



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Ms J L Barker

Respondent

Parliamentary and Health
Service Ombudsman

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Manchester by CVP on 23, 24, 25 and 26 August 2022

EMPLOYMENT JUDGE Warren

Members:

Ms Williams

Miss Heath

Representation

Claimant: in person

Respondent: Ms Egan, Counsel

JUDGMENT

The unanimous judgement of the Tribunal is that :-

1. The claims of direct race discrimination involved conduct by the respondent over a period of time and the claim was made within 3 months (allowing for any early conciliation period) of the end of that period. The Tribunal has jurisdiction to hear the claims in accordance with section 123 of the Equality Act 2010
2. The claims of direct race discrimination in contravention of section 13 of the Equality Act 2010 are ill founded and are dismissed.

Written reasons have been requested by the claimant.

Reasons

Background

1. By an ET1 presented to the Tribunal on 7 September 2021 the claimant alleged that the respondent had directly discriminated against her because of her race. The respondent denied the allegations.
2. Following a preliminary hearing for case management by Employment Judge Sharkett on 21 January 2022 an agreed list of issues was prepared.

List of Issues:

1. Time Limits

- 1.1 Given the date the claim form was presented and the effect of early conciliation, any complaint about something that happened before 7 April 2022 may not have been brought in time.
- 1.2 Were the discrimination complaints made within the time limit in section 23 Equality Act 2010? The Tribunal will decide.
 - 1.2.1 was the claim made to the tribunal within 3 months (allowing for any early conciliation extension) of the act to which the complaint relates?
 - 1.2.2 If not was there conduct extending over a period?
 - 1.2.3 If so, was the claim made to the tribunal within 3 months (allowing for any early conciliation extension) of the end of that period?
 - 1.2.4 If not, were the claims made within such further period as the Tribunal thinks is just and equitable? The Tribunal will decide:
 - 1.2.4.1 Why were the complaints not made in time?
 - 1.2.4.2 In any event is it just and equitable in all the circumstances to extend time?

2. Direct Race Discrimination (Equality Act 2010 section 13)

- 2.1 What are the facts in relation to the following allegations?:
 - 2.1.1 In October 2019 Ms Sills, the claimant's line manager over scrutinised the claimant's work and sought to gather evidence without the claimant's knowledge in order to end her secondment
 - 2.1.2 Between October 2019 and January 2020 Ms Sills failed to inform the claimant of complaints made about her work when others had been made aware of the issues.

- 2.1.3 In December 2019, Ms Sills failed to inform the claimant of the rating of her mid year review before sharing it with Ms Flegg who was not employed by the respondent.
 - 2.1.4 On 18 February 2020 Ms Sills and or Ms Flegg brought the claimant's secondment to an early end, on short notice and without good reason.
 - 2.1.5 In February 2020 failed to share at an appropriate time, information with the claimant which was relevant to the grievance she raised in February 2020.
 - 2.1.6 Failed to deal with the claimant's case in a timely manner resulting in an extended delay of the outcome
 - 2.1.7 Failed to adequately address all complaints in the claimant's grievance initially raised in February 2020 with outcomes being delivered in June 2020, May 2021 and August 2021
 - 2.1.8 When considering the claimant's grievance considered matters that did not form part of the grievance while failing to address matters which were.
 - 2.1.9 Failed to share information which was relevant to the claimant's grievance in June 202, May 2021 and August 2021. This claim relates to the lack of information on which the respondent based it's conclusions
 - 2.1.10 In August 2021 reached a conclusion which a reasonable employer would not have reached on the basis that the claimant's appeal into the process that had been followed had been upheld two weeks prior to the outcome in August 2021?
- 2.2 Did the claimant reasonably see the treatment as a detriment?
- 2.3 If so, has the claimant proven facts from which the Tribunal could conclude that in any of those respects the claimant was treated less favourably than someone in the same material circumstances of a different race was or would have been treated?
- 2.4 The claimant relies on a hypothetical comparator.
- 2.5 If so, has the claimant also proven facts from which the Tribunal could conclude that the less favourable treatment was because of race?
- 2.6 If so has the respondent shown that there was no less favourable treatment because of race.

The Evidence

3. The Tribunal had an agreed bundle of documents consisting of over 1000 pages. The claimant added an email during the hearing. We had witness

statements from the following witnesses who also gave evidence and were cross examined:-

The claimant on her own behalf

For the respondent:-

Ms Micklethwaite

Ms Pollard/ Ms Flegg

Mr Dowd

Ms Carneille

Ms Kilpatrick

Ms Sills

Ms Russell

The following witness evidence was agreed by the claimant and the statements were read without challenge

Mr Galbraith

Ms Booth

We applied the evidential test 'the balance of probabilities' to the evidence.

Both parties made written and oral submissions at the end of the evidence. Counsel for the respondent produced a succinct and accurate representation of the relevant law upon which we were able to rely.

The claimant, although representing herself, proved to be well prepared with a list of cogent and relevant questions for each witness.

The Law

4. Jurisdiction

- 4.1 Any acts presented outside the 3 month time limit would be out of time.
- 4.2 If that is the case the claimant must persuade the Tribunal that the earlier acts form conduct extending over a period, so that it is treated as done at the end of the period (section 123(3)(a) Equality Act 2010 ("EQA")) or that it is just and equitable to extend time to allow her to bring claims in respect of the out of time acts.
- 4.3 *Hendricks v Metropolitan Police Commissioner [2002] EWCA Civ 1686*, the claimant has to prove, in order to establish an act extending over a period, that a. the incidents are linked to each other, and b. that they are evidence of a continuing discriminatory state of affairs.
- 4.4 The alternative is that the claimant must satisfy the Tribunal that it is just and equitable to extend time under section 123(1) (b) EQA to allow her to bring claims for acts which on the face of it are out of time.

- 4.5 There is a burden of persuasion on the claimant but not a burden of proof.
- 4.6 Relevant factors include
 - 4.6.1 the length and reason for delay.
 - 4.6.2 The extent to which the cogency of the evidence is likely to be affected by the delay
 - 4.6.3 The extent to which the respondent had cooperated with any requests for information
 - 4.6.4 The promptness with which the claimant acted once she knew of the facts giving rise to the cause of action
 - 4.6.5 The steps taken by the claimant to obtain professional advice once she knew of the possibility of taking action.

5. Burden of proof for discrimination claims

- 5.1 Section 136 EQA the initial burden of proof lies with the claimant to prove facts from which it could be determined, in the absence of any other explanation, that discrimination had occurred. *Ayodele v Citylink Ltd [2017] EWCA Civ 1913*. If the claimant succeeds then the burden shifts to the respondent to show that it did not discriminate against her. *Laing v Manchester City Council [2006] IRLR 748 (EAT)* reminds us that the process is flexible and that all evidence must be heard and considered before making findings of fact.
- 5.2 In considering what inferences can be drawn from the primary facts the Tribunal must assume there is no adequate explanation for those facts (*Igen v Wong [2005] IRLR 258*)
- 5.3 *Royal Mail Group Ltd v Efofi [2021] UKSC33* provides the most up to date summary of the above.

6. Direct Race Discrimination

- 6.1 Section 13 EQA: 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.
- 6.2 The claimant must establish more than the bare facts of difference in a protected characteristic and an alleged difference in treatment. *Madarrasy v Nomura International plc [2007] IRLR 246*
- 6.3 The Tribunal must be concerned with the grounds or reason for the less favourable treatment. Why did the respondent treat the claimant as it did? *Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] 2 All ER 26*
- 6.4 The protected characteristic must have a “significant influence on the outcome” *Nagajaran v London Regional Transport [2000] 1 AC*
- 6.5 Why did the alleged discriminator act as they did. What consciously or unconsciously was their reason? (*Chief Constable of West Yorkshire v Khan [2001] 1 WLR 1947*)

7. Liability for the actions of 'agents'

7.1 A member of one police force responsible for line managing a civilian employee of another police force was found to be the agent of that police force. *Commissioner of Police of the Metropolis v Weeks [2012] UKEAT. 0130/11.*

8. The Facts

We have made the following findings of fact. We have only dealt with the facts relevant to the issues in the case.

9. The claimant was employed as a senior caseworker in the respondent's organisation. She dealt with issues raised by members of the public. She lived in Birmingham and worked in Manchester. Her work began in 2011.
10. In 2016 Ms Sills became the claimant's line manager. The two did not get along well, and they went to mediation to resolve their differences. Ms Sills believed it was sorted, the claimant it now transpires did not.
11. In September 2019 the claimant was successful in applying for a secondment to another Ombudsman (LGSCO). She would work out of Coventry and would, as is the norm, carry a few of her cases over with her. Ms Sills did not expect her to take all of her 'live' cases, and indeed there was evidence that some were reallocated to other senior caseworkers. Her line manager at her secondment was aware of the carry over and allowed for that in allocating new work to her.
12. The claimant and Ms Sills discussed in advance when she would move, and how much work she would take. She had 16 cases and would take 5 and Ms Sills would reallocate 11. She moved to her new role on 21 October 2019. Ms Sills took some time to reallocate the other 11 cases and the claimant believed (wrongly) that she was expected to maintain all 16. It is clear that was not the case as it was only a few days and then a few weeks before other caseworkers expressed their concerns about the quality of the claimant's work – they had obviously been reallocated. Some were not however reallocated until December 2019. The claimant was only expected to work on 5 cases, and was given time in her new role in which to do so.
13. Mr Dowd, another senior caseworker working for the respondent received cases 6 and 7. (We had agreed to use numbers for the cases to save identifying the individuals with whom the caseworkers were engaged).

14. Within a short period of time he raised concerns with Ms Sills. Ms Micklethwaite also received concerns from Mr Dowd, and passed them to Ms Sills, about the way in which the claimant had been handling these 2 cases. Prior to these concerns Ms Sills had been happy with the claimant's work and had indicated to her new employer that she was on track for a 'fully effective' rating at her mid year review.
15. On 18 November 2019 Ms Sills asked the managers of other caseworkers to indicate any concerns about Ms Sill's work reallocated to them. She eventually received concerns from around 7 or 8 sources expressing concerns.
16. At around the same time the claimant was invited to her mid year review by Ms Sills. Due to lack of availability the meeting did not take place until 15 January 2020. Ms Sills decided the meeting needed to be face to face. At this point she had not raised any of the concerns with the claimant, nor provided her with the evidence of the concerns. The claimant eventually received the evidence of the concerns a few weeks before this hearing with the service of the witness statements. Ms Sills explained that she wanted to see a complete picture before the mid year review. In her evidence she accepted that with hindsight it would have been better raised with the claimant sooner. Ms Sills had not met this situation before, where an individual had been seconded, so she raised the matter with her line manager Ms Micklethwaite and HR before the mid year review.
17. Whilst the claimant was in her original role she had been working successfully towards obtaining accreditation for an Advanced Certificate in Professional Practice for Ombudsman Caseworkers. This involved her selecting work to submit for assessment. The plan was that she would continue this in her seconded role. On 21 November 2019 Ms Sills advised the Professional Skills manager that she and Ms Micklethwaite had decided that the accreditation process would be halted because of the concerns raised. At this stage the claimant remained unaware of any concern, or this decision. There was also a discussion about ending the secondment and returning the claimant to her original role with an informal support package
18. On 10 December 2019 Ms Sills emailed Ms Flegg (now Pollard), the claimant's new line manager whilst on secondment, describing the concerns. Around 6 January 2020 Ms Flegg asked for further details which were promised in due course. The claimant was unaware of this exchange.
19. On 15 January 2020 the claimant met with Ms Sills to undertake her mid year review and she was advised of the feedback and told she was not on track to make 'effective'. She was advised her secondment was not

secure, and she would receive an informal improvement plan. She was not told her secondment would end, because that decision had not been taken then by Ms Flegg.

20. Ms Flegg discussed the meeting with the claimant and advised Ms Sills that the claimant was confused and did not understand how Ms Sills had reached that conclusion. The claimant was given a collated summary of the feedback on her cases and a copy of the meeting notes from 15 January. She replied, answering the allegations, on 6 February 2020. Ms Sills reviewed her reply and sent that, with her comments attached to Ms Micklethwaite, who accepted some of the claimant's explanations. It still left concerns.
21. On 7 February 2020 Ms Sills completed the mid year review form, but did not change the rating before sending it back to the claimant. She planned to give the claimant additional support. She advised Ms Flegg that was her plan and asked Ms Flegg for her view on the secondment.
22. Ms Flegg was prepared to end the secondment immediately, and did so on 18 February 2020. Normal practice would be to give 28 days' notice which was provided for in the secondment agreement. Normal practice would also include consulting the claimant. The claimant was simply told it would be ending on 24 February – less than a week. In fact the claimant was on annual leave until 2 March 2020, and she was then signed off with a sickness note describing her condition as stress at work, before her intended return date. She returned to work on 31 August 2020.
23. At this time Ms Sills had another member of her team, a white man, on an informal support package, albeit for different reasons. His circumstances did not make him a helpful comparator.
24. On 20 February the claimant entered a grievance against Ms Sills and the respondent alleging discriminatory conduct in the withdrawal of her accreditation and the ending of her secondment. She did not mention the nature of the discrimination, in particular her race. She identified as black and was the only ethnic minority member of Ms Sill's team at that stage, although there had been 2 other black and 2 Asian members of staff at different times in Ms Sill's time as manager.
25. Her grievance was investigated by Mr Galbraith (research and evaluation manager). There was an investigation meeting with the claimant, her TU representative, and a representative from HR. At this stage we noted that the HR department was described as in serious disarray, under staffed and apparently badly managed. This was the excuse given subsequently for the failure to comply with the requirement to supply the claimant with a copy of the co workers complaints about her work.

26. Mr Galbraith interviewed Ms Sills and Ms Micklethwaite (twice) and prepared a summary report which was used in the grievance hearing chaired by Ms McGivern, a finance business partner, on 29 June 2020.
27. On 10 August 2020 the claimant complained about the process undertaken, and her complaint was upheld, and a new grievance process started from scratch.
28. In September 2020 Ms Russell (assistant director) commenced a new grievance investigation. There were further investigation meetings, with the claimant providing further information and Ms Sill responding to it and on 14 April 2021 a second report was produced.
29. On 22 April 2021 Mr Conway (an external HR consultant) chaired a grievance meeting. The outcome was to uphold the claimant's grievance that the process had taken too long but to reject the rest of her grievance. The claimant believed the outcome did not address the facts of her secondment, its ending, and the halting of the accreditation process. It still did not supply the evidence of the senior caseworkers' complaints about the quality of her work. She appealed.
30. On 6 July 2021 Ms Booth (an external HR consultant) decided the appeal. She upheld the claimant's assertions about the failures of the grievance outcome, and returned it to Mr Conway to address the issues.
31. Mr Conway wrote to the claimant on 26 August 2021 dealing with the deficiencies raised by her in her appeal letter but maintaining the stance that there was no evidence of discrimination. He still did not supply the evidence of the complaints, despite being told to do so by Ms Booth.
32. The claimant presented her claim to the Tribunal having undertaken early conciliation, on 7 September 2021.
33. The claimant returned to work in September 2021 and a support package was put in place for her after 7 October 2021, when her phased return ended and she reminded her line manager that it was required.
34. During this entire period, the claimant mentioned race only once, in her reply to Mr Galbraith's investigation report.

The Submissions
For the claimant

The claimant asserted that the motivations behind the respondent's actions and ongoing failure to seriously and adequately consider her complaint were

discriminatory. A reasonable employer would have taken different actions in the circumstances and the reasons for not doing so were discriminatory.
The respondent has not addressed the delay in sharing information about performance with her
Private information was discussed with her line manager on secondment before it was discussed with the claimant
Informal support was only offered when the claimant instigated it suggesting that these issues were not as serious as made out at the time of the grievance.
Capability procedures should have been used (not dealt with in the evidence)
The delay in dealing with the was motivated by race discrimination
The claimant's work towards accreditation was considered of good quality, in contrast with the suggestion that the problems raised were serious and worrying.
The appeal outcome recommended that details of all the complaints were sent to the claimant, but that was only received with Ms Sill's statement before the hearing, and makes no mention that this was solicited.

For the respondent.

The respondent's submissions can be dealt with swiftly. They consisted of 81 paragraphs, and after reminding the Tribunal of the issues and law, can be summarised as – this is a case of incompetence and not discrimination on racial grounds.

Conclusions

35. Any incident which occurred after 7 April 2021 may be out of time unless part of a continuing act. We find that from the date the claimant accepted the offer of secondment to the date of the final outcome of her grievance, there were a series of continuing acts because had she not applied for and obtained the secondment it is unlikely that any of this would have happened. This was conduct alleged against various managers in relation to her secondment and therefore conduct extending over a period. It could be argued the conduct actually continued until the claimant finally obtained the evidence of her alleged poor quality work, when witness statements were exchanged for this hearing. We therefore find that we have jurisdiction to hear this claim.

Direct Race Discrimination

36. Throughout this case we were aware of how well the claimant had prepared. However we have had to prompt and remind the claimant to deal with her case that this was race discrimination. She was markedly reluctant to deal with the point, to the extent that there was no mention of it in her cogent, typed closing submissions.

37. We deal with our conclusions using the paragraph numbers from the list of issues.

- 2.1.1. We find that Ms Sills did scrutinise the claimant's work in response to Mr Dowd's feedback. That feedback was followed by others, and she did seek other examples from the other managers. We find this to have been because of her concerns to know the bigger picture. As a line manager about to undertake a mid year review that made sense to her at the time. She now of course accepts that with hind sight she should have raised the concerns much earlier. We bear in mind the evidence we heard of a difficult relationship between Ms Sills and the claimant in the past, and consider that Ms Sills is unlikely to have wanted the secondment to end early, and that she was simply increasing her own workload by suggesting an informal improvement plan. We considered the issue that the claimant was, at that time the only black person in the team. There is no evidence at all that the claimant's race played any part in Ms Sill's decisions. Mr Dowd did give feedback which was negative on 2 specific cases, to 2 managers, each of whom agreed the course of action followed.
- 2.1.2. We find that Ms Sills did fail to advise the claimant about the feedback early and now regrets that. This was an unfortunate management decision which left the claimant shocked when she was eventually told some time later. The respondent's explanation that a face to face meeting was needed to deal with such sensitive matters made absolute sense to us. Further, additional feedback was being received, and the meeting was set up at the earliest possible date. The respondent's explanation has satisfied us that the claimant's race played no part in this.
- 2.1.3. In December 2019 the claimant was not told of her potential poor rating for the mid year review because Ms Sills had not reached that decision then, or had she decided that the secondment should come to an end. Indeed it would not be her decision in any event. She discussed issues with Ms Flegg on a 'what if' basis. No decision was made about the claimant's secondment at that stage and so there was no detriment to the claimant, because no decision had been made. The claimant specifically confirmed she was not accusing Ms Flegg of racially discriminatory behaviour.
- 2.1.4. We find on the evidence that the decision to end the secondment came following a discussion between Ms Sills and Ms Flegg, but that the decision was taken by Ms Flegg alone. The claimant specifically said in her evidence that she does not accuse Ms Flegg

of any discriminatory behaviour. As such the decision to end the secondment is not race discrimination even on the claimant's case.

- 2.1.5. In February 2020 the claimant had still not received the hard copy evidence of the allegations made about her by her co workers. We find that right up to shortly before this hearing (and well after disclosure should have happened) that was still the case. Even the second grievance manager and appeal manager tried to make it happen and failed. We heard evidence of excuses – a busy department under resourced and in serious disarray. This was a credible reason. We did not find any evidence that the withholding of these details was in any way deliberate, undertaken by any individual with malicious intent, or racist. It was simply incompetent. We find that anyone in the claimant's position would have been treated in the same way regardless of any protected characteristic. This was not race discrimination.
- 2.1.6. The claimant's case took too long. Over 550 days to resolve. There was only 1 grievance, to which the claimant added detail when asked to do so by Ms Russell. This was simply more background material and affected the scope of the grievance. The respondent's assertion that there were 2 grievances was not right. 1 grievance, with additional material, heard twice. With the HR department in serious disarray both Mr Galbraith and Ms Conway failed to undertake their roles as expected. They were incompetent and inefficient, but there was no evidence that either had reason to behave in a discriminatory way towards the claimant because she was black by causing delay or indeed that they did so for that reason.. The reason for the delay was not racial discrimination.
- 2.1.7. It is fair to say that the claimant's grievance was badly handled twice. Neither investigators nor chairpersons come out with any glory. Finally after prompting, the claimant did receive a detailed and accurate outcome, she felt too little and too late. She still didn't receive the evidence of the complaints as expected. There was no evidence that the process or outcome was in anyway affected by the respondent's alleged antipathy towards her because of her race. There was no evidence of antipathy at all. There was however evidence of apathy. Such is not enough to base a claim of race discrimination.
- 2.1.8. The respondent accepted that the grievance was badly handled and conceded that matters were dealt with which were not in the grievance, and did not deal with matters which were. The outcome in the second grievance suffered the same fate as the first despite the change of personnel. It was however rectified when the claimant

complained and a more senior manager found it to be inadequate as well. This was further evidence of incompetence, with no evidence at all of any form of race discrimination involved.

- 2.1.9. We have made it plain that this evidence should have been shared at the earliest opportunity, simply on the principles of natural justice. The claimant is entitled to know what her accusers were saying about the quality of her work. She had seen a summary, but she wanted to see the full detail and was entitled to do so. On the respondent's admissions we find this down to incompetence and inefficiency. There is no evidence that the claimant's colour impacted on this at all.
- 2.1.10. The appeal outcome was so poor that it was returned to Mr Conway to be rewritten. He duly revised it to ensure it did cover every point in the appeal and supplied it to the claimant. The only alternative would have been to start again for a third time, which would have caused the claimant even more problems with delay. The ultimate decision of the appeal was that the grievance had taken too long to deal with, and the actions of Ms Sills and Ms Micklethwaite (in particular) were not discriminatory but undertaken to ensure the claimant was given the support they felt she needed to improve. The reasons set out in the second grievance outcome were found to be inadequate in other regards, but not discriminatory on the grounds of race. Their management can be criticised – why did Ms Sills not know of these problems? There was clearly inadequate supervision of the claimant's work at the outset, which contributed to what happened subsequently.
- 2.1.11. Despite our best efforts the claimant was unable to define her hypothetical comparator, so the Employment Judge stepped in to assist. We defined the comparator as a white person being seconded to another Ombudsman in the same circumstances as the claimant when it is subsequently established that their work has not been of a satisfactory standard in their original role.
- 2.1.12. We find in relation to all of the claimant's complaints that she was the victim of poor management decisions and a wholly inadequate HR department. We find that the hypothetical comparator would have suffered the same fate. We cannot find the evidence of the 'something more' required in *Madarassy*, and find the claimant has not satisfied us that she passes the first burden of proof. The respondent has provided cogent and credible evidence of non discriminatory reasons for the detriments. The claimant was not the victim of race discrimination, but rather of inadequate,

inefficient and incompetent management in the HR department and elsewhere .

Employment Judge Warren

Signed on 10 July 2023

Reasons sent to Parties on
13 July 2023