Case No: 2407259/2021

EMPLOYMENT TRIBUNALS

Claimant: Miss S Greaves

Respondent: (1) Northwest Ambulance Service NHS Trust

(2) Ms T Kenworthy-Dowdall

HELD AT: Manchester **ON:** 19 – 22 December 2022

BEFORE: Employment Judge B Hodgson
Mrs A Ashworth
Mr P Dobson

REPRESENTATION

Claimant: Mr B Henry, Counsel

Respondent: (1) Ms J Ferrario, Counsel

(2) Mr P Norbury, Solicitor

RESERVED JUDGMENT ON LIABILITY

The unanimous judgment of the Tribunal is that:

1. The claim of harassment contrary to the provisions of section 26 Equality Act 2010 as against the second respondent is upheld

2. The claim of direct discrimination because of race contrary to the provisions of section 13 Equality Act 2010 as against the second respondent is dismissed

3. All claims as against the first respondent are dismissed

4. The matter is listed for a Remedy Hearing on 20 March 2023

REASONS

Background

1. The claimant presented an ET1 Claim Form on 21 May 2021 alleging "race discrimination". This was initially registered only naming the first respondent as a respondent to the proceedings but a subsequent application to add the second respondent was accepted by Regional Employment Judge Franey, albeit subject to such decision being examined at a subsequent Preliminary Hearing

2. The matter came before the Employment Tribunal at a Preliminary Hearing on 22 December 2021 ("the first PH"). The matter was listed for a Final Hearing and also for a further Preliminary Hearing to consider:

    2.1. The objections to the adding of the second respondent which took place on 6 September 2021; and

    2.2. Whether the claims against the first and second respondents are out of time and, if so, should time be extended on the basis of the just and equitable discretion

3. The matter accordingly came back before the Tribunal by way of further Preliminary Hearing on 9 February 2022 ("the second PH")

4. At the second PH, the judgment of the Tribunal was:

    4.1. The second respondent continues to be joined to these proceedings

    4.2. The claimant's claim is allowed to proceed out of time, on the exercise of the Tribunal's just and equitable discretion

5. The claims concern allegations of an offensive and racist term being used by the second respondent with reference to the claimant (who describes herself as being of black African/Caribbean descent or origin) on two separate occasions, namely in or about July 2020 and in or about December 2020. Given the offensive nature of the term allegedly used, it was agreed by all participating in the hearing that the term would be referred to as "the n-word" and this practice is continued within this Judgment

Issues

6. The second respondent's position in summary is that she may have used the n-word in or about July 2020 but not in the manner alleged and not directed towards or in reference to the claimant. She denies using the n-word as alleged in or about December 2020. She denies all claims accordingly

7. The first respondent's position is that it accepts the allegations of the n-word having been used by the second respondent on both occasions but relies upon the statutory reasonable steps defence

8. The issues arising were discussed and agreed at the first PH. These were discussed at the outset of the Hearing and distilled further within the parties' closing submissions as the following:

   Harassment (section 26 Equality Act 2010)

   Did the second respondent use the n-word in reference to the claimant in or about July 2020 and/or in or about December 2020?

   Direct Discrimination (section 13 Equality Act 2010)

   This claim is pursued only in the alternative, in the event that the claim or claims of harassment fail

   Statutory defence (section 109(4) Equality Act 2010)

   In the event that the claim or claims are well-founded, did the first respondent take all reasonable steps to prevent [the conduct] of the second respondent?

9. The Tribunal records that at the conclusion of the claimant's evidence the second respondent's representative made an application for the claims to be struck out on the basis that there was no case to answer. This application was objected to on behalf of the claimant and rejected by the Tribunal. The Tribunal noted that it should only be in exceptional and very clear circumstances that such an application, particularly in the context of a discrimination claim, should succeed. In summary, the Tribunal was satisfied that there had been sufficient evidence produced to it on behalf of the claimant such that the Tribunal should proceed to hear the respondents' evidence before any final Judgment was reached

Facts

10. The parties had agreed a bundle of documents and references to numbered pages in this Judgment are to pages as numbered within such bundle. The bundle originally comprised 405 pages but this was increased to 436 pages by the addition of supplementary documents by the first respondent which was not objected to by the other parties

11. The claimant gave evidence on her own behalf. Her representative also tendered a written statement from Ms Laura Herbert. Ms Herbert did not give oral evidence before the Tribunal and accordingly this evidence was not given on oath nor was it able to be subject to cross-examination. The witness statement in fact references a further statement made as part of the first respondent's internal investigation (pages 82 – 83). In the circumstances, the claimant's representative accepted that very little weight could properly be attached to such evidence

12. The first respondent called a total of four witnesses to give evidence: Mr Anthony Davies, Senior Paramedic; Mr Jason Shaw, Senior Paramedic Team Leader; Mr Malcolm Saunders, Operations Manager; and Ms Joanne Jones, Human Resources Business Partner

13. The second respondent gave evidence on her own behalf

14. The Tribunal came to its conclusions on the following facts, limited to those relevant to the issues, on the balance of probabilities, having considered all of the evidence before it, both oral and documentary

General

15. The first respondent is an Ambulance Trust with a workforce of approximately 6,900

16. Both the claimant and the second respondent were employed by the first respondent at Oldham Ambulance Station. They had in fact known each other since their teenage years

17. The claimant commenced her employment with the first respondent in or about 2003 and most recently has held the post of paramedic. She has also, for a number of years, performed the role of Branch Secretary for Unite although not as a full-time Officer

18. The second respondent commenced her employment with the first respondent in or about 2005, most recently holding the post of Emergency Medical Technician 1. She was dismissed from her post in or about July 2021

19. The chronology is somewhat intertwined but the Tribunal has sought to untangle the individual aspects of the matter in setting out its factual findings

July 2020 incident

20. Reference to this allegation emerged in the course of the first respondent's internal investigation into the December 2020 incident

21. On or about 1 July 2020, a number of senior staff were together in the courtyard of the Oldham Ambulance Station. The group comprised Mr Jason Shaw and Mr Malcolm Saunders, together with two other senior paramedic team leaders, Ms Kelly Barton and Mr Allan Green. This was at about 3pm, at the end of a shift

22. Mr Shaw's evidence is that the second respondent came out of the Station into the rear yard where the group was seated and approached them. As she approached, she said to the group "what's that [n-word] been doing all day". Mr Shaw took this to be a reference to the claimant who had been on alternative duties that day, which had been the subject of comment on other occasions by the second respondent. The claimant was the only black member of staff on duty that day. Mr Shaw informed the second respondent that she should not be using such language and that it should not be repeated

23. Upon reflection that night, he considered that the second respondent's conduct required to be followed up and he spoke to her again about it the following day. He recalls the second respondent "playing the comment down", saying that it was only made in jest and that she did not really mean it. Mr Shaw reiterated to the second respondent that the use of that word was unacceptable and racist and that it should not be used again. He believed that this was a one-off incident that would not be repeated and was accordingly content to leave matters there. He did however notify his line-manager, Mr Malcolm Saunders, of his actions

24. Mr Saunders gave similar evidence. He could not recall the exact words used but remembers the second respondent using the n-word and, although the claimant was not specifically named, this was by way of reference to the claimant (who was the only black person working at the Oldham Station that day) and her being on alternative duties that day

25. Mr Saunders describes all present as being "shocked and flabbergasted" at the second respondent's use of the n-word. He noted that Mr Shaw admonished the second respondent

26. The following day, Mr Shaw told him that he (Mr Shaw) had reinforced the message to the second respondent as to the unacceptability of the use of the

n-word. The second respondent had also spoken with him that day confirming the further discussion with Mr Shaw

27. Mr Saunders felt that the incident had been appropriately dealt with at that stage and considered the issue closed on the basis that there would be no repeat

28. The second respondent's evidence was that she did recall the incident in July 2020 and that Mr Shaw had spoken to her concerning her use of the n-word. She does not recall any suggestion that the term was used with reference to the claimant

29. She believes that she may have used the word when engaged in a telephone call with a member of her family, namely her daughter's boyfriend who she describes as Afro-Caribbean, it being a word that is used by her and others in her home setting

30. There is accordingly a clear conflict of evidence to be determined by the Tribunal. The Tribunal concludes that there is no reason to doubt the direct evidence of Mr Shaw and Mr Saunders. There is no reason evident to the Tribunal why these witnesses should in any way seek to fabricate their evidence which was clearly and consistently given. It is also consistent with the statements they gave to the internal investigation (Mr Shaw's statement is at pages 101 – 102, Mr Saunders' statement is at pages 107 – 108) and those statements given also by the others present (Ms Kelly Barton at pages 103 – 104 and Mr Allan Green at pages 105 – 106)

31. The explanation given by the second respondent is inherently improbable. The evidence of Mr Shaw and Mr Saunders is that the second respondent was speaking directly to the group, not passing by them whilst on a telephone call. The wider context of the use of the word (a specific reference to alternative duties) also contradicts the version of events put forward by the second respondent. The evidence is that no such explanation was put forward by the second respondent contemporaneously

32. In all the circumstances, the Tribunal's conclusion on the evidence before it is that the allegation is made out and the second respondent did use the n-word with reference to the claimant on this occasion

33. There is a further factual issue for the Tribunal to determine also in relation to this incident, namely the claimant's awareness of the word being used. In the submission of the claimant's representative, "whether it was also heard by [the claimant] is irrelevant to the question of whether or not it happened", but the question is potentially relevant to remedy

34. The claimant's evidence is that she was on a conference call in an office facing the yard when she thought she heard the use of the n-word by the second respondent. She came out into the yard and noticed that a number of senior

members of staff were present. She assumed that if the term had been used there would have been more reaction from those present and accordingly concluded she must have misheard. When, arising out of the internal investigation, she became aware of the evidence of those present, she realised that she had not misheard and had in fact heard the use of the n-word by the second respondent

35. The evidence of Mr Shaw and Mr Saunders is that the claimant did not at any point come into the yard at the relevant time and they were satisfied that she had left the site earlier

36. There is again therefore a direct contradiction in the evidence. The Tribunal again prefers the evidence of Mr Shaw and Mr Saunders. As stated, their evidence was clear and consistent. It is inherently improbable that the claimant, particularly given her role of Branch Secretary, believing she had heard a colleague use the n-word, would not pursue the matter but simply assume she must have misheard. The evidence of Mr Shaw – which was not challenged – was that he had spoken with the claimant after the December allegation arose and the claimant advised him she had been unaware of the July incident (see paragraph 10 of Mr Shaw's statement). This was in fact accepted by the claimant in the course of cross-examination. The Tribunal notes that in her statement given to the internal investigation on 6 February 2021 (pages 84 – 88) the claimant is asked (at page 87): *"Other than the occasion LH has spoken to you about, are you aware of any other occasion where [the second respondent] has said something that might be considered racist/discriminatory?"* The claimant in her reply makes no reference to the July incident

37. The Tribunal accordingly finds that the use of the n-word in the July incident was not known to the claimant until it was brought to her attention following the internal investigation. In terms of timing, the claimant's evidence was that she first learned of the July incident after the dismissal of the second respondent in July 2021

December 2020 incident

38. It was this alleged incident that gave rise to the internal investigation referred to above

39. The evidence of the claimant is that, on or about 22 January 2022, she was approached by a colleague, Ms Laura Herbert to ask how she was doing. The claimant replied that she had lodged a "Dignity at Work" grievance which named the second respondent (this document is at pages 57 – 58) but does not make any allegation of racist behaviour. Ms Herbert went on to disclose to the claimant that when she had been sharing an ambulance with the second respondent on a day early in December 2021, the second respondent had referred to the claimant as "that [n-word]"

40. The claimant reported this allegation to Ms Jones-Roberts (Sector Manager). Ms Jones-Roberts asked whether Ms Herbert would be prepared to put the allegation in writing and she did so, at the request of the claimant, by email dated 25 January 2021 (page 405)

41. This was then accepted as a formal complaint by the claimant and the internal investigation commenced

42. The starting point for the internal investigation was a meeting held on 27 January between Mr Saunders and the second respondent. Mr Saunders had prepared a document entitled "Initial Assessment and Risk Management" (page 59) which, according to his evidence, he went through with the second respondent to explain to her what was being investigated. It sets out as "Background Details" the following:

"An allegation of racist language has been submitted against [the second respondent]. The allegation is that on the 3rd or 4th of December 2020 in Oldham station mess room, [the second respondent] in front of Oldham staff members (not in [the claimant's] presence) used racial language in referring to [the claimant]. Namely, whilst referring to [the claimant] used the phrase "that [n-word]"

The evidence before the Tribunal as to how this document was compiled in the terms it was, was unclear. Mr Saunders believes he prepared the document having been asked to progress the matter by Ms Jones-Roberts but he could not explain why the allegation is phrased in the way that it is, given that the sole allegation at that stage was that made by Ms Herbert of an incident occurring whilst she was in an ambulance with the second respondent

43. The second respondent subsequently sent an email dated 28 January to Mr Saunders and a Mr James Stone headed "Apology" (page 60). The email states:

"Following the concern raised about inappropriate language I used in the communal area I would like to take this opportunity to apologise"

It goes on to refer to the passing of time and the possible background for the use of the word but continues:

"However, this is no excuse for me to have used it in a work setting and I personally refute any racist connotations as unacceptable and repugnant to me.

Therefore, I unreservedly apologise to anybody affected and promise to use my best efforts to never use such language again, knowing the deep upset and distress it could possibly cause people directly and indirectly"

44. The second respondent denies making such a comment as alleged

45. The claimant was not herself present when it is alleged that the n-word was used by the second respondent but it was reported to her by Ms Herbert. The evidence in this respect before the Tribunal is (as referred to above) an unsworn statement by Ms Herbert which in turn refers to the statement she made in the internal investigation (pages 82 – 83 and specifically paragraph 6). This statement clearly sets out the allegation

46. The direct evidence of the second respondent is that she made no such comment. The claimant's representative sought to place great store on the fact (which is not disputed) that, on occasion, in the course of giving her evidence, the second respondent referred to not being able to recall making such a comment – one example being in direct response to her own representative in re-examination. He sought to persuade the Tribunal accordingly that this does not amount to a denial and, therefore, although accepting how little weight should be attached to it, Ms Herbert's statement overrides the second respondent's direct evidence. This argument is rejected by the Tribunal. It is accepted that the second respondent, in giving her evidence, did at times refer to not being able to recall the use of the n-word as alleged in December 2020. The Tribunal's experience however is that such a phrase is often used interchangeably by witnesses by way of denial and it was clear to the Tribunal in the overall assessment of the second respondent's evidence that she was maintaining a denial of having used the n-word as alleged in December 2020

47. The Tribunal noted the second respondent's apology at page 60. This however is clearly not a response to an allegation of having used the n-word by reference to the claimant in an ambulance in December 2020. The allegation put to the second respondent (page 59) specifically refers to it occurring in the "mess room" and the apology itself refers to a comment allegedly having been made in "the communal area" (which the evidence indicates were terms used interchangeably)

48. The claimant's representative urged the Tribunal to give material weight to admissions or concessions by the second respondent's Trade Union representative set out in the record of the internal disciplinary hearing. The second respondent herself was not present and her evidence was that she had given her representative no instructions to make such admissions or concessions. In the circumstances, the Tribunal was not prepared to give that documentation such weight

49. What the Tribunal was faced with in terms of evidence was one person's word against another but with one giving direct evidence to the Tribunal and the other giving evidence only as set out in written statements. The Tribunal did not assess the claimant as a dishonest witness. In all the circumstances, balancing the evidence before it and with particular emphasis on the direct evidence given to the Tribunal under oath and subject to cross-examination, the Tribunal's

conclusion on balance is that the second respondent did not use the n-word when alongside Ms Herbert in an ambulance in December 2020

Reasonable steps

50. The first respondent admits, on the basis of the findings of its own internal investigation, that the two incidents of the use of the n-word occurred as alleged. It defends the claims on the basis that it took all reasonable steps to prevent such conduct

51. In addition to the manner in which the July incident was dealt with by the managers concerned, the following facts were brought to the Tribunal's attention in support of this argument

52. All staff of the first respondent receive mandatory training every three years, which includes elements of equality and diversity training and which requires a pass mark of at least 80% to be accepted as completed (see pages 406 – 436). This includes specific reference to "harassment" (page 418). The second respondent most latterly underwent such training in or about May 2019

53. The first respondent has a Dignity at Work Policy (pages 179 – 199). The policy includes a definition of bullying (page 185) and (page 187) states that "bullying and harassment is a breach of the Trust's Disciplinary Rules"

54. The first respondent has a Policy on Equality, Diversity and Inclusion (pages 227 – 240). This outlines the Trust's commitment to equality and diversity and includes (page 233) the responsibility to always act and speak "in a way which does not discriminate or harass and does not exclude others within the group"

55. There are a number of other initiatives which reflect the active promotion of workplace inclusion as referred to in the witness statement of Ms Jones, including:

    55.1. Communications from the Chief Executive (pages 259 – 303)

    55.2. Communication from the Trust's Equality and Diversity Team

    55.3. Staff surveys

    55.4. A Freedom to Speak Up Guardian

    55.5. Staff support networks

    55.6. A Treat Me Right toolkit

<u>Statutory Framework</u>

56. Section 13 Equality Act 2010 (EqA) states that:

(1) A person (A) discriminates against another (B) if, because of a protected characteristic [in this case, race], A treats B less favourably than A treats or would treat others

57. Section 26 EqA states that:

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

(a) A engages in unwanted conduct related to [race], 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 in subsection (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.

58. The burden of proof in discrimination claims rests initially with the claimant but section 136 EqA provides that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that the respondent has acted in a way that is unlawful, the Tribunal must uphold the complaint unless the respondent shows that it did not so act

59. This requires a two-stage process. First, the complainant must prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an unlawful act of discrimination against the complainant. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal 'could conclude' (namely, that a reasonable Tribunal could properly conclude from all the evidence before it) that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination. The second stage, which only applies when the first is satisfied, requires the respondent to prove that it did not commit the unlawful act. However, it is not necessary for the burden of proof rules to be applied in an overly mechanistic or schematic way

60. Section 109 EqA states that:

(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer

…

(3) It does not matter whether that thing is done with the employer's … knowledge or approval

(4) In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment, it is a defence for B to show that B took all reasonable steps to prevent A –

(a) from doing that thing, or,

(b) from doing anything of that description

61. The burden of proof under section 109(4) rests with the employer

Submissions

62. All parties prepared and spoke to very helpful written submissions which the Tribunal does not propose to repeat in this Judgment but full account was taken of all that was put forward by all three representatives, including the various caselaw and the EHRC Code and Guidance, which is reflected in the Tribunal's findings and conclusions

Conclusions

July 2020 incident

63. The Tribunal refers to the finding of fact that this incident did occur as alleged

64. The second respondent's representative pursued the argument that, in the event of such a finding, the statutory definition was not met in that, as the claimant was not present and (as found by the Tribunal) did not directly hear the term used, it cannot have had the purpose or effect as set out in the statutory definition

65. The Tribunal rejects this argument. It is not necessary for a claimant to be present at or even aware of the conduct alleged for the statutory definition to be met. For the avoidance of doubt, the nature and context of the term used (as found by the Tribunal) is such that the Tribunal is satisfied that its use had "the purpose" set out in section 26 of the Equality Act. Further, without question, it must reasonably have had that effect. In any event, it is not in dispute that the fact of the conduct was known to the claimant when she learned of it arising out of the internal investigation

66. The second respondent's representative pursues the bare submission that "none of the matters complained of by the claimant arose as a result of the claimant's protected characteristic". The Tribunal find this a surprising submission. The very nature of the term used is clearly and, in the Tribunal's view, unarguably related to race and this submission is utterly rejected

67. In respect of this specific incident therefore, the claim is upheld as against the second respondent. It would further be upheld as against the first respondent but subject to the first respondent's argument as to the statutory defence

68. The claim of direct discrimination is expressly pursued as a claim in the alternative should the claim of harassment fail and is, on that basis, dismissed accordingly

December 2020 incident

69. The Tribunal refers to the finding of fact that this incident did not occur as alleged

70. In such circumstances, in respect of this specific incident, all claims of harassment and direct discrimination fail

Reasonable steps

71. The Tribunal notes the following guidance from the case of **Allay v Gehlen [2021] IRLR 348***:*

> *"The starting point is to consider whether the employer took any step or steps to prevent the harassment. In considering the reasonableness of any steps taken, the analysis will include consideration of the extent to which the step or steps were likely to prevent harassment. For example, it is not sufficient to ask if there has been training, consideration has to be given to the nature of the training and the extent to which it was likely to be effective …*
>
> *Once the Employment Tribunal has considered what if any steps have been taken by the employer, the Employment Tribunal should consider whether there were any other reasonable steps that [the employer] should have taken …*
>
> *The employer has to establish that they have taken all reasonable steps, which clearly is a high threshold."*

72. Given the findings of fact, the relevant timeframe for the Tribunal to consider is that leading up to July 2020. As the Tribunal has found this effectively to have been a one-off incident, it does not fall to the Tribunal to consider the appropriateness or otherwise of the manner in which the first respondent dealt with the incident but rather the steps it took (and could additionally have taken) up to that point to prevent such conduct

73. The claimant accepts the factual evidence of the steps relied upon by the first respondent but does not concede they amount to all reasonable steps having been taken

74. The claimant argues that there is no direct reference within the mandatory training to not referring to co-workers with racial slurs behind their backs. The Tribunal does not accept this as a reasonable step but rather overly specific and not something that would be expected to be seen in such training. The mandatory training , in the Tribunal's view, is sufficiently – and reasonably – clear that conduct of this nature is unacceptable

75. The claimant further argues that such training is stale. Again, this is rejected by the Tribunal. The Tribunal considers three yearly training to be reasonable particularly given the size of the first respondent and its reliance upon public funding

76. The principal emphasis of the claimant is upon the reaction to and steps taken by the first respondent in response to the July incident. As found by the Tribunal, this cannot be relevant given the Tribunal's findings

77. Looking at the steps taken in the round, and acknowledging that there is a high threshold, the Tribunal is satisfied that all reasonable steps to prevent the conduct that occurred in the July incident had been taken and accordingly the statutory defence succeeds

78. Nothing further has been identified, either by the claimant or the Tribunal, which reasonably should have been taken

Other proceedings

79. As will be clear from these Reasons, the Tribunal is aware that the second respondent was dismissed by the first respondent by reason of gross misconduct arising out of these allegations which, as stated, have been accepted by the first respondent

80. The Tribunal emphasises that, although passing reference has been made to aspects of both the internal investigation and subsequent disciplinary hearing, it has not been relevant to these proceedings for the full facts arising out of the internal process to be considered. The allegations presently to be determined require the Tribunal to come to its own factual findings. The second respondent's claim of unfair dismissal will fall to be considered on its own merits

Remedy

81. The matter was, with the agreement of the parties, provisionally listed for a Remedy Hearing on 20 March 2023 and such hearing will now proceed unless the parties indicate in the interim that terms of settlement have been agreed

_____

Employment Judge B Hodgson

Date 13 March 2023

JUDGMENT SENT TO THE PARTIES ON

14 March 2023

FOR THE TRIBUNAL OFFICE