



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Ms Mary Phillips

v

**WKCIC Group t/a Capital City
College**

Heard at: Bury St Edmunds Employment Tribunal

On: 15th – 18th May 2023

Before: Employment Judge King

Members: Ms J Costley
Mr C Grant

Appearances

For the Claimant: Mr Ajay (counsel)

For the Respondent: Ms Jennings (counsel)

JUDGMENT

1. The claimant's claim for direct discrimination contrary to s13 Equality Act 2010 because of race is not well founded and is dismissed.
2. The claimant's claim for harassment related to race contrary to s26 Equality Act 2010 is not well founded and is dismissed.
3. The claimant's claim for victimisation contrary to s27 Equality Act 2010 is not well founded and is dismissed.

REASONS

1. This is the judgment of the Tribunal in the above matter. It was delivered orally to the parties at the conclusion of the hearing but the claimant requested written reasons which are now given.

2. Both parties were represented. The claimant was represented by Mr. Ajay of counsel and the respondent by Ms. Jennings of counsel. We heard evidence from the claimant. We heard evidence from E1, Matt Calvert (MC) (the investigating officer), Joanne Shanklin (JS), (the disciplining officer) and Ms Marshall (CM), (the appeal officer) on behalf of the respondent.
3. The claimant and respondent having exchanged witness statements in advance, prepared an agreed bundle of documents which ran to 250 pages. The page numbers of the bundle did differ from the PDF copy provided electronically.
4. We were also assisted by a video which was the two minutes of CCTV footage covering the photocopier incident below. There was no sound but the Tribunal were able to see what actually occurred. The video was before the respondent at the time it made its decision.
5. The respondent made an application to admit a witness statement of E1 that was late. The claimant did not expressly object but considered the timing to be unreasonable conduct. Having considered the matter at the outset, we decided to admit the witness statement as it was clearly relevant. The claimant had had the opportunity to consider it and provide instructions to those that represent her even though it was disclosed later than the directions provided. The claimant would also have an opportunity to cross examine that witness and challenge the evidence if it was before the Tribunal which would otherwise be seen from us solely on the papers. The parties agreed that the evidence was relevant as it was the witness statement of E1 who was involved in the photocopier incident.
6. The case was conducted over CVP. We were assisted by the respondent's helpful written submissions and the claimant's helpful oral submissions. At the outset, the claims were identified as direct discrimination because of race contrary to Section 13 Equality Act 2010, harassment related to race contrary to Section 26 Equality Act 2010 and victimisation contrary to

Section 27 of the Equality Act 2010. In terms of concessions, the respondent accepted that the claimant's email dated 2nd October 2020 was a protected act for the purposes of the section 27 claim.

The issues

7. The issues as to liability had previously been set out at the preliminary hearing and agreed between the parties. We had regard to these issues. During the course of the hearing a number of amendments were made to these issue issues. Firstly, it was agreed that the issue as to time was not relevant in this case and had indeed been left in the standard order in error. The respondent did not take the point as to time and the tribunal satisfied itself that there was no time point which would have impacted on its jurisdiction to hear the claim.
8. Secondly in relation to the issues at 4.13.1 and 4.13.2 in the preliminary hearing order of the agreed list of issues relating to the Acas code, these were not part of the claimant's case and therefore no findings of fact were made upon these matters.
9. On the third day of hearing evidence, the claimant withdrew allegation 4.11 which was part of the victimisation claim and this was the second detriment being the issuing of the 12-month disciplinary warning on the 13th January 2021. It was also identified with the parties during the hearing that there was an error in the dates of the list of issues at 4.9 and 4.10 in that both of these dates referred to matters of 2021 when in fact they should have been 2020. These were all agreed before we reached our conclusion. These were clearly typographical errors.
10. The remaining list of issues were adopted as agreed at the preliminary hearing and it is this list of issues upon which we have made our decision. The list of issues below has been amended by the above points with issues struck through that were withdrawn and the amendments are identified by [underline].

11. Turning to the witnesses, we were able to hear evidence from both the claimant and E1 in this matter. We did have to make assessments as to credibility and look at matters on the balance of probabilities as to what was more likely than not.
12. We were conscious that the events to which we had to make findings were approximately two and a half years ago now and therefore we placed particular relevance on and were assisted by the contemporaneous evidence at the time. Unfortunately with the passage of time, the evidence now that we are hearing is somewhat historical as can often be the case. This can impact on witness recollection.

Time Limits

13. ~~Were all the claimant's complaints presented within the time limits set out in sections 123(1)(a) and (b) of the Equality Act 2010 ("EQA")/ sections 23(2) to (4), 48(3)(a) & (b) and 111(2) (a) & (b) of the Employment Rights Act 1996 ("ERA")? Dealing with this issue may involve consideration of subsidiary issues including: whether there was an act and/or conduct extending over a period, and/or a series of similar acts or failures, whether it was not reasonably practicable for a complaint to be presented within the primary time limit; whether time should be extended on a just and equitable basis; when the treatment complained about occurred; etc~~

Direct discrimination because of race (s13 Equality Act 2010)

14. Has the respondent subjected the claimant to the following treatment:
 - 14.1 Issuing the claimant with a 12 month written disciplinary warning on 13th January 2021.

15. Was that treatment “less favourable treatment” i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others (“comparators”) in not materially different circumstances?
16. If so, was this because of the claimant’s race and/or because of the protected characteristic of race more generally?

Harassment related to race (s26 Equality Act 2010)

17. Were the comments by E1 on 1st October 2020 unwanted conduct related to race?
18. Was the allegation of assault by E1 made on 02/10 or shortly thereafter unwanted conduct related to race?
19. Was issuing the claimant with a 12 month written disciplinary warning unwanted conduct related to race?
20. Did any of the above have the purpose or effect of violating the claimant’s dignity or of creating an intimidatory, hostile, degrading, humiliating or offensive environment for her?

Victimisation – contrary to s27 Equality Act 2010

21. Were the claimant’s complaints about harassment by E1 in her statement on 2 October 2021 [amended to 2020] a protected act? [R conceded this was a protected act]
22. Was the allegation on or about 2nd October 2021 [amended to 2020] that the claimant assaulted E1 a detriment?
- ~~23. Was the 12 month disciplinary warning issued to the claimant on 13th January 2021 a detriment? [withdrawn by the claimant on the third day]~~

24. Were any of the detriment(s) above carried out because the Claimant carried out a protected act and/or because the Respondent believed that the claimant had done, or would do a protected act?

The Law

25. The law in this matter as is relevant to this case is as follows: it is set out in a number of places. The tribunal has had regard to Section 13, Section 26, Section 27, Section 39 and Section 136 of the Equality Act.

Discrimination

26. Race is a protected characteristic under s10 of the Equality Act 2010.

27. Direct discrimination is dealt with under s13 of the Equality Act 2010 as follows:

(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.*

(2)

28. Harassment is dealt with in Section 26 Equality Act 2010 as follows:

(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.*

(2) *A also harasses B if—*

(a) *A engages in unwanted conduct of a sexual nature, and*

- (b) *the conduct has the purpose or effect referred to in subsection (1)(b).*
- (3) *A also harasses B if—*
 - (a) *A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,*
 - (b) *the conduct has the purpose or effect referred to in subsection (1)(b), and*
 - (c) *because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.*
- (4) *In deciding whether conduct has the effect referred to 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.*

29. Victimization is dealt with in s27 Equality Act 2010 as follows:

- (1) *A person (A) victimises another person (B) if A subjects B to a detriment because—*
 - (a) *B does a protected act, or*
 - (b) *A believes that B has done, or may do, a protected act.*
- (2) *Each of the following is a protected act—*
 - (a) *bringing proceedings under this Act;*
 - (b) *giving evidence or information in connection with proceedings under this Act;*
 - (c) *doing any other thing for the purposes of or in connection with this Act;*
 - (d) *making an allegation (whether or not express) that A or another person has contravened this Act.*
- (3) *Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.*

30. Also relevant are s39 and s136 Equality Act 2010 which state as follows:

s39 Employees and applicants

- (1) *An employer (A) must not discriminate against a person (B)—*
 - (a) *in the arrangements A makes for deciding to whom to offer employment;*
 - (b) *as to the terms on which A offers B employment;*
 - (c) *by not offering B employment.*
- (2) *An employer (A) must not discriminate against an employee of A's (B)—*
 - (a) *as to B's terms of employment;*
 - (b) *in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;*
 - (c) *by dismissing B;*
 - (d) *by subjecting B to any other detriment.*
- (3) *An employer (A) must not victimise a person (B)—*
 - (a) *in the arrangements A makes for deciding to whom to offer employment;*
 - (b) *as to the terms on which A offers B employment;*
 - (c) *by not offering B employment.*
- (4) *An employer (A) must not victimise an employee of A's (B)—*
 - (a) *as to B's terms of employment;*
 - (b) *in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for any other benefit, facility or service;*
 - (c) *by dismissing B;*
 - (d) *by subjecting B to any other detriment.*

s136 Burden of proof

- (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.*
- (4) *The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.*

31. In addition to the statute, in the respondent's written submissions, the respondent referred us to a number of cases as follows:

Nagarajan v London Regional Transport [1999] ICR 877

Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285

Madarassy v Nomura International Plc [2007] IRLR 246

London Borough of Islington v Ladele [2009] IRLR 154

Richmond Pharmacology v Dhaliwal [2009] IRLR 336

UNITE the Union v Nailard [2018] IRLR 730

Owen & Briggs v James [1982] IRLR 502

Nagarajan v Agnew [1994] IRLR 61

32. The claimant's counsel largely agreed with the respondent's analysis of the law but there were some differences. We confirmed that we had had regard to the wording in the statute as opposed to the wording given by respondent's counsel within the submissions because we prefer to refer to the source of the law.

The facts

33. At the time of the incident and indeed the hearing, the claimant was still employed by the respondent. The claimant had been employed by the respondent since approximately 2003. She was an English for speakers of other languages (ESOL lecturer/tutor).
34. The claimant identified that she was born in London to South African parents living in exile in the UK and she identifies as British African. E1 was a colleague of the claimant and at the relevant time was also an ESOL lecturer. E1 is Polish. The claimant and E1 were work colleagues who in 2014 would socialise outside of work primarily with other colleagues from time to time.

35. It is not in dispute that their "relationship" soured towards 2014/2015. They kept their distance from each other. E1 gave evidence that this was because the claimant had asked her to submit end of year materials, (RAPA) for students she did not teach. E1 considered C to be unreasonable and this soured their "relationship". C felt that E1 had made racist marks towards the end of 2014 and felt it must be related to race as to why E1 distanced herself from the claimant. The claimant herself had already distanced herself from E1.
36. We turned then to three matters of historic allegations about E1's comments. It is not in dispute and it was accepted by E1 that she did make comments about the stupidity of students but this was not race related. A second historic matter related to Somalian students. E1's evidence was that she did not say those things and there was an additional comment that the claimant quoted E1 to say, "Dirty and/or greedy Jews." That quotation turned out to not be specifically what was said but something along those lines.
37. We found it difficult to analyse whether these events did actually occur given the passage of time. They were six years earlier than the events that formed the basis of this claim. There is a difficulty because the claimant cannot be precise as to what was said, so cannot discharge the burden to make a finding that it was more likely than not that this occurred.
38. We also bear in mind the following matters. Firstly, that no complaint was made at the time. E1 had no other complaints made against her that were identified as part of the response investigation into the later incidents. We simply cannot find on the balance of probabilities that the allegations as the claimant interprets them happened. In particular, E1's job is to teach non-English students English. We considered that if the claimant felt E1 had been racist, given the role she held to teach non-English students and the impact not only those views may have on her colleagues, but those who she was responsible for teaching, then she would and indeed should have challenged her at the time if they were said.

39. We also believe the claimant would have taken action in reporting the matter in the context of which those roles took place. The claimant may have perceived them as the background, but we do not find that those comments were actually made. E1 did accept her comments about stupid students and that she could be seen to be a little “*un pc*” but we have deemed the other comments not to have been made and the claimant could not precisely recall what was said given the passage of time which is fundamental in our view. She is asking this Tribunal to find something occurred that she cannot particularise herself or recall with any certainty.
40. There was evidence that in ESOL, the use of nationalities to describe students was commonplace. This was because of the impact on their learning and the starting points for their language. The impact of such racist views goes far beyond allegations towards colleagues and that the claimant could be offended. If E1 held such views this could be quite detrimental to her role. Further, there is nothing of significance that occurs until the events of 2020. We bear in mind that it was COVID and that at the time of these incidents we were emerging out of lockdown as this worsened perception of the altercation due to the close proximity and the invasion of person space.
41. Teaching began face-to-face in the September 2020 after a period when the whole country had been in lockdown. We turn now to deal with the incident on the 1st October 2020. The office was used as a staff room and references to the office or the staff room are used by the parties but are in essence the same thing.
42. Both the claimant and E1 had access to that room. We need to determine what happened on that day. In order to do that, we need to look at what each party said at the time. The first place that we considered was the actual claim form in terms of what the claimant's case is in this regard.
43. In the ET1 and particulars of claim, the claimant said that she overheard E1 and another colleague E5 discussing the student with body odour problem. When asked by E1 where the student was from, E5 replied, "He's

African," to which E1 said, "*That's why - they all stink.*" Then they went on to discuss in detail the possibility of people like him passing on the virus. By the virus, the claimant said that she understood them to mean COVID-19. Further, that she found the conversation deeply upsetting and mentioned it to another colleague sitting opposite her E2. E2 who in turn intervened in their conversation saying she would be deeply offended if such comments were made about her own compatriots.

44. Of particular note here are the words that the claimant relies on as quotations that E1 said and further that E2's recollection of what happened on that day actually comes from the claimant and not from E2 hearing it directly herself. We then looked at the complaint the claimant made at the relevant time. This was made on 2nd October 2020 in response to a complaint by E1 about the photocopy incident which we are going to deal with below.
45. Within the contemporaneous complaint, the claimant complains that E1 made comments regarding students of colour in the staff room. In the Claimant's words as to a direct quote that E1 said, "*African people, especially Somali stink as do I.*" This is the closest contemporaneous document where the claimant identifies what it is she is complaining of and it comes less than 24 hours after the incident in question.
46. The next articulation we have is in the formal statement which was requested by MC, the claimant's line manager. The claimant said at that time:

"E1 came into the staffroom at approximately 17.20. E1 sits behind me to the right. E1 and another Tutor – E5 with whom E1's friendly - were in conversation concerning a student in E5 class. E5 had said that this student had an odour problem – and E1 had asked where he was from - to which E5 replied Africa. In response E1 responded - "that's why - they all stink". They then went on to discuss the possibility of him passing on the virus because of this. I could not help but listen to all of this, and was deeply upset, but said nothing because I have refrained from speaking to E1 for a number of years. I was happy when another

member of staff did step in – E2 – saying that what was being said was highly inappropriate”

47. We turned then to what was said in the statement the Claimant prepared for the disciplinary investigation on 18th October. This stated that:

“At some point E1 and E5 engaged in conversation. E5 told E1 that a student had an odour problem. E1 said to E5, asked if they were from Africa. MP then said “WTF”. Not sure if out loud but it was to E2. Discussion went on and said This man's odour problem could be possible they got COVID as he stunk.”

48. We then have a further explanation which is given in the context of the disciplinary hearing so at this stage the focus was very much what happened at the photocopier as that was what the claimant. This stated:

“E5 said the student in question stank. She mentioned it to be me earlier in the day. I didn't have a problem with that comment. E1 asking where the student came from, when E5 said Africa, not Ethiopian, E1 responded that's why they all stink. They went on to discuss if they are probable to pass on COVID. This is another reason why I was so offended. E1 asked where the student came from and also the COVID comment. “

49. We looked at what E1 said and the first time that this is made is in the statement that she was asked to prepare. She says:

"I was talking to E5 who asked me if I remember the Ethiopian students who were in my class on the first day. She mentioned she feels strange when she is near one of them and she gets a headache. I asked her if it was a smell...

She then told me it wasn't that “It was just the vibe she was getting”. As I didn't understand the cause of a headache, I left it at that and did not make further comments.”

50. Of course, there are no comments about this incident in the original complaint by E1 as she was complaining about the photocopying incident. E1 goes into detail in her incident report about strong perfume and it explains the effect that this had on her in her investigation meeting. Again,

the predominant focus of this meeting was on the disciplinary incident at the photocopier, but nevertheless the background is identified as follows:

"I was starting to prepare for classes E5 asks me if I remember two students. They started with me. I sent to E5. She asked if I remember two students. She said she feels strange around one of them. I asked was it the smell? E5 complaints about the smell in the office. We have a colleague that uses a spray and also when I use sanitizer. All I asked was the smell? It could have been other things, attitude, way he spoke. Smell was the first thing that came to my mind. She said it wasn't that, just the vibe she got. It was then just general chit chat. It was an innocent question, just trying to help. We didn't carry on, I left at the time."

51. We then looked at those witnesses who gave evidence about what happened at the time. We started with E5 who set out her statement by email as follows:

"My conversation went something like this: "When I go round the class checking work, each time I approach this Ethiopian student, I instantly feel my head if going to explode and my face feels as though I have fever. At this stage E1 asked me "Does he smell?" I said "no". I continued "This guy objects me keeping the window open as it's getting cold. I am concerned he could be asymptomatic."

52. We also considered what E5 said in the formal statement in the interview on 15th October which stated:

"E5 stated that the context for the conversation was that she felt vulnerable to getting COVID-19 generally, and so to mitigate this, she wanted to have the windows open so that there was fresh air in the room. Because of this, she was having an issue with one member of the class who objected to the window being open all the time as it made the class very cold. E5 described that when she went close to the learner, her head "exploded". As she knew that the student had been in a class with E1, she approached E1 for advice and to see if had had the same feeling. In describing the situation to E1, E5, described the learner using his nationality, this being Ethiopian. In response to the request for advice, E1 asked if

the learner smelled. This was her first question. E5 replied that he did not. E5 stated she was absolutely certain that this was not a racist comment.”

53. We considered E2's statement which was made by E2 on 12th October 2020 and she sets out here what happened as :

“Later on as we continued working E5 asked E1 , if E1 remembered the students E1 had sent to her. E1 replied, that E1 didn't send anyone. Then E5 insisted, “OK, but they came to my class because...” then E1 explained that they were somebody else's students. E5 said “Well, he smells. What's wrong with him?” I started to get annoyed because this type of conversation I have heard it many times before. E1 asked E5 “Where's he from?” and I don't remember the specifics, but E1 oblivious to everyone else in the staff room said “Is he African? Well, African's smell”.

54. She also outlined at the end of that formal statement that she spoke to E5 and intervened. What she talks about here is that she considered it inappropriate for E5 to discuss the student's health and it was better to speak to them directly.
55. We also considered when E2 was interviewed and had the benefit of those notes from the meeting on 1st October 2020. She had nothing additional to add in relation to this.
56. We also bore in mind that Jorge was not present at the relevant time and his evidence was that he saw E2 speaking to E5 after the incident. Further that E3 could also not shed any light on what happened.
57. We have to make a finding of fact here. Did what the claimant said happened, happen in that staff room? Was it more likely than not? The panel spent a considerable amount of time discussing this matter. It was a unanimous decision as to our findings of fact on this matter but one member of the panel felt it was more closer to the balance more than the other two members of the panel. It is not in dispute that there was a discussion overheard by the claimant.

58. The claimant held a view that E1 was either racist or held racist views. We analysed all the evidence and preferred the contemporaneous evidence from the time given the delay in the matter coming before us. Both E1 and the claimant gave evidence before us and were credible. All of those present except the claimant, i.e. E2, E1, and E5 all refer to the word smell. The claimant uses a stronger emotive word in her description, stink.
59. She is the only one that does so in relation to that matter. E2 and the claimant are more closely aligned in their contemporaneous evidence. E2 gave evidence in her investigation meeting that contrary to E1's view that they were friends, E2 also disliked her and considered that she was racist. We have considered what we see as the claimant's inconsistencies of account.
60. In our view, the inconsistencies in the claimant's evidence far outweigh the inconsistencies in E1's account that claimant's counsel sought to draw out from her evidence. The claimant's attribution to the comments made by E1 changed to a large degree. The first report that was less than 24 hours after the incident. This incident caused in her own words an offence yet she accepted an evidence she had been unable to accurately recall what was said even at the time.
61. E2 could not be precise either. E1 and E5 were quite specific as to the word used and whilst E1 may have added detail to the background circumstances, she did not change the words used in that conversation in her accounts of the matter.
62. Claimant's counsel invited us to consider the motives for E2 to support the claimant. Why would she lie? She was not certain what was said but she did intervene after the event and speak to E5 about discussing such matters with E1. E2 to did not speak to E1 about any comments. She said she did not independently report it. She did not like E1 and thought E1 had said something to offend the claimant as the claimant had drawn that conclusion and indeed the claimant's pleaded case is that she did explain

to E2 what had happened in relation to that conversation so she would have been told things by the claimant rather than necessarily her own account.

63. The changes in the accounts the claimant gives at the time impact her credibility in this regard and the fact in evidence before us she accepted her very first account, "African people especially Somalian stink as do I," was not accurate. She accepted in evidence during cross examination that there was no discussion on this occasion about Somalians at all and that she brought her background thoughts about earlier incidents into this and conflated the two. She had in her words filled in the gap. No other witnesses used the word stink for this incident. This came about later as we will cover further below. In our view this is quite fundamental as even almost contemporaneously the claimant cannot recall with accuracy what was said yet she considers it offensive and racist.
64. We have considered what E5 and E1 said also closely aligned. In fact, E5 was reported by E1 to have made the comment "*It is just a vibe I get*" which could be equally considered offensive. E2 and E5 both gave evidence that E1 should not be having those conversations as it invited E1 to comment. E2's evidence of this in her investigation statement made on 12th October 2020 was not that she spoke to E1 or that the specific words used were offensive, just not to talk about students with others but to discuss it with the student himself or herself.
65. The claim is that E1 said, "That's why they all stink," in response to the reference to Africans. We do not accept that this was said for the reasons set out above. We find that E1 and E5 were discussing Ethiopian students (who are of course from Africa) and that in response to E5's concerns about how she felt, E1 asked if he smelt.
66. The claimant overheard this and concluded that E1 was inferring the African smell, her being of African descent herself took this personally. We do not believe that the claimant lied or made this up, just that given her perceptions were clouded by the fact she interpreted an inoffensive

question as an assumption given her background feeling towards E1 and possibly in order to defend her own actions at the photocopier incident which she was not honest about as outlined below.

67. She was offended by what she assumed E1 was inferring. Notwithstanding the way the claimant felt in the immediate aftermath of this conversation, she did not take any steps at that stage to escalate her concerns. She left the room. Approximately 20 minutes later, an incident took place at the photocopier. This was in a public area where students would have been present and indeed the evidence was that they were present.
68. Again, there are varying recollections of the incident, but the respondent investigated the matter and the tribunal was assisted by CCTV of the area. This showed that the account given by the Claimant was not correct. This unfortunately had no sound but the short heated discussion was captured, albeit captured from a distance. What is now not in dispute, is that claimant went to the photocopier and found some papers on the machine belonging to E1.
69. She put them to one side and another third party approached looking for her copies. When the third party left, the claimant picked up E1's copies (which she accepted she knew they belonged to E1) and put them on the floor. Unbeknown to her, E1 saw this as she approached. When she realised they were hers, bent down to pick them up. At the same time taking the claimant's copies from the tray and putting them on the floor.
70. The Claimant pointed to E1 first. This can be seen from the CCTV and the Claimant accepted this in evidence that she pointed first. E1 pointed back at the Claimant and the claimant raised her hand and swiped E1's arm or hand away from her making physical contact. Words were also exchanged. This version is now the agreed version of the photocopier incident but it is not what was reported accurately by all at the time. E1 emailed MC on the day of the incident to report what happened at the copier at 10:26 PM. It is agreed that the site closes around 9:30 PM which would be the approximate time that the Claimant and E1 left for the day.

71. E1's report about the incident at the photocopier is found in her email complaint made on 1st October 2020 hours after the event as follows:

"I had been photocopying and as it was taking a long time, I quickly went to the kitchen. When I came back, I noticed Mary Philips at the photocopier dumping some worksheets on the floor. When I approached the photocopier, I noticed they were my worksheets. I saw her worksheets and did the same. I asked her why she duped (stet) my worksheets and she said because she wanted to. She then pointed her finger at me and shouted not to touch her stuff. I did the same. She said that I am a nasty and that I stink. I said that she stinks too. She then hit me. I did not reciprocate. There are cameras near the photocopier and that can be checked."

72. She raised it as it made her feel uncomfortable and she was concerned about the claimant's aggressive behavior towards her and she wanted to be separated from the claimant. It was an accurate and factual statement by E1. In response to this email that the claimant complained about the staff incident the next day at 3.03pm having been asked by MC at 10.49am that day to give her account of the photocopy incident.

73. The claimant said in the email that she had in fact started an email to MC the night before. Her witness statement differs to this and it was an incident report started the night before but not concluded. No further explanation for the delay in reporting matters was given. The claimant's first account of the photocopy incident is given in her formal statement:

"I went to the photocopier at approximately 17.35. As usually happens – someone had left some copies in the tray – and I balanced these at the side, on top of a stack of paper. Another teacher - who I think was in G.09 - came to grab some paper knocking the papers off. I had a feeling they were E1's and didn't bother picking them up.

I was just starting to photocopy when E1 came up behind me, grabbed my photocopies, and chucked them on the floor. I was confused, and a bit stunned. I asked what E1 was doing, bent down to pick them up, and as I came up, E1

pointed E1 finger in my face. I retaliated, making the same gesture, and saying something like - how do you like it when I do that to you. There was a stand-off where we just glared at each other for a few seconds. Then E1 made the same gesture again with E1 finger, this time even closer to my face. I knocked hand away as was about to touch me. As glared at me very intensely, I asked about the comments made - to which responded by saying I smelled also and walked off."

74. The claimant said a student witnessed the incident, but we saw no statement from him or her. In the immediate aftermath, DC came past and saw the claimant was upset. The respondent took a statement from DC. Her recollection of her conversation with the claimant (she did not see the actual incident) was that:

"She explained that there had been an incident at the photocopier with another teacher, E1 , during which E1 had thrown Mary's papers on the floor. When Mary asked why had done this, replied, 'Black students smell and you smell.' "

75. This was the only contemporaneous reference to colour. We have considered this but she did not witness the actual event and it is only her recollection of what the claimant said to her and it was given somewhat after the event because the statement was made on 9th October 2020. If it was an accurate recollection of what the claimant said to her then it would be yet another version of events/comments by the claimant.

76. E1 then made a statement on 12th October in which she gave her version of events as :

"When I approached the photocopier, I noticed they were my worksheets. I saw her worksheets and did the same."

"She then pointed her finger at me and shouted not to touch her stuff. She was very threatening. I retaliated by pointing my finger at her and asked her not to touch my stuff. As she was very threatening and intimidating, I was concerned that she could turn violent. She then said that I am a nasty E1 and that I stink. I said that she stinks too, again in self-defence. I was only trying to defend myself,

the best possible way I could as I was very upset, distressed and fearing she might turn violent, which she did. She then hit me. That was assault. I did not reciprocate."

77. The claimant made a statement on 18th October. This consisted of a number of bullet points but at this point she still did not say that she put E1's copies on the floor. She also mentioned she bent to pick up the papers and E1 pointed first but that she shot her hand up in a reflex to push E1 away. She referred to it as defensive but did not indicate that she pointed first. Both the claimant and E1 were shown the CCTV in the investigation meeting and they maintained their respective positions. In this regard the claimant was not upfront and honest.
78. In the report prepared for the disciplinary, the claimant accepted for the first time that she put the papers on the floor but still did not accept that she pointed first and maintained she mimicked E1's pointing. This is not correct. It is in this recollection that both parties refer to stink. This was a discrepancy highlighted earlier in the claimant's account of the staffroom incident although exactly who said what at the photocopier is not agreed or indeed relative to the other conduct that took place there as there is no race allegation in relation to those comments. We considered that the claimant conflated not only the Somalian reference, but the reference of stink, what she said at the copier with the staff room incident given the terminology used.
79. After the photocopying incident, the claimant indicated she tried to find MC, but both parties went off to teach just before the building closed at 9:30 PM, the claimant and E1 were alone in the staff room. The claimant told E1 as she left, "Racist shouldn't work at the college."
80. On 14th October 2020 having seen the initial complaints (those that made the day after and on the day of the incident) and having viewed the CCTV, the claimant was suspended by JS. This was "Following a report of physical assault on a member of staff." Suspension was on full pay and a neutral act given the allegations. On 23rd October 2020, the claimant's

suspension was lifted verbally which was confirmed in writing by letter of the 26th October 2020. The claimant was asked to return to work on 2nd November 2020.

81. MC concluded the investigation on 9th December 2020 and we have had particular regard to the conclusions and the recommendations within the investigation report. There are a number of salient points and conclusions. The claimant was given the benefit of doubt as to the context of the incident at the photocopier but no findings were made that racist comments were made and even with the context the investigator found that the claimant did make physical conduct and had breached the disciplinary policy. The conduct happened in a public space in front of college learners and should have been dealt with differently. This is equally clear to us.
82. E1 was invited to a disciplinary hearing on 17th December 2020 by letter dated 10th December 2020 concerning a breach of the college's disciplinary policy in code of conduct in relation to inappropriate conduct and this was in respect to the incident at the photocopier.
83. The claimant was equally invited to a meeting on the same day with the same letter as E1 in terms of content but as the claimant was off sick, her meeting was postponed accordingly. In essence both were invited to disciplinary hearings to deal with the conduct.
84. E1 then attended her disciplinary hearing and was given a first written warning lasting 12 months. This hearing took place on 17th December 2020.
85. By letter dated 5th January 2021 E1 was given a written warning. We noted that the breaches were identified as the breaches in the disciplinary policy and in the college code of conduct. The breaches were identified from the outset but found to be:

“• carry out their duties in a proper and professional manner at all times; maintain standards of conduct and behaviour reasonably expected of employees and not conduct themselves negligently.

• Be helpful and polite; refrain from rudeness, or inappropriate conduct whether face to face, by telephone or electronically

• Employees must maintain an orderly and courteous manner in front of visitors, students and other employees”

86. The outcome letter went on to say that:

“It is disappointing that this incident had occurred, especially publicly in front of college learners who look to staff as role models. I also agree that the other recommendations made by Matthew are also implemented.

Although I do not find any evidence of you being and making racist comments, I am concerned with some of the comments you have made which can be inflammatory. I would like you to address this with immediate effect with support from your line managers.

Given the above and the seriousness of the incident, I find that a sanction of a first written warning is appropriate. This will stay on your personnel file for a period of 12months.”

87. By letter dated 22nd December 2020, the claimant was invited to a reconvened meeting on 6th January 2021. In the meeting, the claimant's union representative said she accepted the charges and that her actions were mitigated by the incident she perceived in the staff room. Her union representative also referred to the staff survey about 68% of black staff saying the college is institutionally racist.

88. The claimant was found guilty of the same breaches of the disciplinary policy and code of conduct as E1. The outcome was given to her by letter dated 13th January 2021. Again, it was found that:

"It is disappointing that this incident had occurred, especially publicly in front of college learners who look to staff as role models. I also agree that the other recommendations made by Matthew are also implemented.

Given the above and the seriousness of the incident, I find that a sanction of a first written warning is appropriate. This will stay on your personnel file for a period of 12 months."

89. Both the claimant and E1 were given the right of appeal. Both received a written warning and under the respondent's disciplinary policy this is the lowest form of sanction.

90. Following that decision, E1 decided not to continue teaching the evening classes again. She emailed at 2:39pm on 17th December 2020. She outlined she wish the CCTV had picked up the audio and clearly considered the outcome to have been unfair.

91. E1 was asked to reconsider by MC the next day and E1 confirmed that day that she stands by that decision. E1 considered it was unfair and she was in a lost position. She was accused of something she did not do. She complained of the treatment on the 2nd of October by others when she went to work and indeed felt she had no protection going forward making the comment:

"I don't know how I can protect myself. I don't want another confrontation when I will be accused of something I didn't do. I have the warning letter (so unfair!) and I'm already in the lost position – she's Black, am white and a foreigner with a past of saying un PC things (which should be understood in context (the same as Mary's behaviour was understood in context, even though totally made up by her and E2."

92. By email dated 26th January 2021, the claimant appealed her outcome on the basis the penalty was too harsh given the circumstances. Not that she did not accept that she had committed an act of misconduct. In essence, the claimant was relying on the staff room incident as the reason why the

incident occurred as it did and/or it mitigated her behaviour such that a standards letter should have been issued.

93. By letter dated 3rd February 2021, the claimant was invited to an appeal hearing with CM on the 11th February 2021. The claimant attended the meeting with her union representative again. Following that meeting the original sanction was upheld. By letter dated 24th February 2021, CM concluded that:

"I explained that I am clear with what had happened during this incident. I stated that a standards letter was not suitable due to the misconduct displayed by you on that day. The behaviour you displayed falls short of the professional standards expected by all members of staff, especially Lecturers. The incident also occurred in a public area where there were students and staff present. This does not demonstrate professional role models to our learners. I am satisfied that the disciplinary sanction of a first written warning was fair and proportionate given the circumstances and is the least stringent outcome.

You admitted your behaviour was unacceptable and I am satisfied that your mitigation in relation to comments made by the other member of staff were taken into account appropriately. "

94. The claimant again during that meeting accepted her behaviour and that she acted inappropriately. Given this and that the warning given was the lowest possible sanction is it not clear why the claimant felt this was unjustified. Whatever happened before, she accepted she was wrong to behave in that way. Further, she did not give an honest account about the photocopier incident from the outset. Even in the face of CCTV evidence that showed she in fact raised her finger first and she put E1's copies on the floor knowing they were hers.
95. The claimant commenced ACAS early conciliation on 26th December with an ACAS EC certificate being issued on 29th December 2020. The claimant presented a claim for direct discrimination, harassment and victimisation on 29th January 2021 so given the dates of the allegations

there are no time limitation concerns. This has been agreed between the parties as set out in the list of issues and the claimant brought her claims promptly after the incidents occurred.

Conclusions

Direct discrimination

Has the respondent subjected the claimant to the following treatment - Issuing the claimant with a 12 month written disciplinary warning on 13th January 2021

96. Of course it is not in dispute that the claimant was issued with a 12-month written warning on 13th January 2021.

Was that treatment “less favourable treatment” i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others (“comparators”) in not materially different circumstances?

97. The comparator was never identified by the claimant as part of these proceedings. We have considered appropriate comparators in this matter. E1 took part in the incident and she was of a different race, Polish. We have considered both E1 and the hypothetical comparator when considering this matter.

98. Dealing first with E1, C cannot establish less favourable treatment. The allegations about E1's comment were not upheld by her employer and E1 and the claimant had identical warnings. This is despite it being the claimant that put the papers on the floor first, pointed first to E1 and made physical contact with E1. Both E1 and the claimant had the same outcome at hearings chaired by the same person who had all the evidence before them. She was not less favourably treated than E1. Given the above one could even argue she has been more favourably treated given she was the

protagonist and made physical contact with E1 and was then not honest and upfront about the matter.

99. We have considered the hypothetical comparator and whether the claimant has discharged the burden of proof to show that a hypothetical comparator would have been less favourably treated. We are not satisfied this is the case when the other person has in fact been less favourably treated than the claimant in respect of the photocopier incident. Nevertheless as part of our discussions we also dealt with the last part of the issues when considering the hypothetical comparator.

If so, was this because of the claimant's race and/or because of the protected characteristic of race more generally?

100. For direct race discrimination to occur, less favourable treatment must be because of race. We need to consider the reason why the claimant was treated less favourably and this can include an examination of the employer's (or decision maker's) conscious or subconscious reason for the treatment in accordance with *Nagarajan v London Regional Transport and others* [1999]. Here we were in the fortunate position of having heard evidence from the decision maker who imposed the written warning.
101. What the claimant will need to show is that she has been treated less favourably than the comparator whose circumstances are not materially different to hers. When considering the hypothetical comparator we consider that this was another lecturer who had conducted themselves in the same way as the claimant who did not share the claimant's race.
102. We have considered the conscious and subconscious mental processes of JC in deciding to give the claimant a warning and whether race played a significant part in the treatment either whether it was the reason that she was given the warning or a factor in that decision. Claimant's counsel invited us to consider five points to mitigate the behaviour at the copier such that she would not have received a sanction. The claimant sought to rely on the warning being because of race and that some connection

between what she perceived in the staffroom meant that her actions and the sanction that flowed from it meant it was because of race.

103. We have not found as a finding of fact that E1 made racist comments in the staff room. Even if we had, we do not accept that the claimant's admitted conduct at the photocopier should receive no sanction. She accepted the charges and in only being given a first written warning her character and the background circumstances as she perceived them were considered. It was appropriate and arguably generous.
104. We do not believe whatever the claimant believed took place in the staff room, gave her carte blanche to act inappropriately later. She accepted misconduct for which a first written warning was the least sanction. Having considered why the claimant got the warning, it is pretty apparent she accepted she committed an act of misconduct. The issue of sanction of the first written warning was not because of the claimant's race.
105. As we found the claimant did put E1's photocopies on the floor which the claimant only conceded at disciplinary hearing stage and she never accepted until the hearing before us that she pointed first despite the CCTV, it is apparent that she did not give an account that was accurate at the time. Her actions were contrary to both the disciplinary policy and the code of conduct as she now accepts.
106. In terms of Section 136 Equality Act 2010 and the burden of proof we have considered the claimant has not initially proven facts which could establish that an act of discrimination has occurred so the burden of proof has not passed to the respondent. However, had she done so, we satisfied the respondent could show a non-discriminatory reason for the treatment. It was the admitted misconduct. The critical question is why was the claimant treated like she was?
107. We do not conclude in our findings of fact that JS's decision to issue the warning was influenced consciously or subconsciously by race. We found JC to be a credible and reliable witness. It therefore follows that we do not

find the claimant's claim of direct discrimination because of race to be well founded.

108. Given the claimant was not honest in her account, and that she accepted in cross examination that she had conflated several conversations at an earlier date, this impacted in our findings that no racist comments were made in the staff room. The claimant's credibility was damaged in our view by her inconsistent account, changing case and not being upfront about the photocopier incident.
109. In considering whether the claimant was less favourably treated by imposition of the written warning this was because of her conduct and not because of her race or the protected characteristic of race generally.
110. When examining the reason why the claimant was subject to disciplinary action it is clear that it was not because of her race but because of her conduct. When compared with the hypothetical comparator having an altercation at the photocopier in a public area with another member of staff they too would be subject to disciplinary action for failing to adhere to the disciplinary and conduct. Disciplinary action arises for failing to follow the policies and as such we do not consider that the claimant was subject to disciplinary action because of her race as a comparator without that race behaving in that inappropriate way would also be subject to disciplinary action.
111. The claimant pointed at another member of staff, threw her papers on the floor and then hit her hand away. This is clearly unacceptable conduct for a lecturer in a position of trust and responsibility. The respondent did not view these matters as more serious than those of E1 despite these matter and despite her not giving an honest account and it gave no more serious a sanction.

Harassment

Were the comments by E1 on 1st October 2020 unwanted conduct related to race?

112. We have not found that the comments alleged by the claimant in her pleaded case were made by E1 on the 1st of October 2020. So they did not occur. Therefore, they cannot be unwanted conduct related to race. We have also considered the reference to smell and the question that was asked and we find this a neutral question in the context of our findings of fact and what actually happened and we do not take the view that this in any way could be unwanted conduct related to race given the findings of fact that we have made.

Was the allegation of assault by E1 made on 02/10 or shortly thereafter unwanted conduct related to race?

113. E1 made an allegation on 1st October, not 2nd October that, "She hit me." The first reference to the word assault is in the statement that is made on 12th October where... she says "She then hit me. That was assault. I did not reciprocate."

114. Given our findings, it is not correct that E1 made an allegation that the claimant hit her on 1st October and this is not the same as the claimant's pleaded case. The claimant's case was set out in oral submissions that rather than an error in the dates and that the case had been pleaded incorrectly that the allegation by email on 1st October was in some way false. That E1 made this statement because of the claimant's race knowing it to be false or that she did so knowing the claimant was going to raise a race complaint.

115. Actually, we find that the account given by E1 on 1st October 2020 as we have set out above was in fact the most accurate when related to the CCTV. The false account came from the claimant.

116. E1 from the outset was quite clear as to what happened and all of the statements she makes about who pointed first and who did what are all evidenced and supported by the CCTV. We do not consider that an accurate factual statement could be seen to be unwanted conduct. As a matter of fact, the claimant accepted she hit E1. The claimant suggested in evidence that this email was an attempt to make it sound worse, more like she had attacked her instead of what really happened. Actually E1's account is what actually happened and it is the claimant's account that does not accurately affect reality, it downplays her own involvement to suit her own purposes.
117. There is no false allegation. In that email of the 1st of October, it says the claimant hit her. The claimant did hit E1 by swiping her arm with some force even if it was defensive to hit away E1's arm or hand. She did not step back or take any other form of action rather than lifting her arm and making physical contact with E1. She says that this was a reflex defensive action during evidence and indeed claimant's cross-examination of respondent's witnesses much was made of a discrepancy between the arm and being hit on the upper arm. This is not the claimant's pleaded case. The email of 1st October is an accurate reflection of what took place. It cannot be said to be false or amount to unwanted conduct.
118. The references to the being hit on the upper arm came much later and do not relate to the issues in the case. Even if the statement could be said to be unwanted, that making of a true statement of events is not related to race in our view. Further, it could not amount to having the purpose or indeed the effect of violating her dignity or creating intimidating, hostile, degrading, or other offensive environment and it would not be reasonable for the claimant to consider it to have that effect. It was a true statement.

Was issuing the claimant with a 12 month written disciplinary warning unwanted conduct related to race?

119. It is not in dispute that a written warning was issued. For the reasons we have already set out above where the claimant had admitted to

misconduct for which her first written warning is the lowest sanction could this be unwanted conduct? What the claimant wanted was a letter notwithstanding her admission. She relies on this matter as an unwanted conduct.

120. We have found as a matter of fact that no racial comments took place in the staff room were actually made by C1, but the claimant perceived it only. That is the only connection to race. The claimant took matters into her own hands at the photocopier. She took the first action. She put the copies on the floor. She raised her own finger first and she swiped away E1's hand or arm.
121. There was no justification for taking it into her own hands. In those background issues, we have considered the written warning and was it related to race?
122. We have considered *UNITE the Union v Nailard [2018] IRLR 730* case relied on by the respondent. In the current case, the connection is that the claimant perceived there to have been racial comments in the staff room which we found as a matter of fact were not actually said. The conduct at the photocopier was not because of a background of actual racist comments.
123. To say that the claimant can rely on that to make the warning unwanted conduct related to race is a step too far in our view. It cannot be said where the conduct that warranted a first written warning is accepted, that a racial background can excuse that conduct having taken place and make it related to race. In this case we find (as the respondent did in its own processes) that no racist comments were made. The claimant accepted in cross examination she had conflated two different conversations previously and it is clear to us that the claimant's recollection is not correct.

Did any of the above have the purpose or effect of violating the claimant's dignity or of creating an intimidatory, hostile, degrading, humiliating or offensive environment for her?

124. We have not found any unwanted conduct in this case related to race. We have however considered this and find that it would not have been reasonable for the warning to have had the effect in the statutory test. It did not have that purpose but the purpose of not allowing inappropriate behaviour to go unpunished like any employer following a disciplinary policy when an employee breaches its code of conduct. The claimant accepted she had and as such the warning did not have the purpose or effect described.

Victimisation

Were the claimant's complaints about harassment by E1 in her statement on 2 October 2021 [amended to 2020] a protected act?

125. The respondent conceded that this was a protected act, but this is no longer relevant given the withdrawal by the claimant on day three of the allegation relating to the written warning. The detriment relied on is now the initial complaint by E1 which predated the email from the claimant so it cannot be because of this protected act as the detriment alleged predates the protected act. Instead the claimant now relies on the allegation by E1 as a detriment because she alleges that the respondent (i.e E1) believed that the claimant would do a protected act (raise a complaint about race).

Was the allegation on or about 2nd October 2021 [amended to 2020] that the claimant assaulted E1 a detriment?

126. Turning to this issue next, it was actually 1st October 2020 as it was wrongly pleaded by the claimant as the 2nd October 2021. The claimant relies on the allegation that she assaulted E1 as a detriment. We have considered this in detail above factually and that is not what was actually said. As the case developed it was clear that the claimant's pleaded case was wrong in multiple places and without amendment entitled us to

dismiss her claim as it was not as pleaded but we have nevertheless considered matters in light of how the case was put by counsel on her behalf as her case shifted.

127. As set out above we do not believe it to be a false allegation and therefore making a factual statement about events that took place, in our view cannot be a detriment. The claimant accepted in the end that she hit E1 and make physical contact with her. Counsel played on the words of assault (not actually made until later of course which of its own right would make the claimant's pleaded case fail) as making it sound worse than it was. It was physical conduct, E1 did not want it and we discussed the dictionary definition of assault as a physical attack. Attack as a noun is the aggressive or violent act towards a person or a place. It is clear the claimant was the one who pointed at the claimant and was aggressive making physical contact so we do not accept that the use of the word later of assault in the context of the hit is a false allegation. The person who gave a false account was the claimant. E1's statement on 1st October 2020 that the claimant hit her was factually accurate.

Were any of the detriment(s) above carried out because the Claimant carried out a protected act and/or because the Respondent believed that the claimant had done, or would do a protected act?

128. Notwithstanding this, we have gone on to consider whether any of the detriments above were because the claimant carried out protected act or in particular this instance because the respondent believed the claimant had done or would do a protected act.
129. We have considered the motives of E1 in making that initial complaint. The Claimant's case is that E1 made this to be in essence a pre-emptive complaint knowing that the claimant was herself going to complain. In this regard, she relies on the comment that was made at the end of the day that E1 knew that the claimant would complain. We believe it is a stretch for E1 to interpret the comment that claimant made that there was a

complaint coming. It was that racists should not be working at the College not that she would complain.

130. Even if that was the case, the suggestion that E1 somehow emailed first as a preemptive strike. We have asked ourselves how would E1 know that she would get in first? It was an hour after she left. There is no evidence as to why the claimant could not have actually sent such an email first or indeed later that evening. E1 had no way of knowing or suspecting that the claimant would make a complaint before she emailed.
131. The claimant has referred to drafting an incident report in her witness statement and in the email on the 2nd of October 2020, having started an email to MC, but she gave evidence that she sought out MC after the copier incident and could not find them. This is another inconsistency in the claimant's case which impacts on her credibility. There is no evidence that E1 knew that the claimant was doing any of these things. There was no evidence to explain why the claimant when she left the building did not email at that stage. No explanation is forthcoming. E1 sent the email after hours. There is a delay in submitting a complaint and it is only in response to E1's report to MC that the claimant raises the matter of the conversation and there is no real explanation given for that delay. Her complaint comes approximately 22 hours later.
132. We consider it highly unlikely on the balance of probabilities that E1 would make a true statement because she believed a complaint about the comments was coming. We have found that expressly no racist comments were made but in any event E1 expressly stated she did not want to take it further. She did not expressly say she wanted to make a formal complaint, just that in essence she wanted to be kept away from the claimant and this is the remedy that she sought.
133. The claimant's claim that the allegation of her having hit E1 was made because E1 knew the claimant was to complain about something she perceived is not credible in our view.

134. It is for all these reasons that the tribunal dismisses all of the claimant's claims and the claims fail.

Employment Judge King

Date:10.07.23.....

Sent to the parties on: 11 July 2023

GDJ
For the Tribunal Office