



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Z Khan

**Respondent:** Mibelle Ltd

**HELD in person at Leeds**

**ON: 28, 29 and 30 March 2023**

**BEFORE:** Employment Judge Davies

**Members:** Ms S Scott

Mr K Smith

## **REPRESENTATION:**

**Claimant:** In person

**Respondent:** Ms K Sheridan (counsel)

**JUDGMENT** having been sent to the parties on 4 April 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

# REASONS

## **Introduction and procedural matters**

1. These were claims of race discrimination, victimisation and breach of contract brought by the claimant, Mr Z Khan, against his former employer, Mibelle Ltd. The claimant represented himself and the respondent was represented by Ms Sheridan (counsel). The Tribunal heard evidence from the claimant, and from Ms Akhtar and Ms Ahouangonou on his behalf. For the respondent, the Tribunal heard evidence from Mr Caballo, Ms Webster, Mr Colton and Mr Green. There was an agreed file of documents.
2. It is necessary to set out some of the procedural history leading to today's hearing. The claimant presented his claim on 14 June 2022. There was a preliminary hearing before Employment Judge Cox on 31 August 2022. EJ Cox made clear case management orders. The claimant had explained to her the complaints he was advancing and she set them out clearly in her case management order. She listed the final hearing for January 2023.

3. On 1 November 2022, the respondent made an application, because the claimant had not complied with EJ Cox's order to disclose documents. He was ordered to do so by 9 November 2022. The respondent made a further application on 11 November 2022, this time for the claim to be struck out because the claimant still had not complied with the order for disclosure. On 6 December 2022 the claimant was warned that his case might be struck out if he did not comply. On 14 December 2022 he wrote to explain that the delays in complying with the case management orders had been caused by a bereavement and because he was suffering from some mental health difficulties. He referred to a solicitor "going AWOL on" him. That led to the final hearing being postponed, by order dated 5 January 2023. New dates for complying with the case management orders were given.
4. The next contact the Tribunal had was on 11 February 2023, when Ms Cooper, the respondent's solicitor, copied the Tribunal in on an exchange of emails about the exchange of witness statements. That exchange was as follows. At 9.46am on 10 February 2023, Ms Cooper emailed the claimant to say that she was ready to exchange witness statements and to ask him what time he wanted to exchange statements. He replied at 10:19am saying, "If yours are ready send them. I'll send you mine by tonight. My barrister is just reviewing them currently." Ms Cooper replied at 10:31am explaining to the claimant that the practice was to exchange statements at the same time and asking if it could be done by 5pm. He replied saying that he would not agree a time, he would send them by the end of the day and he was not sure when he would get them back. Ms Cooper replied making it clear that she would be in a position to exchange statements before 5pm but not after. She asked the claimant to let her know when he was ready, so that statements could be exchanged.
5. That correspondence was complete by 10:49am. At 11:56pm the claimant emailed his witness statements to Ms Cooper. At 6:52am the following day, she therefore copied the Tribunal into the above exchange. She attached the respondent's witness statements. At 9:42am the claimant applied for the respondent's response to be struck out, because its witness statements had been provided late. He complained about Ms Cooper insisting that the statements should be exchanged at the same time and said that he would not be accepting them. He wrote that he believed that Ms Cooper was trying to get an advantage in the case by viewing his statements first, as she did, and then altering her statements accordingly. He pointed out that nothing was even time stamped on her documents.
6. Perhaps unsurprisingly, the application for the response to be struck out was refused by the Tribunal in peremptory way. This Tribunal noted that the claimant admitted in cross-examination that he was lying when he told Ms Cooper that a barrister was reviewing his witness statements. The claimant also accepted in cross-examination that accusing a solicitor of deliberately trying to take advantage and then altering the respondent's statements was a very serious allegation to make. There was no basis for it. It is absolutely clear from the exchange of emails that the respondent had made proper attempts to exchange witness statements at the start of the day, and had its witness statements ready in anticipation. The claimant was evidently willing to make a serious allegation, for which he had no evidence or foundation, and he stuck to that in cross-examination. Indeed, it seemed to the Tribunal that it was the claimant who was trying, dishonestly, to obtain an advantage. Counsel submitted that that was relevant to the complaints in these proceedings. We return to it below.
7. Returning to the procedural history, the Tribunal also noted that on 27 February 2023 the respondent made a number of applications, including an application for full

disclosure of a text message that the claimant had only disclosed partially. He had redacted some words. The claimant was ordered to disclose the full message. When he subsequently produced it, it became clear that he had deleted an expletive that he had used to describe colleagues. We return to that below as well.

8. The claimant wrote to the Tribunal asking when his witnesses should give evidence. On 15 March 2023, I made an order explaining to him that it was likely to be the first or second day of the hearing that his witnesses gave evidence. He did not give any indication that his witnesses would not be attending.
9. On 27 March 2023 the respondent applied for the claim to be struck out because the claimant had not produced a witness statement for himself. That was dealt with by this Tribunal at the start of the hearing on the 28 March 2023. By that time the claimant had produced a statement for the first time. That statement gave a much more detailed account of the events the subject of the claim, but also made new allegations and gave evidence about other events that he had not previously mentioned. The Tribunal decided that it was not in the interests of justice to strike out the claim. A fair hearing was still possible if the new witness statement was admitted to the extent that it gave evidence about the background, matters relevant to drawing inferences and complaints that were already pleaded, but not admitted to the extent it made new allegations or gave evidence about new events. The respondent is represented by counsel. It was clear that there would be enough time for her to read and then address in cross-examination the greater detail of the existing claims. Those matters had been dealt with by the respondent's witnesses in their statements. The respondent was therefore in a position to deal with the more detailed evidence about matters in the pleaded case. However, the respondent was not in a position to deal with the evidence about wholly new allegations or events. It had not had the chance to identify relevant documents or witnesses. The Tribunal found that it would not be consistent with the overriding objective to postpone the hearing to allow that to be done. That would give rise to delay and expense and the balance of fairness and prejudice rested in favour of excluding that new evidence.
10. The claimant had not made any arrangements for his witnesses to attend the hearing. He told the Tribunal on the first day that they would have been able to attend by CVP but not in person, so we gave him the opportunity to find out whether they were able to attend by CVP the next day. They were and the Tribunal agreed to allow them to do so. We ensured that the claimant sent them copies of the documents overnight.
11. The only other procedural matter to which we need to refer, is that one email referred to in Ms Webster's witness statement was not included in the file of documents. The Tribunal queried that when she gave her evidence. She made clear that she had the email available. She could have produced it but had not been asked to do so. It was produced overnight. The Tribunal was told that that it had not been disclosed by oversight. The claimant did not object and the email was admitted in evidence by agreement.
12. In his closing submissions the claimant made new allegations about disclosure and other documents. These points had not been raised before. A careful review of the Tribunal file shows that no application for disclosure has been made to the Tribunal at any time by the claimant.

## **Claims**

13. I have referred to Employment Judge Cox's case management order. She set out clearly the claimant's complaints in these proceedings. They were:

### **Direct race discrimination**

- 13.1. The claimant alleges that on 13 April 2022 Ms Webster engineered his dismissal by falsely stating to her colleagues that the claimant had resigned during a conversation with her on that day. He says this was race discrimination because he is “non-white.”
- 13.2. In support of his allegation that Ms Webster acted in this discriminatory way, he says that:
  - 13.2.1. In early April 2022 Ms Webster had refused to allow Ms Akhtar, a person of colour, enhanced maternity pay that she had given to Ms Payne and Ms Hawes (both white).
  - 13.2.2. Ms Webster expected Ms Akhtar and Ms Ahouangonou, a person of colour, to complete paperwork for new starters but did not expect Ms Payne to do so.
- 13.3. The claimant further alleges that Mr Colton wrote him an email on 14 April 2022 accepting his resignation without first checking with the claimant if he had in fact resigned. He says that this was direct race discrimination because he is “non-white.” He does not allege that Mr Colton knew that Ms Webster was lying about the claimant having resigned.

### **Victimisation**

- 13.4. The claimant also alleges that Ms Webster engineered his dismissal because she knew that at the end of March 2022 he had had a conversation with Mr Green, in which he told Mr Green that he needed to take action against Ms Webster because she was discriminating on racial grounds against Ms Ahouangonou and Ms Akhtar in the ways set out above.

### **Notice pay**

- 13.5. The parties agree that the claimant was entitled to 12 weeks’ notice of dismissal. The claimant alleges that Mr Colton’s email of 14 April 2022 effectively summarily dismissed him and he claims damages for that breach of contract.

### **Issues**

14. The issues for the Tribunal to determine are therefore:

#### **Direct race discrimination**

- 14.1. Did Ms Webster engineer the claimant’s dismissal by falsely stating that he had resigned on 13 April 2022?
- 14.2. Did Ms Webster refuse to allow Ms Akhtar enhanced maternity pay that she had given to Ms Payne and Ms Hawes?
- 14.3. Did Ms Webster expect Ms Akhtar and Ms Ahouangonou to complete paperwork for new starters that she did not expect Ms Payne to complete?
- 14.4. Did Mr Colton write the claimant an email on 14 April 2022 accepting his resignation without first checking with the claimant if he had in fact resigned?
- 14.5. If it happened, was Ms Webster’s conduct on 13 April 2022 and Mr Colton’s conduct on 14 April 2022 less favourable treatment of the claimant?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's. If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated.

14.6. If so, was it because of race?

**Victimisation**

14.7. Did the claimant tell Mr Green at the end of March 2022 that he needed to take action against Ms Webster because she was discriminating on racial grounds against Ms Ahouangonou and Ms Akhtar in the ways set out above?

14.8. If so, was that a protected act?

14.9. If so, did Ms Webster engineer the claimant's dismissal by falsely stating that he had resigned on 13 April 2022 because the claimant did a protected act?

**Notice pay**

14.10. Did the respondent dismiss the claimant without notice in Mr Colton's email of 14 April 2022?

**Findings of fact**

15. Mibelle Ltd is part of a multi-national group of companies, Mibelle Group, specialising in developing, producing and marketing well-being, health and beauty products. It has a manufacturing site in Bradford, where its human resources ("HR") function is also based. The claimant started working for the respondent as an HR administrator and payroll administrator on 26 April 2021. He describes himself as "non-white." His job was to do the payroll and to provide administrative HR support to Ms Gallagher, the HR manager. The head of HR was Mr Green.
16. Ms Webster was employed by the respondent as an HR advisor on 11 October 2021. Initially that was on a fixed-term contract, as maternity cover for Ms Gallagher. During that fixed-term, Ms Webster was contacted by a previous employer and offered a permanent role. She accepted it and handed in her notice. However, Mr Green wanted to keep her at the respondent, so he made a case and obtained approval to offer her a role as a permanent HR advisor. She was appointed to a permanent HR role in January 2022.
17. Ms Webster describes herself as having dual heritage. Her grandfather came to the UK from Jamaica and she told the Tribunal that her grandfather, her mother and other family members had told her throughout her life of the horrendous discrimination that they had faced in the 1950s and 60s. Her grandfather still talks about it. Ms Webster herself has been on the receiving end of discrimination, as has her partner, who is a person of colour, and her own daughter. Ms Webster said, "I would not wish discrimination of any kind for any reason on my worst enemy." We found her evidence about that in writing and in cross-examination compelling. By itself, of course, that does not mean that she did not discriminate against others, but we were quite satisfied that she would not and did not deliberately set out to do so.
18. Mr Green gave evidence that the claimant was not happy about Ms Webster getting the permanent role and Ms Webster agrees. They said that the claimant's attitude to Ms Webster changed when that happened. Mr Green's evidence was that the claimant took a week off work and went AWOL, having threatened to go sick to see

how the respondent coped without him. He was reminded repeatedly during the hearing that if he did not ask questions about parts of the witness statements that he disagreed with, the Tribunal would assume that he accepted that evidence as accurate. We gave him a chance at the end of questioning Mr Green to go through Mr Green's short statement and check. He did not disagree with Mr Green's evidence on this point and the Tribunal accepted it.

19. In doing so, the Tribunal noted that the claimant accepted in cross-examination that he was unhappy about not having the chance to apply for the role. He did not dispute that he had been absent for a week. He told us that his unhappiness was with Mr Green, not with Ms Webster. Mr Green accepted in cross-examination that the claimant said to him at the time that it "wasn't Ms Webster's fault" but he said that the claimant also told him that he "couldn't bear to look at Ms Webster or be in the same room as her." The Tribunal accepted that evidence. We found that the claimant's attitude towards Ms Webster did change. On his own admission he was very unhappy about not having the chance to apply for a permanent role and we accept that he told Mr Green that he could not bear to be in the room with Ms Webster or look at her and as a result he took a week off work without authorisation. That changed attitude towards Ms Webster is the context for the events that followed.
20. This seemed to the Tribunal to be part of a theme. It appeared that the claimant had a perception that he was at the same level in terms of his HR role as Ms Webster, when he was not. She was a qualified HR advisor. He did some HR administration work. He aspired to do his CIPD training, but he had not started it yet.
21. The claimant's case is that in early April 2022, Ms Webster refused to allow Ms Akhtar enhanced maternity pay, which she had given to Ms Payne and Ms Hawes. In the claimant's words, Ms Akhtar is "non-white" and Ms Payne and Ms Hawes are "white." The claimant also says that Ms Webster expected Ms Akhtar and Ms Ahouangonou to complete paperwork for new starters, but did not expect Ms Payne to do so. Ms Ahouangonou is also, in the claimant's words, "non-white." The claimant says that he spoke to Mr Green about this alleged discrimination by Ms Webster at the end of March 2022. He says that either the making of that complaint, or race discrimination, led Ms Webster falsely to claim that he had resigned on 13 April 2022 when he had not. The respondent disputes the claimant's case. The Tribunal made the following findings about those matters.
22. The Tribunal started with the question of maternity pay. Ms Webster's evidence was that Ms Payne had a prior pregnancy, and the HR manager before Ms Gallagher had previously agreed an enhanced maternity package for her. When she had a second pregnancy, she asked for the same package and Ms Webster was asked to draft a letter. Ms Webster was informed about the package and she queried it with Mr Green. She asked why they were going outside policy, because she (Ms Webster) regarded that as a problem. Mr Green raised the matter with Mr Tourlé, Ms Payne's line manager, and was told about the previous agreement. Mr Tourlé had agreed to pay the same package this time. Ms Webster's only role was to draft the letter, based on decisions taken by others. Ms Payne informed Ms Hawes about the enhanced package. She therefore requested the same enhanced package when she became pregnant. Ms Webster's evidence to the Tribunal was that this proved her point about not going out of policy. Her evidence was that it was not her decision to do so, and she would not do it herself. She did not make the decision in Ms Payne's or Ms Hawes's case. Further, she had no idea that Ms Akhtar was pregnant until after Ms Akhtar had been made redundant. Nobody had asked her to do a maternity letter or

anything else for Ms Akhtar. The Tribunal accepted Ms Webster's evidence about this. Such documentary evidence as there was supported it, for example emails in relation to Ms Payne's enhanced package being queried. Ms Akhtar did not contradict what Ms Webster said about her case. The Tribunal had no hesitation in accepting that decisions were made prior to Ms Webster joining the company about offering enhanced pay outside the policy. It was nothing to do with her and she would not have done it. When was instructed to write an appropriate letter to Ms Payne, she raised a concern about it. She had no idea that Ms Akhtar was pregnant and no involvement in anything to do with her pregnancy. There was absolutely nothing to suggest any form of discrimination.

23. Turning to the question whether Ms Webster required "non-white" managers to complete additional paperwork, Ms Ahouangonou gave evidence about this. She describes herself as black African. She said that when she was recruiting nine new team members Ms Webster insisted that she follow a time-consuming paperwork process involving obtaining authority to recruit, and that she then had to carry out onerous probationary reviews at specified intervals. Ms Ahouangonou said that white managers were not required to do that. She was asked in cross-examination to give details of which white managers had not been required to complete paperwork or carry out the probationary reviews. She said that when she herself joined the company in October 2021, she was not given probationary reviews in about December 2021 or January 2022. She also identified Ms Akhtar having to complete the paperwork. Ms Akhtar confirmed that she was required to complete the paperwork and she said in her witness statement that other line managers were not doing it. She named Tim, Tony, Amy, Amy and Helen. She said she raised this with the claimant, and Ms Webster said that it was something she had introduced. Ms Akhtar said that she did not receive any email telling her about a new process.
24. Ms Webster's evidence was that when she was acting as maternity cover she was just covering for Ms Gallagher and doing what was required. She came to realise that processes were not in place or were not being properly followed. When she was appointed to a permanent role, she was able to start reviewing the processes and introducing changes. She intended to start at the beginning of the employment process and work through to the end, so she started with the authority to recruit process followed by probation. Working with the Financial Controller and Mr Green, she overhauled the policies and then set about introducing them and seeking to ensure compliance. As a result, an email about the new authority to recruit process was sent to all managers on 10 February 2022. That was the email that was produced on the last day of the hearing, after Ms Webster had given her evidence that it could be provided. The email was entirely consistent with her account.
25. The Tribunal also saw an email exchange between Ms Akhtar and Ms Webster on 7 and 8 April 2022. Ms Akhtar raised a concern, asking Ms Webster to make sure that other managers followed the same authority to recruit process as her. She said that they had not done so in their recent dealings with Ms Webster, and she asked to understand the process and align all the managers. Ms Webster replied, thanking Ms Akhtar for bringing this to her attention, and asking for all the examples of managers who had not followed the process, so that she could ensure that they did so moving forward. Ms Akhtar replied to say that she was sure Ms Webster had it on record. It could be cross-checked against the recent recruits. She did not provide any names. Ms Webster replied a while later to say that she had now thoroughly checked her records for the recruitment she had been involved in, and that she had "authorities to

recruit” for all of them. She told Ms Akhtar that the form had been reviewed and reissued on 10 February 202. We noted that Ms Webster then issued a reminder to everybody about the policy on 11 April 2022, just after this exchange, attaching another copy of the process.

26. The Tribunal again had no hesitation in accepting Ms Webster’s evidence. The contemporaneous emails were completely consistent with it. Ms Akhtar and Ms Ahouangonou may have seen other managers not complying with the authority to recruit process or the probationary review process, but the context is clearly that there had been a history of people not complying with these processes and that is precisely what Ms Webster was trying to change. What was missing was any evidence to show that Ms Webster was being partial in doing so. Ms Ahouangonou’s own experience pre-dated the changes Ms Webster was implementing. When Ms Akhtar raised the concern about the authority to recruit process a few weeks after Ms Webster had circulated the revised policy, Ms Webster asked for names. Ms Akhtar did not provide them. Ms Webster therefore checked her own records and also sent a reminder to everybody with a further copy of the new policy.
27. The third plank of the claimant’s case is the alleged conversation between him and Mr Green in which he complained that Ms Webster was discriminating. The claimant told Employment Judge Cox at the preliminary hearing that he spoke to Mr Green at the end of March 2022, and told him that he needed to take action against Ms Webster because she was discriminating on racial grounds against Ms Akhtar and Ms Ahouangonou. In his witness statement, he said that he held a meeting with Mr Green at which he raised concerns and told Mr Green he was going to whistleblow about this. Mr Green was about to go on some compassionate leave, and he said that he would discuss it with the claimant when he came back. In cross-examination, the claimant accepted that it cannot have been the end of March he spoke to Mr Green, because Mr Green was absent before the end of March. He said that must have been a mistake. Mr Green’s evidence was that there was no such conversation. He said that he was off sick at the end of March, but had been absent for two weeks before that on compassionate leave. He did say that the claimant told him that Ms Ahouangonou and Ms Akhtar were coming to him for HR advice and Mr Green said that he told the claimant to be careful because he did not want him giving incorrect advice. There were lots of issues with both of those managers at the time, which Ms Webster was sorting out, and he did not want crossed wires. He said that he did not ask the claimant why those managers were coming to him. He was adamant that no complaint of discrimination was made or referred to.
28. The Tribunal preferred Mr Green’s evidence that the claimant did not raise a discrimination complaint with him or refer to one. First, in general terms we found the claimant a much less credible witness. For example, we have referred to his admission that he had lied to the Tribunal about having a barrister. We found his evidence changeable and confused in many respects, and it seemed to us that the reason for that is because it was not accurate. On the other hand, the Tribunal found Mr Green’s evidence clear and consistent.
29. The Tribunal also took into account that the documents from the time make absolutely no mention of the claimant raising these concerns with Mr Green. We took particular note of the exchanges of text messages between the two of them, which were friendly and supportive on Mr Green’s part. There is no mention in those text messages of the claimant raising concerns about discrimination or of his being concerned that he was being targeted because he had done so. The Tribunal also placed particular weight on



the documents recording the investigation that was subsequently carried out by Mr Caballo (see below). During that investigation, the claimant put forward various explanations of why he thought Ms Webster had lied about him resigning, but this was not one of them. The Tribunal noted in particular that in one email to Mr Caballo the claimant said, "Please consider the fact that senior managers from brands have put in complaints about Ms Webster to [Mr Green] about her partial and victimisation behaviour to which I'm unsure whether they raised them officially now or not but had refused to go to [Ms] Webster and only deal with me, causing [Ms Webster] to further dislike me and get me out of the company." In the context that he was explicitly drawing Mr Caballo's attention to complaints from Ms Akhtar and Ms Ahouangonou, and to his uncertainty about whether they had raised them officially with Mr Green, it seemed to the Tribunal implausible that if he had himself raised such complaints with Mr Green, the claimant would not have said so in this email.

30. The Tribunal therefore found that the claimant did not speak to Mr Green to allege or report discrimination by Ms Webster. It follows that Ms Webster could not be aware of any such conversation.
31. Ms Webster did say in cross-examination that she was aware that Ms Akhtar had raised a complaint about a different matter, namely Ms Webster asking Ms Akhtar during a meeting whether she had experience as a manager. Ms Webster's evidence to us was that that was a normal thing for HR to ask, and the purpose of such a question was to see whether training or support could be offered. The Tribunal did not need to resolve that matter. We note and accept that Ms Webster was aware that the complaint had been made, but was not aware that it had been identified as a complaint of discrimination.
32. That leads us to the events of 13 April 2022. There is no dispute that the claimant was involved in some remote training with Mr Blake that day. Ms Webster at some point moved to a different office, because her work was disturbing Mr Blake. There is also no dispute that the claimant had been given a 10% pay rise and had come to know about that a few days earlier. The context, as Mr Green explained, was that there was a reluctance to offer any pay rises at all, but it was necessary to increase pay for those on the lowest rates of pay to keep in line with the national minimum wage. In that context, Mr Green had successfully argued that those closest to that pay bracket, including the claimant, should also get a bigger pay rise, in order to maintain the differential between the different grades. Everybody else was then given a 1.5% pay rise.
33. Ms Webster's evidence was that at about 11.30am the claimant came through and asked her why new employees were getting a 1.5% pay rise. She told him it had been approved by Mr Caballo and Mr Muller. He said that it was totally wrong and she told him that it was not her decision. He said, "Fuck this shit I'm handing my notice in with immediate effect. I don't need this shit. I've not been happy for a while." Ms Webster said that she was very surprised. The claimant said that he was going to contact the lead HR business partner of the group. Ms Webster told him not to be hasty. He said, "Nah Jen. I don't need this fucking shit. I should be paid more than this shit." He went on to say that Mr Green had never done anything for him and that he had told Mr Green to benchmark his role. He said that he did more than administration and that his role was more of a stand-alone payroll role. Ms Webster's evidence was that she did not really disagree or agree with the claimant. She said that he then showed her what looked like an advert from Indeed for a role paying between £28k and £35k and said that he had been offered a new job. She asked if he had applied for it and he said

that he had been headhunted and did not need to stay at the respondent. He referred to being overlooked when she had been given her permanent role. Ms Webster said that during the conversation the claimant was visibly angry and that she was quite shaken by it. She said that he then left the premises shortly after 11.30am. She believed he had left his employment, as he had said that he was leaving with immediate effect. Ms Webster contacted Mr Colton by Teams and told him that the claimant had resigned and left with immediate effect. Then she made a Teams call to Mr Colton. She said that she was shaking and Mr Colton told her to come up for a cup of tea. She also called Mr Johnson to make sure there were arrangements in place for the payroll.

34. The message Ms Webster initially sent to Mr Colton said, “[Mr Khan] is handing in his notice.” It was sent at 11:29am. The claimant makes great play about the wording of that message, but the Tribunal found that it was entirely ambiguous. The claimant “is handing his notice in” could mean “has handed his notice in” or “is handing his notice in now” or “is going to hand in his notice.” The Tribunal did not find that the wording of the message demonstrated that the claimant had not handed his notice in.
35. Ms Webster’s evidence was that she went to Mr Colton’s office and whilst she was there she got a Teams message from the claimant saying, “I’m going home. I don’t feel well. Not sure when I’ll be in next. Will hand in sick note after my first week self-cert. Can you assist Robert Blake in training?” That message came through at 11:41am. At 11:52am, having discussed it with Mr Colton, she replied, “Hi Z... what shall I put down as reason for sickness?” At 11:53am the claimant sent a series of replies: “I’m not telling you”, “for that reason”, “I’m telling you just to make you aware. I will discuss reasons with my manager which you are not my manager. [Mr Green] said “just let Jen know if you’re going to be off and she will do likewise.” Mr Colton’s evidence supported what Ms Webster said. Ms Webster added that later that day she spoke to Ms Durwood, group general counsel, and reported the claimant’s resignation to her.
36. The claimant’s evidence was that he was doing some training. He took a break at 11am and told Ms Webster that he was going to his car for some fresh air. He went and sat in his car. He sent Mr Green a text message, telling him he was not feeling well and had sent him a detailed email. The claimant said in his witness statement that the email was a complaint that his salary increase was low and that other jobs paid better; it included screenshots of other jobs on Indeed. The claimant said in his witness statement that he had discussed his pay rise and other better paid jobs with Ms Webster, but not that day. He said that Mr Green replied to his text message saying that was fine and to let Ms Webster know, so he sent Ms Webster a message telling her that he was sick. That led her to ask the reasons and he was not willing to provide them.
37. The Tribunal saw the messages that the claimant sent to Mr Green. They were sent at 12:56pm, i.e. more than an hour later and *after* he had messaged Ms Webster. It is clear that the account the claimant gave in his witness statement was not accurate. The claimant’s messages to Ms Webster were sent between 11:30am and midday, before he messaged Mr Green and, on his account, sent him an email raising complaints about his pay increase and the amount he was paid.
38. The Tribunal preferred Ms Webster’s account. In particular:
  - 38.1. Ms Webster’s account was consistent with the documents, the timings, notes that were made at the time, and what she reported to Mr Colton at the time. By

contrast, the claimant's account was not consistent with the documents – the timings do not make sense, and the sequence of events was not as he described it.

- 38.2. Shortly after leaving the building, the claimant was expressing concerns about his payrise to Mr Green. That was the very matter that Ms Webster said he had been raising with her and angry about when he resigned.
  - 38.3. The Tribunal noted that when the claimant subsequently messaged Ms Webster to say that he was off sick, Ms Webster asked him what the reason was rather than responding to say that he could not be off sick because he had just resigned. Ms Webster and Mr Colton both said that they were seeking to de-escalate the situation. Mr Colton said that he was trying to create some space and time. The Tribunal accepted that sensible and plausible explanation.
  - 38.4. The Tribunal also noted that the claimant wanted to collect his laptop. He asked his colleague to collect it for him and then went to collect it himself when that was not permitted. Again, the Tribunal concluded that the fact that the claimant wanted his laptop did not mean that events did not happen in the way Ms Webster described. It might mean, for example, that the claimant regretted what he had said or that he wanted to access his laptop for whatever reason.
  - 38.5. The Tribunal took into account the claimant's presentation in the Tribunal. He was very quick to become agitated and raise his voice when he was cross-examining the witnesses. He had to be reminded more than once by the Tribunal to lower his voice and lower his tone when questioning the witnesses.
  - 38.6. The claimant had previously made a threat to go AWOL and see how the respondent coped. Mr Green's evidence was that he was not surprised that the claimant resigned. He felt that he was acting on a threat this time.
  - 38.7. Finally on 5 May 2022 the claimant sent a message to Mr Lambat, when they were discussing the arrangements for collecting his laptop. In that message he described his colleagues as "lying motherfuckers". That was the message that he had redacted and only disclosed with that expletive included when ordered to do so shortly before the hearing. It shows that he was capable of using that language to a colleague about other colleagues, as Ms Webster said he had done on 13 April 2022.
39. Returning to the events, Mr Colton's evidence was that when Ms Webster came to see him on the 13 April 2022, he believed that the claimant had resigned in the way that she described. He repeated that evidence in cross-examination. He said that his first question was, "What's his notice period?" because he was aware that there was a payroll run to be done. Ms Webster told him that the resignation was with immediate effect. He said that he had no doubt that the claimant had resigned. He thought it was because the claimant felt undervalued when he learnt that other people were getting a payrise. In the afternoon, Mr Lambat contacted Ms Webster, asking to collect the claimant's laptop. Mr Colton said that he was concerned about the claimant's state of mind. He did not want him to have access to the payroll, so he gave the instruction, which Ms Webster relayed, that a colleague could not collect the laptop on the claimant's behalf. Later on, he was told that the claimant was on the premises wanting to collect the laptop. Mr Colton met him, found that he was still "disgruntled" and therefore, so as not to escalate matters, he told him that he could not have the laptop because they did not encourage working while on sick leave.

40. The next day, 14 April 2022, Mr Colton emailed the claimant just before midday setting out an account of what he had been told by Ms Webster had happened the previous day and accepting the claimant's resignation without notice. That account was again consistent with the evidence Ms Webster gave to the Tribunal. Mr Colton and the claimant then exchanged further emails and had some conversations. The claimant emailed Mr Colton, setting out his notes of one of those conversations. The claimant recorded that he had told Mr Colton that he had not resigned, that he had accused Mr Colton of race discrimination because he had "taken Ms Webster's word for it", and that Mr Colton had twice suggested to him that he should revoke his resignation.
41. It is the claimant's case that the reason Mr Colton sent the email accepting his resignation without phoning him to check, is because, in his words, he is "non-white". Mr Colton's evidence was that that had nothing to do with it. He accepted Ms Webster's account because she gave a detailed summary shortly after it had happened. He saw in person how she was impacted. He had no doubt that there had been a clear and emphatic resignation with immediate effect and that was in his view backed up by the fact that the claimant had left immediately. Mr Colton confirmed that evidence in cross-examination. He said simply that he believed what he was told on the day, Ms Webster was a trusted colleague and the claimant's race had nothing to do with it. The Tribunal accepted that evidence. It was clear that there was no basis whatsoever for concluding that race had anything to do with Mr Colton's decision. The Tribunal noted that the claimant's case was that Mr Colton disbelieved him because he is a person of colour, but Ms Webster is a person of colour too. The claimant identified no rational basis for contending that she was believed and he was not because he is a person of colour in those circumstances. It is therefore difficult to see how the claimant's case could be sustainable in any event, but for the avoidance of doubt the Tribunal had no hesitation in accepting Mr Colton's evidence as truthful.
42. We note that after the exchanges on 14 April 2022, Mr Colton instigated an investigation into whether the claimant had actually resigned or not. Mr Caballo, who conducted it, concluded in due course that he had. As we have noted, Mr Colton had twice advised the claimant to revoke his resignation. Mr Green was in contact with him by text message, despite Mr Green himself being on sick leave, and he also advised the claimant to retract the resignation even if he said he had not resigned. The claimant accepted in cross-examination that he could have done that, but he chose not to. It was not until 5 May 2022 that Mr Caballo concluded his investigation. At no point before that did the claimant withdraw his resignation, or say that he had acted hastily or because he was not well. It seemed to the Tribunal he could have done so during that period too.
43. In summary, the Tribunal found that by his words and conduct the claimant resigned without notice on 13 April 2022 at about 11:30am. It was 24 hours before that resignation was accepted, so he had a chance to cool off, but he did not try to change his position during that 24 hour period. There was a further period after 14 April 2022 during which the claimant could have sought to withdraw the resignation, but chose not to. The Tribunal was therefore satisfied that there was a resignation without notice validly accepted by the respondent.

### **Legal principles**

44. Claims of discrimination and victimisation are governed by the Equality Act 2010. Direct discrimination is dealt with by s 13 and s 39, and victimisation by s 27 Equality

Act 2010. The Equality and Human Rights Commission's Code of Practice on Employment is relevant, and the Tribunal considered its provisions.

45. The burden of proving discrimination or victimisation is governed by s 136 Equality Act 2010. There is authoritative guidance about the burden of proof in *Igen Ltd v Wong* [2005] ICR 931. That guidance remains applicable: see *Royal Mail Group Ltd v Efobi* [2021] ICR 1263. In essence, the guidance outlines 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 had committed an unlawful act of discrimination or victimisation against the complainant. That means that a reasonable Tribunal could properly so conclude, from all the evidence before it. 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, as the Supreme Court again made clear in *Efobi*, it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish the unlawful act. But they have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other.
46. Direct discrimination arises where (1) an employer treats a person less favourably than it treats or would treat others and (2) the difference in treatment is because of a protected characteristic. In answering the first question the Tribunal must consider whether the employee was treated less favourably than an actual or hypothetical comparator whose circumstances were not materially different. The second question entails asking why the employee received less favourable treatment. Was it because of a protected characteristic or was it for some other reason? It is necessary to explore the mental processes of the employer, to discover what facts operated on his or her mind: see *R (E) v Governing Body of the Jewish Free School* [2010] IRLR 136, SC ("*JFS*"). The protected characteristic need not be the only or even the main cause of the less favourable treatment; it must be an effective cause: see e.g. *London Borough of Islington v Ladele* [2009] IRLR 154, EAT. It is not always necessary to answer the first and second questions in that order. In many cases it is preferable to answer the "reason why" question, first.
47. A person victimises another if he subjects him to detriment because he does a protected act or because the person believes he has done or may do a protected act. A protected act includes making an allegation that somebody has contravened the Equality Act 2010. As in direct discrimination, the protected act need not be the sole or main cause of the detrimental treatment; it must be an effective cause.

## Application of law to facts

48. The Tribunal's detailed findings of fact are set out above. Our conclusions on the issues can be very briefly stated because this is a case in which they turn on the findings of fact. We deal with the issues in turn.

### Direct race discrimination

- 48.1. For the reasons given in the findings of fact, Ms Webster did not engineer the claimant's dismissal by falsely stating that he had resigned on 13 April 2022. The claimant did resign and walk out on that date.
- 48.2. For the reasons given in the findings of fact, Ms Webster did not refuse to allow Ms Akhtar enhanced maternity pay that she had given to Ms Payne and Ms Hawes. Ms Webster did not take the decision to award enhanced maternity pay

to Ms Payne and Ms Hawes. She questioned that decision when she found out about it. Ms Webster had nothing to do with Ms Akhtar's maternity pay. She did not know Ms Akhtar was pregnant.

- 48.3. For the reasons given in the findings of fact, Ms Webster did not expect Ms Akhtar and Ms Ahouangonou to complete paperwork for new starters that she did not expect Ms Payne or other white managers to complete. Ms Webster introduced amended procedures and sought to enforce compliance with them by all managers. When Ms Akhtar raised a concern with her, she took steps to try and identify managers who were not complying and to reinforce the requirement to comply with the revised policy again.
- 48.4. For the reasons given in the findings of fact, Mr Colton did write the claimant an email on 14 April 2022 accepting his resignation without first checking with the claimant if he had in fact resigned. However, it was not because of race.

**Victimisation**

- 48.5. For the reasons given in the findings of fact, the claimant did not tell Mr Green at the end of March 2022 that he needed to take action against Ms Webster because she was discriminating on racial grounds against Ms Ahouangonou and Ms Akhtar. He did not do a protected act. In any event, Ms Webster did not engineer the claimant's dismissal by falsely stating that he had resigned on 13 April 2022.

**Notice pay**

- 48.6. For the reasons given in the findings of fact, the respondent did not dismiss the claimant without notice in Mr Colton's email of 14 April 2022. The claimant resigned without giving notice and walked out on 13 April 2022. He did not withdraw his resignation, despite having the opportunity to do so, and it was accepted by the respondent. The respondent therefore did not breach the claimant's contract by dismissing him without notice. In fact, it was the claimant who was in breach of contract by resigning without giving notice.

**Employment Judge Davies**

**Date: 4<sup>th</sup> May 2023**

REASONS SENT TO THE PARTIES ON

**Date: 5<sup>th</sup> May 2023**

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FOR THE TRIBUNAL OFFICE

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