EMPLOYMENT TRIBUNALS

Claimant: Monika Ignatowicz

Respondent: Harrogate Healthcare Facilities Management Limited

Heard at: Leeds **On:** 16, 17 and 19 May 2023. 18 May 2023 in chambers.

Before: Employment Judge Jones
Ms L Fawcett
Ms J Noble

REPRESENTATION:

Claimant: In person
Respondent: Mr S Roxborough, counsel

JUDGMENT having been sent to the parties on 22 May 2023 and written requests having been requested by the respondent by email on 5 June 2023, in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the tribunal provides the following

REASONS

1. The findings of the Tribunal are unanimous.

Introduction

2. These are claims for direct race discrimination and victimisation.

The Claims and Issues

3. The claims and issues were considered at a preliminary hearing on 18 May 2022 before Employment Judge Wade. She identified five factual situations, each of which was a complaint of direct race discrimination and two of which were alternatively claims of victimisation. They were:

   3.1 On or around 5/6 April 2021 "Judith I" shouted at her, would not let her go to her ward, told her she could not refuse an instruction and so on as set out in lines 5 to 8 of section 8.2; less favourable treatment than Judith

would have or did give to English, or non-Eastern European or non-Polish colleagues, because of the claimant's race. The claimant relies on her race as Polish.

3.2 Manager Adrian Kopycinski's failure on this same day to investigate or reprimand Judith. The claimant says this was less favourable treatment to her detriment than would have been the case if Judith had been a Polish or Eastern European supervisor because Adrian was not prepared to tackle an English or non-Eastern European/Polish supervisor. Similarly, the employer's ongoing failure to discipline or reprimand Judith for her behaviour.

3.3 On 5 April 2022 Stephen McIntosh forbidding the claimant to go for water and telling her to wait half an hour for a drink. Alleged to be less favourable treatment because of race and/or victimisation because the claimant had made her complaint of 29 December 2021 (the alleged protected act).

3.4 Karen Hatch hiding facts and neglecting facts in her role in addressing the claimant's complaint; said to be less favourable treatment because of race as above/and or victimisation (because the claimant had done the protected act). Ms Hatch would not have neglected or hidden facts had she been addressing allegations of race discrimination from a non Polish colleague, it is said. Further, she neglected or hid facts because this was a complaint including allegations of race discrimination (the protected act).

3.5 Between around April 2021 and May 2022 the claimant and her partner were not permitted by Judith I to take holiday at the same time; this was less favourable treatment of the claimant (including refusals of her partner's leave) because of race; she alleges that couples who are not Polish or Eastern European were granted holiday requests to enable them to take holiday at the same time.

4. The issues at the final hearing are those set out at the preliminary hearing.

The Evidence

5. The claimant gave evidence. The respondent called Miss J Ickringill, a supervisor who usually oversaw a team of up to 60 domestic assistants, Mr Adrian Kopycinski, Assistant Hotel and Site Services Manager, who was responsible for approximately 130 to 140 staff, Stephen McIntosh, Supervisor and Karen Hatch, Human Resources Partner.

6. In addition the Tribunal had a bundle of documents of 543 documents.

Background/Findings of Fact

7. The respondent is a facilities provider to the NHS Foundation Trust which services Harrogate and the surrounding area.

8. The claimant commenced employment with the respondent as a Domestic Assistant on 25 March 2019. She is Polish and that is her first language.

9. In April 2021 the incidents which were the subject of this claim and other matters which were subsequently raised in her grievance arose. These are considered below.

10. The claimant was unwell because of work related stress from 7 April 2021 to 1 July 2021. She attended a long-term sick meeting on 10 June 2021 with Mr Stuart Kelly, the Hotel and Site Services Manager. She informed him of having a stress related illness and a problem with her knee which created difficulties when moving trolleys. She also described supervisors directing her to work on the Pannal ward which was causing her anxiety for personal reasons. These were that the claimant had had 5 miscarriages. The Pannal ward was the post-delivery suite. Mr Kelly referred the claimant to the occupational health department. He also sent an email on 10 June 2021 to all supervisors and Mr Kopycinski to inform them she should not be allocated to work on the Pannal ward.

11. The claimant had a telephone assessment with an occupational health nurse on 21 June 2021. The nurse assessed her, following tests, as having moderate/severe generalised anxiety disorder and depression. She addressed the history of a right knee injury which had occurred 5 years previously and for which the claimant had undergone surgery. She recommended a risk assessment and a managing work pressures assessment upon her expected return to work on 1 July 2021. She also recommended that the claimant refrain from pushing heavy items such as trolleys.

12. The claimant returned to work on 1 July 2021. On 14 July 2021 Mr Kelly sent an email to all relevant supervisors and managers to inform them that the claimant should not participate in the movement of trolleys.

13. The claimant took a number of periods of leave. Three of those coincided with that of her partner, Lucasz Poltorak, who also worked as a domestic assistant and had joined the respondent in February 2021. These were between 9 August and 29 August 2021. That leave had been requested by the claimant and Mr Poltorak on 11 July 2021. Leave between 26 October 2021 and 28 October 2021 had been requested by the claimant on 16 October 2021 and by Mr Poltorak on 19 October 2021. Leave on 24 December 2021 had been requested by the claimant and by Mr Poltorak on 27 November 2021.

14. On 29 December 2021 the claimant submitted a detailed grievance concerning the conduct of the managerial staff in the office of the domestic service department to domestic assistants and a number of procedures and practices she said which were not being followed. The complaint was lengthy and discursive, running to 4 pages and did not clearly identify each issue upon which she sought a resolution.

15. Ms Illingworth, Sterile Services Department Manager, conducted the investigation with the assistance of Ms Hatch as HR support. They held two meetings with the claimant on 11 January 2022 and 17 February 2022. On 18 February 2022 Ms Illingworth wrote to the claimant and categorised the concerns under 4 headings: *1. The current Health and Safety Issues you have*

raised within the domestic service. To establish the operating procedures and how these are communicated to staff. 2. How staff are inducted and trained to perform their domestic duties. To establish consistency and effectiveness. 3. Allocation of work. To establish fairness and equity of tasks. 4. Management Behaviours. If the investigating officer determines that the conduct of any individual could be in breach of a disciplinary threshold then they will escalate the matter accordingly.

16. Interviews were conducted with Mr McIntosh, Mr Prok, and Mr Kopycinski. An interim outcome was sent to the claimant on 4 March 2022 in which 7 recommendations were made to deal with health and safety issues arising from the claimant's concerns.

17. On 28 April 2022 Ms Illingworth sent to the claimant a letter detailing the outcome to the grievance. She identified 20 concerns and upheld a large number of them. She recommended disciplinary investigations into the conduct of Miss Ickringill and Mr McIntosh. These were undertaken but went no further because the allegations were one person's word against another. These were confidential investigations. They would not have been known to the claimant. They were only disclosed in the witness evidence in this case.

18. The claimant did not exercise her right of appeal. On 8 May 2022 the claimant sent an email to Mr Coulter, Chief Executive, to complain about Ms Illingworth and Ms Hatch who she said had hidden facts. She referred to severe bullying discrimination and said no consequences were imposed on aggressive English people and foreigners were oppressed. This was treated as an appeal to the grievance, albeit out of time.

19. On 8 June 2022 the claimant attended an appeal meeting with Mr Colwell, deputy Director of Estates and Facilities. The appeal was not upheld.

The Law

Unlawful acts of discrimination

20. By section 39(2) of the Equality Act 2010 (EqA):
An employer (A) must not discriminate against an employee of A's (B)—
(d) by subjecting B to any [other] detriment.

21. By section 109(1) of the EqA, anything done in the course of a person's employment must be treated as done by the employer and by section 109(3) it does not matter whether the thing is done with the approval or knowledge of the employer.

Definitions of discrimination

22. Direct discrimination is defined in section 13 of the 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.*

23. By section 23 of the EqA, *on a comparison of cases for the purpose of section 13, there must be no material difference between the circumstances relating to*

each case and *the circumstances relating to a case for the purpose of section 13 shall include a person's abilities if the protected characteristic is disability.*

Protected characteristics

20. By section 9 of the EqA, race is a protected characteristic It is defined as colour, nationality and ethnic or national origins.

Victimisation

21. By section 27(1) of the Equality Act 2010 (EqA), a person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act, or A believes that B has done, or may do, a protected act.

22. A protected act includes making any allegation (whether or not express) that A or another person has contravened the EqA or doing any other thing for the purposes or in connection with the EqA.

23. In **Nagajaran v London Transport [1999] ICR 877** the House of Lords held that in a victimisation or direct discrimination claim the essential question was why the employer had acted in a particular way and that the reason may be a subconscious one. Lord Nicholls pointed out that most people will not admit to acting in a discriminatory way and are often unaware they are doing so.

Burden of proof

24. Section 136(1) of the EqA concerns the burden of proof: *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.* Section 136(2) provides that does not apply if A shows that A did not contravene that provision.

25. In **Laing v Manchester City Council and another [2006] ICR 1519**, the Employment Appeal Tribunal stated that if a tribunal was satisfied on the evidence that the respondent had provided a reason which, on a balance of probabilities, had eliminated any discriminatory cause, it was not necessary for the tribunal to trouble about whether the burden of proof had shifted in the first instance. In **Hewage v Grampian Health Board [2012] ICR 1054,** as later endorsed in **Efobi v Royal Mail Group Limited [2021] UKSC 33,** the Supreme Court stated that it was important not to make too much of the role of the burden of proof provisions: "*They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other*", per Lord Hope in **Hewage**.

Time Limits

26. By section 123(1) of the EqA proceedings may not be brought after the end of the period of 3 months starting with the date of the act to which the complaint relates, or such other period as the employment tribunal thinks just and equitable.

27. By section 123(2) of the EqA conduct extending over a period is to be treated as done at the end of the period. In **Commissioner of Police for the**

Metropolis v Hendricks (2003) ICR 503, the Court of Appeal held that an act extending over a period was distinct from the succession of unconnected isolated specific acts that could constitute a state of affairs and was not restricted to a rule, policy or practice as identified in the earlier case law.

Analysis and conclusion

28. We have considered below each allegation separately. Because we have explained our decision in that way, it should not be thought that we did not take an overview of the case when we decided each allegation. In deciding each claim, the full picture was taken into account on all of the evidence.

On or around 5/6 April 2021 "Judith I" shouted at her, would not let her go to her ward, told her she could not refuse an instruction and so on as set out in lines 5 to 8 of section 8.2; less favourable treatment than Judith would have or did give to English, or non Eastern European or non Polish colleagues, because of the claimant's race. The claimant relies on her race as Polish.

29. On 5 April 2021 an incident arose when the claimant and her supervisor had a heated exchange when the claimant said she would not clean the Pannal ward. The claimant was not sure whether this was the 5 or 6 April 2021, but we are satisfied this must have been on 5 April 2021 because in her evidence Miss Ickringill said she had not been working on 6.

30. Miss Ickringill had no recollection of the matter, which is understandable given she was not asked about this until many months later and there was nothing particularly out of the ordinary for it to stick in her memory. In contrast it was an incident which upset the claimant and this was why she remembers it. There was some dispute about whether Miss Ickringill shouted at the time, which she denied in evidence. In the original complaint raised in the claimant's grievance, the claim form and her witness statement the allegation of shouting was not made, although she used the word "shouty" at one point in the lengthy grievance interview. The claimant says that Miss Ickringill raised her voice and was loud. She also said she was rude.

31. We find that Ms Ickringill asked the claimant to work on the Pannal ward. The claimant refused. Miss Ickringill took exception to this and believed the claimant was being insubordinate. We consider she probably did raise her voice and said how dare the claimant refuse to do the job, she was the supervisor and she could say where the claimant worked. It is likely she was brusque, which the claimant took as being rude because she felt unable to explain her objection to going to the Pannal ward. This upset the claimant because she had raised her difficulty working on the Pannal ward with Mr Prok the previous year and believed he was going to escalate that issue to the managers Mr Kelly and Mr Kopycinski. We are satisfied that was not done and the first Mr Kelly knew about this was on 10 June 2021 at the long-term sick meeting.

32. Being spoken to brusquely and in an elevated tone could constitute a detriment in the workplace, but this would depend very much on the circumstances. Clearly if this was because of a protected characteristic, it would be a detriment. If it was because an employee was being

confrontational and refusing to do work it would not, albeit a calm and measured response is preferable.

33. We find Miss Ickringill spoke as she did because she believed the claimant was refusing to comply with a reasonable request. She had no idea that the claimant had a particular reason not to do that task. Mr Prok had never told her and only he knew. Had she known we are satisfied she would not have insisted upon the claimant cleaning that ward. Miss Ickringill gave evidence about her own personal reasons why she would have empathised with the claimant's position.

34. With hindsight, it is fair to say she should have given the claimant the opportunity to explain her reason, but she jumped to the conclusion it was an unjustified rejection of a management instruction. We are not satisfied this was anything to do with the race of the claimant. Indeed, the claimant said Miss Ickringill spoke in a similar manner to many of the domestic assistants and that she was rude to all including other supervisors. We heard evidence that about 60% of the domestic assistants were not British, but from many countries throughout the world. The claimant accepted in cross examination that this was typical of the conduct of Miss Ickringill which arose regardless of nationality. There was no evidence or findings from which we could infer the aspects of the heated exchange which forms the basis of the first allegation had anything to do with the race of the claimant and that hypothetically, if the claimant had been British or of another nationality other than Eastern European, that the same would not have happened.

Manager Adrian Kopycinski's failure on this same day to investigate or reprimand Judith. The claimant says this was less favourable treatment to her detriment than would have been the case if Judith had been a Polish or Eastern European supervisor because Adrian was not prepared to tackle an English or non Eastern European/Polish supervisor. Similarly, the employer's ongoing failure to discipline or reprimand Judith for her behaviour.

35. The claimant said Mr Kopycinski heard the exchange because he was in the office sitting at his desk separated only by a partition. She said she was crying by this time. She was disappointed by his passive behaviour. She said she had discussed what had been said and that he said he knew nothing about what she told Mr Prok, when she explained that to him.

36. Mr Kopycinski said in evidence that he could not recall the incident.

37. The claimant's complaint is that Mr Kopycinski did not take action to reprimand Miss Ickringill at the time for her behaviour or then investigate the matter. This appears to have been described as an act of race discrimination at the preliminary hearing because Mr Kopycinski failed to investigate or reprimand Miss Ickringill because she was not Polish or of Eastern European origin.

38. It would plainly be a detriment for no action to be taken by way of investigation or, if proven, some form of reprimand given.

39. We had difficulty understanding what precisely it was the claimant was saying about this complaint. Whose race was it which she says caused Mr Kopycinski to do nothing. Hers or Miss Ickringill's? In cross examination the claimant said that there were instances when domestic assistants who were not Polish were shouted at, but the supervisors were not reprimanded. This would undermine a complaint of race discrimination. That is because it would reflect the general complaint which runs throughout, in the claimant's first grievance, interviews at the grievance meetings and appeal, the claim form and her witness statement that Mr Kopycinski is passive and does not reprimand the office staff, by which she means the supervisors. Her complaint then, was that the division was between the office staff, supervisors and managers on the one hand, and domestic assistants on the other. Race was not the discriminating feature, status was.

40. We note that the supervisors are of different national origins including two who were Polish. The complaint as characterised at the preliminary hearing, was that it was Miss Ickringill's race which was the motivation for Mr Kopycinski treating her more favourably in overlooking the matter, and thereby the claimant unfavourably. This formulation of the complaint was not raised in the claimant's witness statement nor in her evidence or closing submissions.

41. Addressing the complaint in either way, there is no evidence to suggest that the race of the claimant or the race of Ms Ickringill led Mr Kopycinski to take no action. In his evidence Mr Kopycinski said he treats all staff the same regardless of their race. He was an impressive witness. His answers were clear, consistent and measured. We accepted his explanation. We should add that the fact that he was Polish himself was not of any significance. That is as required by section 24(1) of the EqA.

On 5 April 2022 Stephen McIntosh forbidding the claimant to go for water and telling her to wait half an hour for a drink. Alleged to be less favourable treatment because of race and/or victimisation because the claimant had made her complaint of 29 December 2021 (the alleged protected act).

42. This event occurred on 4 April 2022, not 5 April as the claimant alleges. We regard the file note made by Mr McIntosh of that date as likely to be accurate. Both the claimant and Mr McIntosh recalled the matter and there is a measure of agreement as to what happened.

43. Mr McIntosh asked the claimant to take her break at 3.30 rather than 4 as was normal. There had been a natural break in duties. She declined. She asked to go for a drink. Although the claimant states in the claim form it was a request for water, she was unclear about this when challenged in cross examination. Mr McIntosh's note refers to a drink in his statement. We consider that is likely to be more reliable than the claimant's later suggestion that it was a drink of water. In her evidence she explained that she does not drink tap water and so could not use one of the water dispensers which were available in several places in the hospital.

44. The claimant wished to buy a bottle to drink. There was some doubt as to whether a vending machine was accessible at that time near the entrance to the hospital or it would have been necessary to use the shop in the same

area. The note refers to a shop, and we again accept this is likely to be accurate.

45. On any view the claimant asked permission to go to obtain a drink from near the hospital entrance and this was refused.

46. Mr McIntosh says that it was because the claimant would have been taking extra time out of working hours to do this because the shop was 5 minutes' walk away and it might have taken up to half an hour. Even if this is an exaggeration, we consider that it would have taken at least 15 minutes of her working time.

47. We entirely accepted the explanation of Mr McIntosh for this. There was no evidence it had anything to do with the claimant's nationality. The claimant provided no evidence to explain why her nationality was a matter which influenced Mr McIntosh on this or any other matter. When this was put to her in evidence the claimant said she wouldn't be surprised, but there were other situations in which she could feel that.

48. In respect of the complaint of victimisation, it was said at the preliminary hearing that the protected act was in the grievance made on 29 December 2021. There is reference to bullying, no respect for domestic staff and how they were treated in general. Only two references are made which might be construed as an allegation of discrimination in this detailed 4 page document of concerns. The first was that an employee had used the same tip of a mop on the entire hospital ward and when it was reported to the office, Miss Ickringill said, "not to be personal because it was an Englishman". The second was, "On the part of the office, you can feel the difference between people there is a division into English and foreigners, especially on the part of *Judi".*

49. We are satisfied that could be taken as a reference to a contravention of the EqA. Discrimination on racial grounds was far more clearly expressed and easy to identify in the letter to the Chief Executive which was treated as an appeal. In any event Ms Illingworth interpreted it as touching on matters relating to race as she specifically made recommendations in respect of diversity, namely an investigation into the culture of the department. Mr McIntosh knew of the allegation, because in his interview in the grievance investigation he was asked if he had heard any supervisors refer to staff as they are English or by any other nationality.

50. We are not satisfied the refusal to allow the claimant to go to purchase a bottle of water or a drink had anything to do with the grievance at all. That was entirely because the claimant had chosen not to take her break when offered but sought to take time out of her working day within half an hour of the break beginning. Mr McIntosh did not know that the claimant did not drink tap water and so would not have been able to relieve her thirst by taking a drink from the water fountain, a practice which was understood and permitted during working hours. The issue of taking 15 minutes, on any view, to buy a drink from the shop or vending machine was not necessary or appropriate, in the light of what he knew.

Karen Hatch hiding facts and neglecting facts in her role in addressing the claimant's complaint; said to be less favourable treatment because of race as above/and or victimisation (because the claimant had done the protected act). Ms Hatch would not have neglected or hidden facts had she been addressing allegations of race discrimination from a non Polish colleague, it is said. Further, she neglected or hid facts because this was a complaint including allegations of race discrimination (the protected act).

51. When asked to clarify what had been hidden or not addressed in her evidence, the claimant said that there were two matters. These were similar to those raised in the appeal. She did not raise the other issues touched upon in her statement either in the course of her evidence or in her closing arguments.

52. The first was that she could not take time off at the same time as her partner, Mr Poltorak, and the second was that she should have been entitled to have a human resources officer at the return to work interview after absence in June 2021. In respect of the criticism that the return to work meeting had not been dealt with, this was incorrect as it is specifically covered. The complaint was not well made as the policy did not require a human resources officer to be present.

53. The issue of hidden facts was explored in cross examination but it seemed this was a confusion arising from the language barrier and the complaint was about not dealing with matters.

54. On behalf of the respondent Ms Hatch agreed that the issue of holiday had not been addressed in the outcome to the grievance. In respect of that, she said it had been overlooked because the list of concerns which the claimant had raised was substantial. Outcomes on 20 complaints had been set out in the outcome letter dated 28 April 2022.

55. We accepted Ms Hatch's evidence. This was an exhaustive enquiry into a wide range of concerns in respect of policies and practices in the domestic service department. The claimant had never identified them clearly, because they were part of a lengthy and unstructured narrative of complaints in the written grievance and in the two interviews. It was left to Ms Illingworth to identify which parts of the claimant's story were complaints which required a resolution. Many were upheld. A recommendation was made for disciplinary investigations to be undertaken into the conduct of her supervisors Mr McIntosh and Miss Ickringill. Reviews were required into issues of diversity and staff relations. This was a good example of a conscientious and thorough investigation which acknowledged serious matters of concern and appropriately addressed them. There was no evidence that the nationality of the claimant a protected act influenced any part of that decision.

56. The claimant was unable to provide any explanation as to why Ms Illingworth and Ms Hatch would have addressed almost all her complaints, only to ignore a small minority. Why would she have ignored the few which the claimant identified at the appeal and in allegation 4 in this case? It would have been extraordinary for Miss Illingworth to recommend a review of the culture in the department and investigation into diversity and disciplinary investigations, if

race or reference to that as a protected act had influenced Ms Illingworth and Ms Hatch in any way.

Between around April 2021 and May 2022 the claimant and her partner were not permitted by Judith I to take holiday at the same time; this was less favourable treatment of the claimant (including refusals of her partner's leave) because of race; she alleges that couples who are not Polish or Eastern European were granted holiday requests to enable them to take holiday at the same time.

57. The claimant was unable to provide any specific instance when she asked for leave which was at the same time as her partner and it was refused. She said this had occurred on several occasions when she asked Mr Prok and had been told she couldn't because they were a family.

58. In cross examination the claimant acknowledged that there were the three occasions identified in 2021 above when she and her partner took leave together and some at short notice, less than the 2 months requested under the policy. All had been authorised by Miss Ickringill. The claimant's witness statement recorded she had refused this every time. The claimant explained that inconsistency as a problem in translation.

59. This allegation was not illustrated by examples, that is times and dates, and was then contradicted by the documentation. That demonstrated that leave had been granted, yet the claimant had said none had. We could not make any findings of what had been refused and when in these circumstances. No detriment was established.

60. Even if the detriment had been made out, this would not have been because of race. The claimant's comparators Kasha and Magda, who were a Polish couple, worked in the same ward. She said they had been granted leave in contrast to herself and her partner. The other comparators were Mr Prok and his mother. They were Slovakian. Whatever the reason might have been for any refusal of leave, it could not have been because the claimant was Polish or of Eastern European origin when those of that race were granted their leave requests.

Time limits

61. In the light of our findings that the claims are not established on the evidence, it is not necessary to address the issue of time limits.

Employment Judge D N Jones
Date: 25 July 2023

REASONS SENT TO THE PARTIES ON
26 July 2023

FOR THE TRIBUNAL OFFICE

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