Case No: 2303545/2021

EMPLOYMENT TRIBUNALS

Claimant: Mr France Maria

Respondent: London Ambulance Service NHS Trust

Heard at: London South (remote hearing) **On:** 5, 6, 7, 8, 9 June 2023

Before: Employment Judge B Smith (sitting with members)
Ms J Saunders
Ms S Dengate

Representation
Claimant: In person
Respondent: Mr A Ross (Counsel)

JUDGMENT having been sent to the parties on 15 June 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The claimant began his employment with the respondent, the London Ambulance Service NHS Trust, in February 2012. Both now, and during the relevant periods, he was employed as a Fleet Multi Skilled Technician. The focus of the claim is that the claimant was treated unfavorably by the respondent because of his race, particularly in relation to promotion opportunities.

2. This is denied by the respondent. The respondent defends the case on various grounds including time limits and the respondent also denies that some of the things alleged by the claimant actually happened, and where they did the respondent says it was not related to the claimant's

race which he describes as black/British of Seychelles decent and African origin.

3. The Claimant brings complaints of:

   (i) Direct race discrimination, contrary to Sections 39(2) and 13 of the Equality Act 2010 (‘EqA’);

   (ii) Harassment related to race, contrary to Sections 40 and 26 EqA;

   (iii) Victimisation, contrary to Sections 39(3) and section 27 EqA; and

   (iv) Being subject to a detriment on grounds related to union membership or activities, contrary to section 146(1)(b) Trade Union and Labour Relations (Consolidation) Act 1992 (‘TULCRA)’.

Procedure, documents and evidence heard

4. The claimant represented himself during the hearing and gave sworn evidence. Until very shortly before the hearing he was represented by solicitors and the time when he was represented included the preparation of his witness statement, the agreed bundle and the list of issues.

5. During the hearing the claimant was not permitted to cross examine witnesses on the detail of documents not in evidence because this would be unfair to the witnesses. When witnesses were asked about documents not in evidence we have taken their answers in that context. The claimant was given frequent breaks throughout this hearing to ensure that he was in a position to ask questions of each witness. The Tribunal did not allow questions on irrelevant issues, or for irrelevant documents to be put in evidence which had not been sent to the respondent in advance of the hearing in light of when the bundle was agreed. Our focus was on the list of issues agreed between the parties and approved by the Tribunal when deciding what was relevant.

6. The list of issues in the case was almost entirely agreed by the parties save for an amendment by the Tribunal on Monday 5 June to reflect the correct law as to the time limits on the trade union detriment claim. The

amended list of issues was sent to the parties to reflect the wording of s.147 TULCRA.

7. We have considered a hearing bundle of 813 pages; more specifically the documents referred to in that bundle by the parties during the hearing as indicated at the start of the hearing. The evidence also included 72 pages of witness statements and we heard from the claimant, Steve Perks, Simon Parker, Nigel Birch, Darryn Vellenoweth, Martina Orton, Sanchia Lyons, Simons Thwaites, Jason Rosenblatt, Lee Hyett-Powell and Robert Rudzki. All witnesses gave evidence under oath or affirmation.

8. A cast list and chronology prepared by the respondent are agreed documents.

9. The respondent provided written submissions. Both sides made oral closing submissions.

Issues for the Tribunal to decide

10. The list of issues was originally agreed between the parties during the period in which the claimant was represented. Minor amendments to the list of issues were made during the hearing to better reflect the statutory language in respect of time limits. The updated list of issues was provided to the parties during the hearing. The final list of issues can be found at **Appendix A** and the relevant parts are extracted in the conclusions section below.

Findings of Fact

10. We make the following findings of fact.

(i) General

11. The claimant was employed by the respondent, an ambulance service NHS trust, since 1 Feb 2012. Hecontinues to be employed by the respondent. His role at the relevant times was a Fleet Multi Skilled Technician.

12. Acas conciliation started on 13 July 2021, the EC certificate was issued on 2 August 2021,and the ET1 presented on 26 August 2021.

13. The cast list and chronology are agreed documents and we make findings of fact in accordance with those documents.

(ii) *Chronology*

14. Overall, the timeline and principal relevant facts are not in dispute. In general, we make factual findings in relation to the chronology, meetings and correspondence in accordance with the documentary evidence.

15. The background facts include the following. On 12 July 2017 the claimant raised a grievance about his line manager, Robert Rudzki ('Grievance 1').

16. On 4 August 2017 the Grievance 1 hearing was held. It was chaired by Simon Parker (Fleet Operations Support Manager at Fulham) and the outcome letter was dated 14 September 2017. In 2018, on 4 November the claimant raised a grievance about Robert Rudski and Simon Parker ('Grievance 2'), and the meeting for that grievance was chaired by Mark Crouch on 11 Feb 2019. A further meeting about the grievance was held with Steve Perks (Head of Fleet from August 2018 to August 2020) in May 2019 with the written outcome on 15 August 2019 from Steve Perks. The claimant submitted an appeal of Grievance 2 in August 2019.

17. In January 2020 the claimant was interviewed for a Workshop Manager secondment at Barnehurst, West Ham, and Hillingdon Workshops. The evidence about this included that he scored 14/35. On 18 February 2020 substantive workshop manager applications were opened. On 12 May that year there was also an advert for a Whipps Cross Workshop Manager secondment. The Workshop Manager secondments were, in effect, temporary promotions due to a restructure.

18. On 2 June 2020 the claimant raised a grievance against Steve Perks ('Grievance 3)', alleging race discrimination in relation to progression opportunities. The respondent accepts that this was a protected act. Grievance 2 had its appeal hearing chaired by Justin Wand on 21 July 2020 and this was resumed on 25 August 2020. The written outcome of that was dated 17 September 2020.

19. Grievance 3 had its hearing chaired by Lee Hyett Powell (the then Quality, Governance and Assurance Manager) on 21 September 2020 and it was rescheduled on 3 November 2020. The outcome letter was dated 23 November 2020.

20. The claimant's first round interview for the substantive role of Manager at Whipps Cross was on 17 December 2020. This was held remotely.

21. In January 2021 the Strategic Assets and Property Directorate Staff Communication Form was set up and the claimant shadowed Darryn Vellenoweth (Workshop Manager at Hillingdon from 2017 and Fleet Operational Support Manager for workshops based at Romford, Camden, Chase Farm and Whipps Cross from 2020) for a two week period. The claimant requested that he be a fleet department representative on the Communication Forum on 30 January 2021, and it was closed in March that year.

22. The claimant's second round interview for the Whipps Cross Manager was on 12 March 2021. He was unsuccessful. On 5 April 2021 the claimant went to the Hillingdon Workshop on a secondment for a three-month period.

23. In July 2021 Karl White and Robert Rudski communicated complaints about the claimant to Simon Thwates.

(iii) *Witness evidence*

24. Overall, we accepted the evidence of the respondent's witnesses. This is because we found them to give detailed answers where possible, they were candid if they did not recollect something, and on many important matters relevant to the issues their evidence was consistent with the documentary evidence. By contrast, we found that the evidence of the claimant was often vague and lacked detail, and therefore it was difficult for us to give significant weight to many of the claims he was making. For those reasons, where there was a conflict of evidence between the claimant and the respondent's witness, we tended to prefer the evidence of the respondent's witnesses. This informed our decisions below.

25. We did find, however, that the claimant had a genuinely held belief in the allegations he was making, generally speaking.

(iv) Findings on key issues of fact

26. Turning to the important facts, most of the key factual allegations in the list of issues were not in dispute.

27. However, we do find that, contrary to the claimant's case, the general support offered to the claimant by the respondent included work shadowing Mr Vellenoweth, interview skills support in March 2021 (as set out in the evidence of Simon Thwaites), Ms Orton gave the claimant feedback and learning points from interviews, Mr Vellenoweth offered the claimant support, and from the evidence of Mr. Rosenblatt the claimant accessed some of the internal training courses. This is because it was supported by the evidence of those witnesses and was not effectively challenged by the claimant or clearly undermined by other evidence.

28. We find that Steve Perks (Head of Fleet) did not second the claimant to the Workshop Manager positions in Barnehurst, West Ham or Hillingdon in January 2020 (issue 4.1).

29. We find that Steve Perks did not second the claimant to Whipps Cross in May 2020 (issue 4.2).

30. We did not find that the facts supporting issue 4.3 happened, ie. whether Simon Parker did not support the claimant with interview preparation. This is because Simon Parker's evidence, including in his witness statement, was that he was not asked but if he was asked he would have been willing to offer assistance. We accept his evidence because it is clear and detailed, there is nothing to clearly and reliably undermine it, and there no clear documentary evidence in support of the claimant's position.

31. We find that the claimant was not appointed to the role of Whipps Cross Workshop Manager in March 2021 (issue 4.4). Darren Vellenoweth (Fleet Operational Support Manager), Martina Orton (HR Lead Values,

Behaviours & Relationships Change Management Programme) and Nigel Birch had different roles in relation to that decision.

32. We did not find that Martina Orton (or anyone else) excluded black members of Fleet staff from the Fleet Communication Forum in or around February 2021.This is because we accept her evidence on this point and claimant has not advanced any evidence to effectively undermine this. Also, we accept that there was at least one black member on that forum who Ms Orton named in her evidence. This was outside of the claimant's knowledge and not challenged by him (issue 4.5).

33. We find that the claimant went on a three-month secondment from 1 April to 1 July 2021 (issue 4.6). However, we do not find that the claimant was required or in any way forced to go on this secondment by Sanchia Lyons (HR Manager), Simon Thwaites (Head of Fleet), Jason Rosenblatt (Interim Head of Staff Engagement) and or Lee Hyett-Powell (issue 4.6 and 6). We accept their evidence that this was a supportive measure for the claimant and this came out of the grievance outcome in November 2020 (as set out in letter dated 23 November 2020). Also, there was no clear evidence to support the claimant's contention that he was required to go on this other than his general assertion. The claimant's case is also completely undermined by his own evidence in cross-examination. This is because he accepted that remained at Hillingdon for 3 months because he was content to do so.

34. As to the allegation that Simon Thwaites caused the Claimant to be investigated on or around 12 July 2021 for the bullying and harassment of two managers (Issue 10.1), we find that the claimant was investigated on or around 12 July 2021 for the bullying and harassment of two managers. The investigation was stated by Mr Thwatites. However, he only caused the investigation to begin because he received complaints himself about the claimant. Also, the claimant accepted in cross-examination that it was reasonable for him to be investigated in those circumstances.

35. We also did not find that the points in issue 10.1, namely that the claimant was investigated for bullying and harassment, were because the claimant had done the protected act (issue 11). There was no evidence to support this other than the claimant's general assertion. The

claimant only referred to Simon Thwaite's knowledge in support of this, but his knowledge of the claimant is not enough to establish causation. The fact that he knew about the complaint isn't enough.

36. We do not find that Robert Rudzki, Manager and Simon Parker, Senior Manager refused the Claimant leave to attend trade union training on the following dates (issue 12):

    (i) 14 – 18 May 2016;
    (ii) 9 – 13 July 2016;
    (iii) 24 – 28 September 2016;
    (iv) 26 – 30 June 2017;
    (v) 6 – 10 November 2017; and
    (vi) 3 – 7 December 2017.

37. The claimant also tried to advance a different case, namely that he should have been given time off in lieu ('TOIL') after the event. However, we accept Mr Rudski's evidence that the claimant was not following the proper process for requesting leave for trade union activities and this was at the heart of his disagreement with the respondent. We find, overall, that the evidence showed that the claimant was given reasonable time to attend trade union activity, and the respondent did not require him to take annual leave in order to do so.

38. We also find, alternatively, that the sole or main purpose of the actions of Robert Rudski and Simon Parker in doing what they did, was not to prevent or deter the claimant from in taking part in activities of a trade union or to penalise him (issue 13). This is because was no evidential link between any dispute over TOIL or leave that there may have been, and their purposes. On at least one occasion we accept the respondent's evidence that the claimant working pattern did not give rise to TOIL being required.

<u>Relevant law</u>

39. We have applied the relevant sections of the Equality Act 2010 ('Equality Act') as mentioned already and also the relevant provisions of TULCRA**.** We have also taken into account the cases and legislation referred to at paragraphs [17] to [44] of the respondent's written submissions.

40. When deciding whether or not to extend time, the test for the Equality Act claims is whether or not it is just and equitable to extend the time

limit for any otherwise out of time acts or omissions. That is a broad discretion of the Tribunal. The factors we should take into account are not specified by statute. We have, in particular, looked at the length of the delay, the reason for any delay, the prejudice to the claimant, and the prejudice to the respondent. There does need to be some good reason to extend time and it should not just be assumed. We have, to a limited degree, taken into account the merits of the claimant's case but this has not been determinative. This is because in some cases it may be just and equitable to extend time for a weak case, and not just and equitable to extend time for a strong case. It is just one of many factors to take into account.

41. The test for the TULCRA claim is stricter; whether it was reasonably practicable for the claim to be made within the time limit, and if not was it made within a reasonable period.

42. We also have to determine between single acts and continuing acts. This involves understanding the difference between single acts with continuing consequences, which are treated as single acts, and true continuing acts.

43. Section 136 alters the ordinary civil burden of proof for some of the claimant's claims under the Equality Act. A claimant must start the case by showing that there is a prima facie case of discrimination before the respondent is then required to discharge the burden of showing that the discrimination did not occur.

<u>Conclusions</u>

(i) *<u>Jurisdiction</u>*

Issue 2: The claim was received on 26 August 2021, following Acas Early Conciliation between 13 July 2021 ("Day A") and 2 August 2021 ("Day B"). Accordingly:

2.1. Taking into account any conduct extending over a period, did any act or omission, about which the Claimant complains, occur on or before 13 April 2021? If so, such act or omission is, on the face of it, out of time.

<u>Equality Act Claims</u>

2.2. Is it just and equitable to extend the time limit for any otherwise out of time acts or omissions?

44. We find that all of the acts in issues 4 and 6 are out of time. They are not continuing acts because they are discrete, separate, involved different people and different things. Also, 4.6 refers to the decision, which is a standalone act with a continuing consequence, not a continuous act.

45. We decided that it would not just and equitable to extend time (issue 2.2). We have considered the claims individually. Some have been subject to quite lengthy delay. There had been prejudice to the respondent because many witnesses were unable to recall some details, as shown through cross-examination of the witnesses. We find that the prejudice to the claimant is limited because the claim has nonetheless been fully explored in evidence and we have been able to make factual determinations. Looking at the merits of the claimant's case, much of it is not made out on the facts. Turning to the reason for delay, the claimant says relied on advice (unspecified). However, he is or was a Trade Union representative and had the support of the trade union at various times in his grievances. He also contacted Acas at an early stage in respect of some matters, including Grievance 2, as the claimant accepted in cross-examination. We did not find that it would be proper, in this particular case, to find that awaiting the outcome of the internal grievance process as determining this point in the claimant's favour. This is, in part, because not all matters were subject to a grievance, and the grievances had finished some time before the ET1 was presented in any event. We find that there was no clear reason why we should extend time other than potential prejudice to the claimant. Overall, the balance of factors are against allowing it.

<u>*TULCRA Claim*</u>

2.3. Was the Trade Union Detriment claim brought within time? Was the claim made within three months beginning with the date the detriment occurred? If not, was there a series of similar acts or failures and was the claim made to the Tribunal within three months of the last one? If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit? If if was not reasonably practicable for the claim to be made within the time limit, was it made within a reasonable period?

46. The claim was not brought within 3 months. It was clearly out of time by a very high margin. The claimant accepted he could have brought a claim earlier and provided no real reason why he didn't. Even if wasn't practicable to do so, there has been a very long delay and there is no clear justification to suggest that it was made within a reasonable period.

47. It is not necessary for us to reach further conclusions on the claims of direct race discrimination, harassment related to race, or trade union detriment in light of those decisions. However, should we be wrong in our decision on the time limits, we do provide alternative conclusions on the substantive questions. This is possible and fair in light of our conclusions on the facts, having heard the evidence and case as a whole.

Direct Race Discrimination

48. The issues are as follows:

> 3. *The Claimant describes his race is black/British of Seychelles decent and African origin.*
>
> 4. *Did those for whom the Respondent is liable under Section 109 EqA treat the Claimant less favourably than they treated or would have treated others in materially the same circumstances by:*
>
> 4.1. *Steve Perks (Head of Fleet) not seconding him to the Workshop Manager positions in Barnehurst, West Ham or Hillingdon in January 2020. The Claimant relies on Karl White and Craig Doyle as actual comparators.*
>
> 4.2. *Steve Perks not seconding him to Whipps Cross in May 2020. The Claimant relies on Trevor Fautley as an actual comparator.*
>
> 4.3. *Simon Parker (Fleet Operational Support Manager) not supporting him with interview preparation for a Manager's position at Whipps Cross Workshop in December 2020.*

4.4. Darren Vellenoweth (Fleet Operational Support Manager), Martina Orton (HR Lead Values, Behaviours & Relationships Change Management Programme) and Nigel Birch not appointing him to the role of Whipps Cross Workshop Manager in March 2021.

4.5. Martina Orton excluding black members of Fleet staff from the Fleet Communication Forum in or around February 2021.

4.6. Sanchia Lyons (HR Manager), Simon Thwaites (Head of Fleet), Jason Rosenblatt (Interim Head of Staff Engagement) and Lee Hyett-Powell (Quality, Governance and Assurance Manager) requiring the Claimant to go on a three-month secondment from 1 April to 1 July 2021.

5. If so, was this because of the Claimant's race?

49. We concluded that there was no sufficient evidence from which we could properly infer that those things which did happen were because of the claimant's race and so the burden of proof does not shift to the respondent. We did not feel that there was sufficient evidence to support a weight of numbers argument, particularly in relation to promotions. For example, Mr Wallace did score well and only didn't take up a relevant position due to other reasons. This shows that the respondent was willing to promote a black individual to the role of manager. Also we took into account the small number of roles, typically held, for example, for 10-12 years, and the low turnover. From this we found that the absence of black managers, or those of the claimant's race more generally, isn't enough to shift the burden of proof to the respondent. There was also other evidence from the respondent's witnesses about diversity more generally which was against any weight of numbers type argument, and the evidence did not include the detailed diversity data which might be needed to support such an argument.

50. It is also relevant that the claimant's case has been put on a changing and confused basis as set out in respondent's written submissions. The claimant makes very general assertions about the culture, including about racism in the workplace which are not supported by the evidence.

51. Contrary to the claimant's position, we conclude that the recruitment processes adopted were evidenced to have been through, well documented, independent, use of scoring system and consistent questions for each candidate, not knowing race at shortlisting, and the processes were transparent. This is primarily established through the documentary evidence in the bundle about the various recruitment processes carried out.

52. Also, issues 4.3, 4.5 and 4.6 would fail on the facts in light of our conclusions on the facts as set out above.

Harassment related to race

6. Did those for whom the Respondent is liable under Section 109 EqA subject the Claimant to unwanted conduct by:

6.1. Sanchia Lyons, Simon Thwaites, Jason Rosenblatt and Lee Hyett-Powell requiring the Claimant to go on a three-month secondment from 1 April to 1 July 2021.

53. We find that, contrary to the claimant's case, the respondent was in fact trying to support him by offering the secondment. We don't accept the claimant's argument that the respondent failed to support his career as an individual with a protected characteristic. This is because it did various things include working shadowing Mr Vellenoweth and the other matters set out in paragraph [27] above.

54. Issue 6.1 also fails on the facts, as set out in our conclusions on the facts above. In light of this we have decided not to express conclusions on issues 7 and 8, namely:

7. If so, was the unwanted conduct related to the Claimant's race?

8. If so, did the conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

Victimisation

> *9. Did the Claimant do any of the following, alleged to be protected acts (and, if so, did he thereby do a protected act):*
>
> *9.1. Complaining about discrimination in a grievance in or around June 2020.*
>
> *10. Did the Respondent subject the Claimant to any of the following alleged detriments:*
>
> *10.1. Simon Thwaites causing the Claimant to be investigated on or around 12 July 2021 for the bullying and harassment of two managers.*
>
> *11. If so, was this because the Claimant had done the (alleged) protected act?*

55. This claim (issues 9, 10, 11) fails in light of our conclusions on the facts, namely that there was no causal link between the claimant's protected act, and the actions of Simon Thwaites in relation to the investigation. What Simon Thwaites did was not because the claimant had done the alleged protected act.

<u>*Trade Union Detriment*</u>

> *12. Did the Respondent subject the Claimant to a detriment by Robert Rudzki, Manager and Simon Parker, Senior Manager refusing the Claimant leave to attend trade union training on the following date(s):*
>
> *12.1. 14 – 18 May 2016 (one day of annual leave to be taken to attend)*
>
> *12.2. 9 – 13 July 2016 (one day of annual leave to be taken to attend)*
>
> *12.3. 24 – 28 September 2016 (four days of annual leave to be taken to attend)*
>
> *12.4. 26 – 30 June 2017 (three days of annual leave to be taken to attend)*
>
> *12.5. 6 – 10 November 2017 (three days of annual leave to be taken to attend)*
>
> *12.6. 3 – 7 December 2017 (three days of annual leave to be taken to attend)*

13. If so, was the sole or main purpose of the detriment to prevent the Claimant or deter him from taking part in the activities of an independent trade union, or penalising him for doing so?

56. This claim (issue 12 and 13) would also fail in light of our conclusions on the facts above.

57. There is also no clear evidence that the claimant attended on those dates in 2016, and it likely that the claimant is mistaken as to the dates alleged. This is because there is evidence about training on these dates in 2018. However, even on 2018 dates, that wouldn't help his case.

58. More generally, we do not accept the claimant's analysis of the law as applied to his case, as he put it in cross-examination and closing submissions. Specifically, he frequently sought to rely in cross-examination of the witnesses on the public sector equality duty, as opposed to the relevant provisions of the Equality Act 2010 which more properly apply to the type of claims he was making.

<u>Costs</u>

59. At the end of the hearing, after the oral reasons had been given, the respondent applied for costs. The claimant had been on notice of the application since the previous day. The respondent relied on a 38 page bundle and various authorities. The claimant did not object to costs being determined at this stage.

60. In terms of means, the claimant told us that he was still working on a secondment, but was just earning basic overtime. The evidence included recent wage slips showing his current income.

61. The respondent's application was made under rule 76, in particular rule 76(1)(a) on the basis that it was unreasonable for the claimant to have pursued his case because it had no reasonable prospect of success, taking into account the content of his primary evidence.

62. We find that the claimant did act unreasonably in bringing at least some of the elements of his case. We do not consider that proper consideration had been given to his ability to meet the stricter time limits that would be applied to his case. Also, some factual elements of his case, such as whether or not he was forced to go on a secondment,

were readily conceded during cross-examination. There was also a paucity of detail in his witness statement. The respondent's submissions were made on the basis that the claimant should have recognised the weaknesses in his case a few week's before the hearing. This was at a time when he was legally represented. We agree that the claimant could and should have known and appreciated at least some of the weaknesses in his case as set out above. We therefore find that the discretion to award costs under s.76 is engaged.

63. We accepted that even if we find that a party has acted unreasonably, it is still a matter of our discretion whether or not to award costs. We decided that the circumstances of this case, overall, were such that it was proper to exercise the discretion to make an award of costs. The respondent had been put to the costs of a lengthy hearing considering a number of distinct claims, some elements of which were clearly extremely weak. We did not consider there were any clear or determinative factors against exercising our discretion in this case.

64. Pursuant to rule 84 we may have regards to the claimant's means and likely future means.

65. We do not consider that every element of the claimant's case was so weak that it was necessarily unreasonable to bring the claims in their entirety. The key weak points have been outlined above. We also do consider that the claimant does not have the means to meet a costs order in full. We also do not consider that all of the costs claims were reasonably necessary, particularly in terms of solicitor attendance throughout the trial. This is because a less expensive fee-earner could have been used.

66. Taking all of the above factors into account, we decided that an award of costs of £3,000 in favour of the respondent was appropriate. These must be paid by 9 August 2023, that being a time for payment the claimant agreed by the claimant during the hearing.

Employment Judge Barry Smith

22 July 2023