



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

and

Respondents

Mr V Pillai

Corporate Office of the House of Lords and
Corporate Office of the House of Commons
(Operating as the Parliamentary Digital Service)

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

SITTING AT: London Central

ON: 7-9 November 2022

BEFORE: Employment Judge A M Snelson

MEMBERS: Mr I Allwright
Ms J Marshall

On hearing the Claimant in person and Ms G Hirsch, counsel, on behalf of the Respondents, the Tribunal unanimously determines that:

- (1) The Claimant's complaints of direct race discrimination and race-related harassment are not well-founded.
- (2) All claims other than those based on alleged racial comments and on the Claimant's dismissal (see Allegations (3) and (7) in the list of issues reproduced in the Reasons below, para 5) were presented out of time and are accordingly outside the Tribunal's jurisdiction in any event.

REASONS

Introduction

1 The Respondents jointly operate the Parliamentary Digital Service ('PDS'), which provides IT and digital advice and support to the members and staff of both chambers of the UK Parliament and other stakeholders across government.

2 The Claimant, Mr Vinod Pillai, is 48 years old and of Indian descent. He was continuously employed by the Respondents as a Grade A2 Solution Architect (an IT role) on an annual salary of some £63,000 from 13 February 2020 to 17 March 2021, when his employment was terminated with pay in lieu of notice on the stated ground that he had failed his probation.

3 By his claim form presented on 14 July 2021 the Claimant brought complaints of race discrimination and unfair dismissal. All claims were resisted.

4 The unfair dismissal claim was later struck out for want of the requisite qualifying period (two years' continuous service).

5 The scope of the remaining dispute was agreed between the parties at a case management hearing before Employment Judge J.S. Burns on 10 June 2022 in these terms (small presentational changes incorporated):

Direct race discrimination

The Claimant describes his race as Indian

He claims the following alleged acts and omissions as less favourable treatment because of his race:

- (1) Insufficient supervision of the Claimant's work (by Line manager Rupert Hay-Campbell (RHC); comparator is Modesto Vega (MV) (a white man and the other probationer)**
- (2) Claimant's exclusion from team meetings; on a weekly basis from August 2020 onwards (by RHC; comparators are the 6 white members of IT team)**
- (3) RHC making racial remarks - saying "*the Claimant's work doesn't have colour*" (about 6 times during one to one meetings); referring to "*“Paki”-edges*" (about 6 times during one to one meetings) and referring to "*curry-int*" issues when the Claimant tried to discuss current issues (about 6 times and also in front of others)**
- (4) Failure to hold a 6-month, interim probation review; (by RHC; comparator MV)**
- (5) Extending Claimant's probation period (by RHC; comparator MV)**
- (6) Refusal to change his line manager (by Simon Body; comparator MV)**
- (7) Dismissal (by RHC in collusion with Sharon; comparator is MV)**

The Claimant also claims harassment related to race, in relation to the alleged unwanted conduct in (3) above.

We will refer to the claims as 'Allegation (1)', 'Allegation (2)' and so on.

6 The case came before us on 7 November 2022 for final hearing by CVP, with four days allowed. The Claimant represented himself. He presented his case with courtesy and demonstrated a good command of the written material. The Respondents were represented by Ms Georgina Hirsch, counsel, who advanced their case with restraint and moderation.

7 Having read into the case on the morning of day one, we heard evidence and submissions on liability, adjourning for private deliberations on the morning of day three. On the afternoon of the same day we gave an oral judgment dismissing the claims.

8 These reasons are given in writing pursuant to an oral request made by Ms Hirsch at the end of the hearing.

The Legal Framework

9 Direct discrimination is defined by the Equality Act 2010 ('the 2010 Act'), s13 in (so far as material) these terms:

(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.

By s23(1) and (2)(a) it is provided that there must be no material difference between the circumstances of the claimant's case and that of his or her comparator and that (for these purposes) the 'circumstances' include the claimant's and comparator's abilities.

10 In *Nagarajan v London Regional Transport* [1999] IRLR 572 Lord Nicholls construed the phrase 'on racial grounds' in the Race Relations Act 1976, s1(1)(a), in these words:

If racial grounds ... had a significant influence on the outcome, discrimination is made out.

It is well-established that introduction of the 'because of' formulation under the 2010 Act (replacing 'on racial grounds', 'on grounds of age' etc in the earlier legislation) effected no material change to the law (see *e.g. Onu v Akwivu* [2014] EWCA Civ 279).

11 The 2010 Act defines harassment in s26, the material subsections being the following:

(1) A person (A) harasses another (B) if –

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of –

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

...

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

(a) the perception of B;

(b) the other circumstances of the case;

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

12 Discrimination is prohibited in the employment field by s39 which, so far as relevant, states:

(5) An employer (A) must not discriminate against an employee of A's (B) –

- ...
- (c) by dismissing B;
 - (d) by subjecting B to any other detriment.

13 A 'detriment' arises in the employment law context where, by reason of the act(s) complained of a reasonable worker would or might take the view that he or she has been disadvantaged in the workplace. An unjustified sense of grievance cannot amount to a detriment: see *Shamoon v Chief Constable of the RUC* [2003] IRLR 285 HL.

14 Employees are protected against harassment by the 2010 Act, s40(1).

15 2010 Act, by s136, provides:

- (1) This section applies to any proceedings relating to a contravention of this Act.
- (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.

16 On the reversal of the burden of proof we have reminded ourselves of the case-law decided under the pre-2010 legislation¹, including *Igen Ltd v Wong* [2005] IRLR 258 CA, *Villalba v Merrill Lynch & Co Inc* [2006] IRLR 437 EAT, *Laing v Manchester City Council* [2006] IRLR 748 EAT, *Madarassy v Nomura International plc* [2007] IRLR 246 CA and *Hewage v Grampian Health Board* [2012] IRLR 870 SC. In the last of these, Lord Hope warned that it is possible to exaggerate the importance of the burden of proof provisions, observing (judgment, para 32) that they have "nothing to offer" where the Tribunal is in a position to make positive findings on the evidence.² But if and in so far as it is necessary to have recourse to the burden of proof, we take as our principal guide the straightforward language of s136. Where there are facts capable, absent any other explanation, of supporting an inference of unlawful discrimination, the onus shifts formally to the employer to disprove discrimination. All relevant material, other than the employer's explanation relied upon at the hearing, must be considered.

17 The 2010 Act, s123(1) enacts a jurisdictional limitation period for the presentation of claims in the employment sphere of three months starting with the date of the act or event complained of. The effect of the early conciliation provisions enacted more recently is to extend the period by the time taken up with conciliation. By s123(3)(a) 'conduct extending over a period' is to be treated as done at the end of the period. The Tribunal has a discretion under s123(1)(b) to substitute for the three-month period such other period as it thinks just and equitable.

¹ The language of s136 was new but did not change the effect of the burden of proof provisions.

² See to like effect the judgment of Lord Leggatt JSC in *Efobi v Royal Mail Group Ltd* [2021] ICR 1263 SC, especially at para 38.

Oral Evidence and Documents

18 We heard oral evidence from the Claimant and, on the Respondents' side, Mr Hay-Campbell and Mr Body (both already mentioned).

19 Besides the testimony of witnesses we read the documents to which we were referred in the agreed bundle of documents, which, with additions made during the hearing, ran to around 600 pages.

20 We also had the benefit of Ms Hirsch's written submissions, which were produced on the morning of day three, before closing argument.

The Primary Facts

21 The evidence was extensive. Although we have had regard to all of it, we have reminded ourselves that it is not our function to recite an exhaustive history or to resolve every evidential conflict. The facts which it is necessary to record, either agreed or proved on a balance of probabilities, we find as follows.

The main narrative

22 The Claimant's appointment was for an initial fixed term of two years, extendable thereafter by a further fixed term or to a permanent position. His letter of appointment dated 27 January 2020 specified his main contractual terms and conditions, which included:

Your first 9 months of employment in the Parliamentary Digital Service will be a probationary period, your appointment will be confirmed upon the successful completion of this probationary period and you will be eligible to apply for internal promotion. At 6 months you will receive an informal appraisal and a formal appraisal at 9 months.

Under the Respondents' probation scheme there is a limited power to extend the probationary period.

23 The Claimant's role of A2 Solution Architect sat within the Solution and Data Architects Team ('the team'), the main function of which was to design digital systems. The team, which consisted of some eight or nine individuals, was managed by Mr Hay-Campbell, Head of Architecture. He in turn reported to Mr Body, Chief Technology Officer.

24 The team was ethnically diverse. Apart from the Claimant it contained at least two other non-white members of Asian descent.

25 The role of Solution Architect is relatively senior. It commands a substantial salary. Essential requirements listed in the person specification included:

- **Experience of successful technical leadership, working as an architect on complex projects and programmes.**
- **Ability to design complex technical solutions in an inclusive and participatory manner ...**

...

- Ability to innovate and think creatively, showing willingness to apply new approaches to solving problems and to learn new methods and technologies.
- Ability to think analytically, with systematic and logical approach to solving complex problems and high attention to detail.

The expectation of the Respondents was and is that appointees to Solution Architect posts will rapidly progress to working with a high degree of autonomy, albeit with frequent managerial and peer contact.

26 Mr Hay-Campbell ran the recruitment process which led to the Claimant's appointment and chaired the interview panel which selected him from among the shortlisted candidates.

27 The Claimant worked at the Respondents' Westminster offices for the first five weeks of his employment. At all material times thereafter, like all Parliamentary Digital Staff, he worked from home owing to the Covid-19 pandemic.

28 Mr Hay-Campbell set up one-to-one (remote) meetings with the Claimant, initially weekly and, from April 2020, fortnightly. The meetings served as an opportunity to share information about the work on which the Claimant was engaged, discuss and address any problems arising and provide the Claimant with a regular means of access to managerial support generally. They were not seen as 'supervision' sessions because the Solution Architects were intended to operate at a level at which that degree of intervention would have been inappropriate.

29 In parallel with the one-to-one meetings, the Claimant was invited to attend, and did attend, regular, fortnightly team meetings, as were all other team members. These were a forum for the entire team to share information about current and future projects and, no doubt, technical insights and sundry other matters.

30 As we have noted, the Claimant complained that he was "excluded" from team meetings from August 2020 (Allegation (2)). Before us he persisted with this claim, despite being constrained to admit that he had attended all meetings. When the matter was probed it became clear that the complaint rested only on the fact that at one point, or perhaps twice, his name was found to have somehow "dropped off" the electronic distribution list for the emailed meeting invitations. The error was remedied. Mr Hay-Campbell told us that he had no explanation for what had happened. He was adamant that the omission of the Claimant's name, when it occurred, was accidental. It was not suggested to him that he had engineered it, let alone that it could have served his interests to do so.

31 The Claimant's six-month informal appraisal should have taken place in mid-August 2020. It did not happen then or at any other time. Mr Hay-Campbell's explanation (offered later) was that he did not have time to carry out the appraisal because of great pressure of work arising from the Covid-19 pandemic.

32 Concerns were raised about the Claimant's performance from the summer of 2020, if not earlier. In March 2020 he was assigned to the 'BizTalk' upgrade project run by Ms Sharon Dempsey, Director – Data & Search Transformation. There were few 'deliverables' (as we understand it, these were measurable tasks

to be completed or milestones to be reached within any project). None was achieved during his time on the project and his role was (as we understand it) reduced to concentrating on how BizTalk was monitored.

33 The BizTalk project was paused in July and the Claimant was asked to turn his attention to the 'Cherwell' project, which related to an IT service desk. Asked by the responsible manager to prepare a 'High Level Design', he produced a single slide which, as Mr Hay-Campbell learned much later, that individual found to be of very poor quality. Very soon afterwards, the Claimant was, at his own request, replaced on the Cherwell project by another team member, so that he could give full attention to the 'Broadbean' project, to which he had recently been assigned.

34 Here, the objective was to design a recruitment tool. At a meeting on 21 July 2020 the Claimant delivered a paper. The meeting was not a success. His work was the subject of considerable private criticism by team members. Ms Dempsey wrote to Mr Hay-Campbell the same day. Her email included this:

Vinod's paper today was of a similar superficial level to the ones he did for [BizTalk]. [T]o put that in front of the [Technical Design Authority] today and seemingly have no concept of a narrative or the activities required on Broadbean leaves me concerned of his calibre. This was pretty basic.

My feedback is lack of attention to detail, and he comes across as thinking he knows more than he does, and I think that's why The BizTalk team and me find him difficult to work with.

Just needed to say that as I was exasperated when I opened the slides.

Mr Hay-Campbell wrote to the Claimant the next day. His email was diplomatically worded but left no room for doubt that there were numerous deficiencies in his work on the Broadbean project. In September 2020 the Claimant was assigned to the HR & Payroll project, but it seems that he did little if any work on it at that time because he was fully engaged with Broadbean, which was not completed until the end of November.

35 In early November 2020 the Claimant expressed interest in an internal role but was advised by HR that he must pass his probation before making any application.

36 On 12 November 2020, Mr Hay-Campbell took the decision to extend the Claimant's (nine-month) probation period by a further three months. By an email of the same date he explained his reasoning in these terms.

I am extending your probationary period by 3 months ending on 13 February 2021. The reason for the extension is to give you more time to demonstrate your capability for the role of Solution Architect. The areas of concern and where you need to demonstrate improvement are as follows:

- **Technical leadership - I have seen very limited evidence of your ability to provide technical leadership and limited evidence of your engagement with technical subject matter experts in the Digital Service.**
- **Ability to design complex technical solutions - to date the only solution that you have designed is the Broadbean system. This is not a complex system**

and I believe that you need further opportunities to demonstrate your abilities in this area.

- **Planning and organisational skills - I have seen limited evidence of your planning and organisational skills, particularly in managing your own workload.**

The objectives to be achieved over the next 3 months are:

- **Engage closely with the HR&P [project] to deliver agreed technical documentation in support of the procurement process.**
- **Deliver a design for the BACS project and secure agreement of TOA.**
- **Engage with, and contribute to, the development of the Architecture team's operating model, design principles and design patterns.**

I will hold regular 1:1 meetings with you during the upcoming months and will hold another review meeting with you in due course. If there is anything else that I can do to support you, please let me know.

37 Mr Hay-Campbell held weekly one-to-one meetings with the Claimant from January 2021 onwards. He offered support and advice at those meetings. For example, on the subject of the HR & Payroll project (to which the Claimant had returned), he suggested that he create a high-level “to-be” architecture design (or diagram). It seems that the suggestion was not taken up.

38 Also in January 2021, tensions between the Claimant and other members of the team worsened. These manifested themselves strikingly in differences over the approach to be taken to completing a set of ‘Non-functional Requirements’ (‘NFRs’), again on the HR & Payroll project. In an email to the team dated 21 January 2021, from the Claimant wrote:

Thanks for your NFR comments - happy to respond to them by aligning with the following key Principles

[Principles listed in bullet points]

Please note, I will not be in a position to respond any comments if your reviews are outside of the scope of the above.

Several team members were irritated and offended by the Claimant’s behaviour and conveyed their feelings to Mr Hay-Campbell. By 4 February, Mr Hay-Campbell was writing to Ms Barbara Joy, Senior HR Manager, reporting that two team members had reported the difficulty they were experiencing in working with the Claimant, that the current “impasse” had stalled the HR & Payroll project and that he (Mr Hay-Campbell) was “a bit stumped” about how to manage a staff member who was not willing to receive feedback or act on instructions.

39 On 5 February 2021 Mr Hay-Campbell decided that difficulties between the Claimant and other team members made it necessary to remove him from the HR & Payroll project, and he was transferred to the ‘Hybrid Meeting Rooms’ project.

40 Despite support from Mr Hay-Campbell at a level which, he thought, ought not to have been necessary, the Claimant appears to have had considerable difficulties with the Hybrid Meeting Rooms project. Work was returned to him to be started afresh. In addition his removal from the HR & Payroll project did not appear

to resolve the problem of deteriorating relationships within the team. On 26 February 2021, Mr Indranil Saha, a team member of Asian descent, wrote to Mr Hay-Campbell in the following terms.

I am writing this email to bring to your attention, behaviours which I have witnessed from Vinod Pillai which I consider to be unacceptable in the workplace. I am raising this to your attention, as it is impacting on my time at work and it has created an uncomfortable environment to work in.

When I started working alongside Vinod on the HP&P and iServer projects, I have experienced behaviour which is not conducive to working in collaboration or promoting teamwork.

Initially, I had experienced actions and language that were inappropriate, odd comments being made in emails, cancelling meetings without explanation and confrontations in Teams chat. I have ignored such behaviour, in the interest of delivering the project ...

Unfortunately, the situation has developed to such an extent, I am now finding myself, needlessly spending too much time having unproductive conversations with him and having to continuously explain decisions in time-consuming email exchanges and chats.

As the newest member of the team, we, the team and I, have tried to support Vinod with "mentoring" conversations to demonstrate best practice and to acclimatise him to the processes that we follow within PDS. Yet, I am unsure if this is adding any value, as Vinod seems quite inflexible in his approach and does not appear very receptive to advice as the behaviours have not changed.

...

Having routinely witnessed such poor behaviour from Vinod within the team, I fear for the worst regarding his behaviour towards our Business colleagues as this shows Digital Service in a poor light. In addition to this, although I have brought this to your attention in the past, less formally, in our 1: 1 meetings, I am now officially raising this as a matter of concern that I want to discuss with you, in the hopes of finding a resolution. To clarify, I do not feel comfortable working in an environment where such behaviour is continually directed towards my colleagues and I. I would like to report this behaviour to HR but I would like to raise it with you, in the first instance as our line manager.

41 By a letter of 27 January 2021 Mr Hay-Campbell invited the Claimant to a probation review meeting to be held on 8 February. In the letter he pointed out that he continued to have concerns about his performance and provided details.

42 On 29 January 2021, the Claimant sent a long email to Mr Body, complaining that Mr Hay-Campbell was treating him unfairly in various ways, most recently by extending his probation and obstructing his hopes to progress his career. The broad thrust of his argument was that his performance had been satisfactory and that the professed concerns of Mr Hay-Campbell had not been communicated to him at the relevant times, were not evidence-based and had no substance.

43 Mr Body invited comments from Mr Hay-Campbell, which he supplied in a long email of 2 February setting out a number of concerns about the Claimant's work.

44 Mr Body and the Claimant met (remotely) on or about 2 February 2021. The Claimant asked for a change of manager. Mr Body explained that the team was very small and there was no room for another manager between Mr Hay-Campbell and him. Besides, he (Mr Body) did not have capacity to take on another 'report'. Accordingly, any route to a change of manager must be through an internal transfer to a different role. The Claimant accepted Mr Body's answer. It was, however, agreed that his complaints about Mr Hay-Campbell should be taken forward under the grievance procedure. The probation review meeting set for 8 February was postponed.

45 A manager, Mr Sean Grazier, examined the grievance and, on 1 March 2021, dismissed it. The Claimant appealed, adding fresh allegations of unfair treatment. A manager senior to Mr Grazier, Mr Chris Mooge, dismissed the appeal on 7 April 2021. At no point in the grievance process did the Claimant make any allegation of discrimination in any form.

46 In the meantime, while the grievance appeal was underway, the probation review meeting was re-scheduled for 15 March 2021. Those present were the Claimant, his trade union representative, Mr Hay-Campbell, Ms Joy and Ms Claudia Rock (a more junior member of the HR team), who took a note. The Claimant's case at the meeting was consistent with his email of 29 January. In short, Mr Hay-Campbell's criticisms of his performance were either entirely misplaced or exaggerated and there was no evidential basis for a finding that he had failed to meet the required standard. The meeting was adjourned for Mr Hay-Campbell to consider his decision.

47 By a letter of 17 March 2021 Mr Hay-Campbell advised the Claimant that he had decided to dismiss him with pay in lieu of notice on the ground that his performance had failed to meet the standard required. He rejected the Claimant's complaint that he had not been given appropriate feedback and rehearsed the deficiencies in his performance between February and November 2020. Turning to the more recent history, he wrote as follows.

During the period from November 2020 to March 2021 you did demonstrate [your] ability to build relationships with some stakeholders, especially those outside the Digital Service. However, you did not build successful relationships within the Architecture team and you did not deliver written output to an adequate standard. Specifically:

- **You did not deliver a non-functional requirements document for the HR & Payroll project that met the required standard despite significant feedback being offered by colleagues in the Architecture team.**
- **You dismissed the advice of colleagues within the Architecture team on the grounds that they had never carried out a G-Cloud procurement before despite the fact that they did, in fact, have significant experience.**
- **Your tone and language in working with colleagues was not constructive – for example questioning the integrity of a colleague in an email copied to the CTO.**
- **Due to the poor working relationship with other team members that you created I was forced to reassign you to other work and ask other members of the Architecture team to complete the non-functional requirements for the HR & Payroll project.**

- You have failed to deliver documentation of an adequate quality to support the Hybrid Meeting Rooms work since being reassigned to the project on 5 February 2021.

48 We reject the Claimant's assertion, if pursued (he appeared to retract it in the course of giving evidence) that there was "collusion" between Mr Hay-Campbell and Ms Dempsey in the decision to dismiss. We are satisfied that the decision was Mr Hay-Campbell's alone.

49 The Claimant appealed against his dismissal. The appeal was assigned to Mr Body. It was in the course of the appeal process that the Claimant for the first time made the allegation that he had been subjected to race discrimination. The appeal was unsuccessful and the complaint of discrimination was rejected.

50 The Early Conciliation period ran from 7 to 30 June 2021, a total of 23 days. As we have stated, the claim form was presented on 14 July 2021.

Miscellaneous facts

51 The alleged racial comments relied on for the purposes of the harassment or direct discrimination claim under Allegation (3) are not substantiated. Mr Hay-Campbell did not pass any racial comments or say anything which conveyed, or could reasonably be understood as conveying, any kind of racial slur. Nothing said by Mr Hay-Campbell to the Claimant 'related to' race generally or his protected racial characteristic in particular. Nothing said by Mr Hay-Campbell to the Claimant had the purpose or effect of violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. Nothing said by Mr Hay-Campbell to the Claimant was perceived by the Claimant as violating his dignity or creating an environment of the sort just referred to.

52 Mr Vega (already mentioned), the Claimant's comparator, was appointed by Mr Hay-Campbell as a Solution Architect about two months after the Claimant.

53 During his probation period and, it seems, at all material times thereafter, Mr Vega did not report to anyone other than Mr Hay-Campbell and there is no evidence that he ever sought a change of line manager.

54 Mr Hay-Campbell omitted to carry out a six-month appraisal for Mr Vega, as he did in the Claimant's case. His evidence that the reason in both cases was the same, namely extreme pressure of work, was not challenged.

55 Mr Vega's probation period was not extended. His appointment was confirmed after nine months' service.

56 There is no evidence of any concerns having arisen over Mr Vega's performance during his probationary period.

Secondary Findings and Conclusions

Rationale for primary findings

57 In arriving at our primary findings we have had regard to all the material put before us. In assessing the evidence and arguments, we have had particular regard to four factors: first, inherent plausibility; second, the extent to which contemporary documentary evidence supports or undermines the rival cases; third, the quality of the Respondents' evidence in defence of the actions on which the claims rest; fourth, the weight and coherence of the Claimant's challenge. We will address these briefly in turn.

58 It seemed to us that, in many respects, the Respondents' case was plausible and the Claimant's implausible. The idea that Mr Hay-Campbell, who had recruited the Claimant, should have been disposed from the start to discriminate against him because of his race struck us as unlikely. That he would have subjected him to racial slurs and taunts repeatedly over an extended period seemed to us all the more improbable. And the suggestion that he did not believe that there were any deficiencies in the Claimant's performance was, to us, still more far-fetched. The theory that he had simply conjured up a bogus ground for dismissal made no sense: it was obviously highly undesirable for Mr Hay-Campbell to lose the Claimant because doing so would reflect poorly on him as the person primarily responsible for the appointment and land him with the burden of a fresh recruitment exercise.

59 The contemporary documents, from some of which we have quoted, were to our minds strongly supportive of the Respondents' case. They contained telling illustrations of a litany of concerns, aired over a significant period, about the Claimant's skills and his approach to his work and colleagues. Those illustrations did not rest on gossip or mere impressions but on documented facts and events and first-hand experience. This cogent material wholly undermined his much-repeated complaint that there was no evidential foundation for the criticisms of his performance.

60 In our judgment, the Respondents' evidence was of high quality. The two witnesses were clear, straightforward and careful. Their accounts were rational and coherent. The overall case presented was internally consistent and, as already observed, in large part corroborated by contemporary documentation.

61 We set less store by the fourth factor. In the usual way, the claims turned on our findings about what the Respondents did and the motivation behind their actions. That being so, the main focus was on their evidence and the argument deployed in defence of it. Nonetheless, the case put forward by the Claimant did not assist him, for at least two reasons. First, it rested in some instances on mere assertion. One example was his claim that Mr Vega was at some stage managed by someone other than Mr Hay-Campbell, a proposition for which no evidence whatsoever was adduced. Second, the Claimant ran, and before us appeared to persist with, arguments which contradicted, or at the very least tended strongly to undermine, the only 'live' claim (for race discrimination), namely (a) that he was subjected to detrimental treatment because he had asked for a change of line

manager and/or (b) that, failing a successful comparison with Mr Vega, he should be allowed to rely in the alternative on Mr Saha, a person who shared his relevant racial characteristic of Indian descent. While making every allowance for the fact that the Claimant was without legal representation, we were left with some doubt as to whether he was clear in his own mind about precisely what unlawful act he was accusing the Respondents of committing.

Consequences of our primary findings

62 Allegation (1) is defeated by our primary findings. The Claimant received a standard level of supervision from Mr Hay-Campbell, appropriate to his relatively senior role as a Grade A2 Solution Architect, and ultimately a higher degree of supervision than would ordinarily be expected. No arguable detriment is shown.

63 Allegation (2) fails because the detriment claimed is not established: the Claimant was not excluded from team meetings. Not being included in some electronic invitations was not the detriment relied upon and rightly so, since it was too trivial a matter to be capable of constituting an actionable detriment. It occasioned no disadvantage as the Claimant knew about the team meetings, was expected to attend them and did attend them. In any event, we are satisfied that the omission of the Claimant's name from some electronic invitations was accidental and not the product of any motivation to exclude him or cause him any form of harm. There was and could be no question of excluding him. The team was small and he was a member of it. If he had not attended he would have been missed and questions would have been asked. The Claimant could not point to any other fact or event suggesting a more general policy or aim (on the part of Mr Hay-Campbell or anyone else) to exclude him from team.

64 Allegation (3) fails because we have found that the alleged acts of harassment did not happen. Mr Hay-Campbell said nothing to the Claimant which 'related to' his race, or race generally (see the 2010 Act, s26(1)(a)). Nor did he say to the Claimant anything capable of satisfying the other elements of the tort of harassment under s26(1)(b). Nor, for the same reasons, does Allegation (3) disclose any actionable detriment.

65 Allegation (4) stands on an undisputed fact: Mr Hay-Campbell did not carry out an informal six-month appraisal in the Claimant's case. Detrimental treatment is made out. But we have also recorded that Mr Hay-Campbell made the same omission in the case of the Claimant's white European comparator, Mr Vega. This identical treatment compels the Claimant to advance the unpromising case that his hypothetical comparator would, in like circumstances, have been more favourably treated than *both* he *and* Mr Vega were.

66 Allegations (5) and (7) can be taken together. Both concern admittedly detrimental acts (extension of probation and dismissal) which are defended as being based on Mr Hay-Campbell's perceptions about the quality of the Claimant's work and the prospect of him meeting the demands of his role. They will be examined below, but again the analysis will necessarily be confined to the 'fall-back' case, which cites an hypothetical comparator. The primary case, resting on Mr Hay-Campbell's different treatment of the Claimant and Mr Vega, is defeated by

our primary finding that the comparison is invalid because there were no concerns about Mr Vega's performance and therefore Mr Hay-Campbell had no possible reason to extend his probationary period or to conclude that he had failed his probation.

67 Allegation (6) starts with the difficulty of showing that the refusal of the Claimant's request to be assigned to a different line manager amounted to an arguable detriment. He had no right to have that unusual request granted and, as Mr Body explained in evidence, there was no practicable means of granting it at least for so long as the Claimant remained a probationary employee in an A2 Architect role. Despite these observations, we prefer to say only that it is doubtful whether an arguable detriment is shown. In any event, what is abundantly clear from our primary findings is that the comparison relied on by the Claimant is invalid. Given the need for a 'like for like' comparison, his case has to be that Mr Vega asked for a change of line manager and his request was granted. We have already found that Mr Vega did not at any material time report to anyone other than Mr Hay-Campbell. That is enough to explode the comparison relied upon. Perhaps superfluously, we would add that there no evidence of him ever having *asked* for a change of reporting line but the logical corollary of our primary finding must be that if he did, his request was met with the same answer as the Claimant's. To state the obvious, this conjecture tends directly *against* the theory of race-based decision-making by Mr Body. In these circumstances, the Claimant is again driven to rely on an hypothetical comparator.

Analysis of the claims which survive our primary findings

68 As we have explained, Allegations (4), (5), (6) and (7) merit further consideration, but in each case they are diminished by our primary findings, which invalidate the comparisons with the treatment of the 'actual' comparator cited.

69 Starting with Allegation (4), we accept as true Mr Hay-Campbell's explanation for the fact that he did not carry out a six-month informal appraisal of the Claimant, namely that he was too busy dealing with other responsibilities, including extra tasks resulting from the Covid-19 pandemic. The omission was certainly regrettable. An informal interim review is a valuable feature of any well-conceived probation scheme and one which, properly employed, may head off performance problems which are otherwise liable to put a probationer's career at risk. For Mr Hay-Campbell merely to dispense with the appraisal without comment seems more than a little unreasonable, even if his other work pressures were considerable. But our focus is not on the reasonableness of the omission but the reason for it. In our judgment, there is simply nothing from which it would be possible to infer a racial motivation behind it. To the contrary, the undisputed fact that Mr Vega was disadvantaged in precisely the same way as the Claimant lends telling support to the explanation for the treatment complained of and argues compellingly against the notion that any element of race discrimination lay behind it.

70 As for Allegations (5) and (7), we find that Mr Hay-Campbell's explanation for his actions was consistent, plausible and evidence-based. It is not for us to stand in his shoes, but to review his decision-making. Having done so, we are

quite satisfied of four matters. First, he had serious concerns over a sustained period about the Claimant's performance in the relatively senior role to which he had been appointed. Those concerns extended to his technical aptitude, his capacity to work independently, his productivity, his willingness to accept and benefit from feedback, and his preparedness to work constructively and harmoniously with his peers. Second, when he took the decisions on which Allegations (5) and (7) rest Mr Hay-Campbell judged that, despite considerable support, the Claimant had not progressed sufficiently and was not performing at the standard required of an A2 Solution Architect. Third, Mr Hay-Campbell's judgements were not mere impressions: they were founded on evidence accumulated from a range of sources. In many instances, that evidence is located in, or corroborated by, contemporary documents. Fourth, Mr Hay-Campbell's perceptions about the Claimant's performance and progress fully explain his decisions and there is nothing whatsoever to sustain the theory that race discrimination played *any* part in the decisions to extend the probation period or to dismiss.

71 Dealing specifically with Allegation (5), we should add that we accept that a material factor in Mr Hay-Campbell's decision-making was his consciousness that he had omitted to carry out the six-month appraisal. We think that he was mindful that his omission might have prejudiced the Claimant and that it would be right to seek to compensate for that risk by extending the probation period by a further three months. This factor certainly does not support an inference of discrimination. If anything, it tends in the opposite direction.

72 Allegation (6), resting (as we have found) on the highly dubious proposition that the refusal of the Claimant's request for a change of line manager amounted to an actionable detriment, is in any event unsustainable because there is no rational basis for finding that any discrimination was involved. Mr Body's explanation for his decision made obvious sense. It is very hard to see what other course was open to him. And even if the Claimant had any valid ground for feeling aggrieved, there is, again, nothing to suggest that race was a factor. The posited comparison with Mr Vega has been exploded and there is no material before us from which it could be inferred that an hypothetical comparator not sharing the Claimant's racial characteristics would have been treated more favourably than he was.

73 We have stepped back to review in the round our individual assessments of the four claims which have survived our primary findings. Putting them together does not add weight to the Claimant's case. Rather, doing so reinforces our view that the Respondents' explanations for their actions, which exclude discrimination, have been consistent, rational and plausible. Given our primary findings, he is left with the naked assertion that those actions were infected by race discrimination. That serious allegation cannot stand on assertion alone: it can only be made good with supporting evidence, of which, we find, there is none.

74 For the reasons stated, the complaints of race discrimination under Allegations (4), (5), (6) and (7) are not well-founded.

75 In reaching our conclusions we have not had recourse to the burden of proof provisions. We have had the evidence carefully explored and tested before us, enabling us make findings in the usual way.

Jurisdiction

76 It is common ground that Allegation (7) is within time. We agree with Ms Hirsch (submissions, para 15) that, allowing for the standard three-month limitation period and the time to be added on in respect of early conciliation, the last date on which an in-time claim could have been brought in respect of any pre-dismissal complaint was 8 March 2022. It follows that, on their face, Allegations (1), (2) and (4)-(6) inclusive are out of time and so outside the Tribunal's jurisdiction.

77 In the case of Allegation (3), the Claimant did not put dates on his complaints. In the grievance appeal he did say that the alleged harassment took place at one-to-one meetings, and it is common ground that they continued up to his dismissal. In the circumstances, it cannot be said that Allegation (3) is, on his own case, out of time. And since the Tribunal has held that the events on which this part of the case depend are not made out in fact, there is no room for it to find that the harassment claims are within time, or out of time. To do so it would need to make findings as to when the act or acts of harassment occurred, which is, self-evidently, impossible. It follows that Allegation (3) fails on the facts but not on the separate ground that it is out of time.

78. Is there any basis for determining that the Tribunal has jurisdiction in relation to Allegations (1), (2) and (4)-(6)? The answer is no. There was no unlawful conduct at all and the concept of 'conduct extending over a period' (the 2010 Act, s123(3)(a)) is inapplicable. And there could be no possible reason to exercise the discretion (see s123(1)(b)) to substitute a longer period than the primary three-month period to bring within time any claim already found to be without substance.

Outcome and Postscript

79. All claims fail on their merits and are dismissed.

80. All claims save those based on Allegations (3) and (7) are in any event out of time and are accordingly dismissed on the additional ground that the Tribunal has no jurisdiction to consider them.

81. It seems to us that both parties could learn useful lessons from this case. We think that it would benefit the Claimant to reflect on the value of being open to feedback and constructive criticism and on the dangers of intemperate and divisive communication with colleagues.

82. As for the Respondents, they should count themselves fortunate that this case has not turned on our assessment of the reasonableness of their actions but on the narrower issue of whether any discrimination is shown. We have already voiced concern about the omission to hold the six-month appraisals (in the cases of the Claimant *and* Mr Vega). That was a significant departure from sound

employment relations practice and probably a breach of contract too. Regardless of work pressures, they would do well to ensure that the error is not repeated.

83. In addition, we were most surprised to read in the documents before us Mr Hay-Campbell's cheerful admission to having discussed his proposal to dismiss the Claimant with Mr Body. He was the obvious candidate to hear any appeal against dismissal and was, in short order, asked to perform that task. If the unfair dismissal claim had not been eliminated for a technical reason, it is not easy to see how the Respondents could have escaped an adverse finding (at least on procedural grounds). We have not seen fit to ask for comments from the parties on this aspect, because we are very clear that it could not affect our view on the discrimination claims. But we do think that the Respondents should give urgent consideration to reviewing their employee relations practices and spreading awareness at all levels of what the law expects of the reasonable employer.

EMPLOYMENT JUDGE – Snelson
18th Nov 2022

Judgment entered in the Register and copies sent to the parties on : 18/11/2022

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