tribunal accepted that although there were numerous entries in the pupil's behaviour log, there was no entry of any adverse racial conduct on his part. This accorded with Ms McShane's understanding that there had not been any racist conduct by pupil X.

12. The Claimant told the Tribunal that after the incident on 4 February 2020 he discovered that the pupil X had previously made a similar comment to another member of staff. This was recorded in paragraph 42 of the case management order made by Employment Judge Gardiner on 2 February 2022. The Claimant was ordered to provide details of the earlier incident involving the pupil but was unable to do so. All he said in his letter to the Respondent dated 16 May 2022, '*After the incident had occurred to me, an individual came forth from the school and told me that this was not the first time this student had racially abused a member of staff. I do not know names of persons involved as the individual that came forth didn't wish to provide me details as she was afraid of her employment status, as she is still with the school. The incident was said to have taken place at the school. These are all the details I have in response to your letter dated on the 5 April 2022'.*

13. Ms McShane gave evidence to the Tribunal which was accepted that there was not another similar incident in the past involving pupil X. This was because, when the Claimant was speaking to Ms McShane in the post-lunch meeting on 4 February 2020, he said that he had been told the class of which the Pupil was a member had been racist, not that the pupil himself had previously been racist. Ms McShane mentioned this in the statement which she provided to Ms Chandler on 11 March 2020. In addition, there was no similar incident recorded in pupil X's behaviour log nor in any of the reports that the Respondent had about his previous conduct. As a result, the Tribunal found that there was no previous incident involving pupil X of a similar nature before.

Law

Race discrimination

14. The shifting burden of proof applies to claims under the Equality Act 2010, s136 EqA 2010.

15. By s9 EqA 2010, race is a protected characteristic and race includes colour; nationality; ethnic or national origins.

16. In case of discrimination, on the comparison made between the employee and others, "there must be no material difference relating to each case," s23 Eq A 2010. The requirement for comparison in the same or not materially different circumstances applies equally to actual and to hypothetical comparators, as highlighted in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11.

17. In Chief Constable of West Yorkshire Police v Khan [2001] ICR 1065 (at para 29) Lord Nicholls explained that outside the field of discrimination law:

> "Sometimes the court may look for the 'operative' cause or the 'effective cause'. Sometimes it may apply a 'but for' approach. For the reasons I sought to explain in Nagarajan v London Regional Transport [1999] ICR 877, 884-885, a causation exercise of this type is not required either by section 1(1)(a) [direct discrimination] or section 2 [victimisation]. The phrases 'on racial grounds' and 'by reason that' denote a different exercise: why did the alleged discriminatory act as he did?"

18. In Khan the Chief Constable had withheld a reference from a police officer who had brought race discrimination claims against the force. The Chief Constable could not give a reference because the proceedings were still live, and he did not want to be prejudiced by any reference given at that stage. Thus, as a matter of "but for" causation, had it not been for the race discrimination claims, a reference would have been supplied. At paragraph 77 Lord Scott observed under the heading 'The causation point':

> "Was the reference withheld "by reason that" Sergeant Khan had brought the race discrimination proceedings? In a strict causative sense it was. If the proceedings had not been brought the reference would have been given. The proceedings were a causa sine qua non. But the language used in s.2(1) is not the language of strict causation. The words "by reason that" suggest, to my mind, that it is the real reason, the core reason, the causa causans, the motive, for the treatment complained of that must be identified."

19. In Amnesty International v Ahmed [2009] ICR 1450, Underhill P explained at para 3

> "We turn to consider the "but for test" [...] This is therefore a useful gloss on the statutory test; but it was propounded in order to make a particular point, and we do not believe that Lord Goff intended for a moment that it should be used as an all-purpose substitute for the statutory language. Indeed, if it were there would plainly be cases in which it was misleading. The fact that a claimant's sex or race is a part of the circumstances in which the treatment complained of occurred, or of the sequence of events leading up to it, does not necessarily mean that it formed part of the ground, or reason, for that treatment."

20. In relation to the discrimination claims based on race, the burden of proof rests initially on the employee to prove on the balance of probabilities facts from which the tribunal could decide, in the absence of any other explanation, that the employer did contravene that provision. To do so the employee must show more than merely that he was subjected to detrimental treatment by the employer and that the relevant protected characteristic applied. There must be something more. If the employee can establish this, the burden of proof shifts to the employer to show that on the balance of probabilities it did not contravene that provision. If the employer is unable to do so, we must hold that the provision was contravened, and discrimination did occur. We also considered the well-known provisions of Igen Ltd v Wong [2005] IRLR 258 in this respect, which we do not repeat here.

Harassment

21. s26 Eq A provides "(1) A person (A) harasses another (B) if—
A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of — violating B's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for B. ….. (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account— the perception of B; the other circumstances of the case; whether it is reasonable for the conduct to have that effect."

22. In determining whether particular conduct is "related to" a protected characteristic, an employment tribunal must make a clear finding of fact, based on the evidence before it. In Tees Esk and Wear Valleys NHS Foundation Trust v Aslam UKEAT/0039/19 a tribunal upheld a complaint of harassment related to race (the claimant being a British-Asian Indian), following a comment made by a psychiatrist, and overheard by the claimant, about Islamic State (ISIS). Allowing the employer's appeal, the EAT found that the tribunal had failed to make a clear and distinct finding that the conduct related to the claimant's British-Asian Indian race. At best, it had formed this view on the basis of a "perception" of ISIS as "an international organisation connected with Asian people, in particular those in such areas as Pakistan, Afghanistan and Iran". This was not a proper finding, because there was no evidence before the tribunal to support it. It was not something of which the tribunal could take judicial notice. The fact that the claimant considers that the conduct was related to a particular characteristic is not necessarily determinative, nor is a finding about the motivation of the alleged harasser.

23. Whether it was reasonable for A's conduct to have the effect it did on B is an objective test. A's conduct will only be considered as having the necessary effect on B where it is reasonable for the conduct to have that effect. Therefore, provided any offence caused is unintentional there will be no harassment if B is being "hypersensitive". According to the EAT, in a case concerning the RRA 1976, the question of reasonableness in this context is a matter of fact for the tribunal to determine, having regard to all the relevant circumstances including the context of the conduct (Richmond Pharmacology v Dhaliwal [2009] IRLR 336).

Conclusion and Findings

24. In order for the Claimant to succeed in this claim off harassment under section 26 of the Equality Act 2010 he has to prove that the Respondent through pupil X engaged in unwanted conduct related to a relevant protected characteristic namely his race and that that conduct had the purpose or effect of violating his dignity or creating an intimidating, hostile, degrading or humiliating or offensive environment for him.

25. We have considered the evidence and have concluded that the Claimant has not on the balance of probabilities proven that pupil X racially verbally abused him on 4 February 2020. As a consequence, his claim pursuant to section 26 of the Equality Act fails.

26. We preferred the evidence of Ms McShane, the Assistant Head Teacher who witnessed the derogatory term used by pupil X towards the Claimant at 10.20am on 4 February 2020 as she was outside room 2 standing close to the main stairwell. She heard pupil X using the term ‘fat c…’ at least twice as an insult to the Claimant after an art class and she had clearly recognised the Claimant and pupil X then coming down the stairs. Ms McShane had the opportunity of speaking to the Claimant immediately and recounted that the Claimant was not sure, himself, of what pupil X had said and had asked the pupil to repeat the slur. The Claimant initially recounted that pupil X called him black ‘c…’ but was not sure himself. Ms McShane was sure of what had been said and told the Claimant that it was a ‘fat c….’. The Claimant had explained the background to the incident to Ms McShane which involved the Claimant intervening when the pupil X took property that did not belong to him during an art class.

27. This incident was noted in a pupil behaviour log which was a contemporaneous document which was in the bundle. This record does not refer to pupil X using a racist insult

to the Claimant. We accept that pursuant to the Respondent's behaviour policy this was an accurate record of what had happened on 4 February.

28. It is also important to note that the Claimant agreed to a mediation meeting with pupil X called a 'Restorative Justice' meeting which took place 30 minutes after the incident on 4 February 2022 at 11 am. Such a meeting was organised by the Respondent to resolve issues of conflict and in this case, the Claimant agreed to resolve the matter with pupil X on the basis of an apology and on his acceptance that the pupil had called him a 'fat c….' rather than a 'black c….'. The meeting was overseen by Ms McShane with Ms JS in attendance. We accept Ms McShane's account of the meeting going well and the Claimant explaining that he thought he heard pupil X use a racist term but was prepared to move forward on the basis that he had not. The pupil apologised for swearing and the Claimant and pupil X shook hands at the end of the meeting which ended on good terms. We accepted that the typed notes of the meeting in the bundle were an accurate record of what had occurred at that meeting.

29. The Claimant accepted himself that there is no reason for Ms McShane to have lied in respect of her account of the events. Furthermore, we find that the Claimant would not have asked pupil X to repeat himself if he was sure of what the pupil had originally said. This indicated to us that the Claimant himself was not sure of the words that were used in the first instance and accepted in the restorative justice meeting that the words used were not racist.

30. We also noted that the Claimant had waited for nearly a month after his last day of service with the Respondent to make a formal complaint of discrimination. We observed the Claimant as an intelligent and informed young man and find that he would not have waited for over a month to raise such a serious complaint if indeed a racist insult had occurred. We read the statement of AR and placed little weight on it as he did not attend to give oral evidence under oath or be cross examined or asked questions by the Tribunal. Furthermore, the statement lacked any real detail and was very short. It did not state what pupil X had said to the Claimant merely saying he was racially abused.

31. With regards to the Claimant's claim that the Respondent had failed to undertake a risk assessment following an earlier alleged incident of racial abuse by pupil X against another member of staff, we find on the evidence that the Claimant had not produced any real evidence of such an earlier incident. As a consequence of this failure, we find that there was no such incident of racial abuse by pupil X in respect of an earlier incident. We were informed in our decision making on the basis of the Respondent's disclosed reports in relation to pupil X and the absence of racial abuse by him in the past.

32. We permitted the Claimant to expand on his claim that he was not safeguarded in respect of induction training provided to him by the Respondent. However, we do not find that the Claimant proved that he was not provided with such training. After reviewing the additional documentary evidence provided by the Respondent after the Tribunal's specific order, and after reviewing that oral evidence of Ms McShane, we have concluded that the Claimant was provided with induction training on his first day of service on 29 January 2020 by the senior safeguarding lead, Ms VF. This training was organised by Ms McShane by email on 27 January 2022 and the documentary evidence confirmed that the claimant was provided with the training by Ms VF as shown by her diary entry confirming the provision of the training as well as the training log which showed that the training was provided.

33. Accordingly, the Tribunal dismissed the complaint of harassment.

Employment Judge Hallen
17 October 2022