Case Number: 2206180/2022

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**and**	**Respondent**
Mr D Adeyemi-King		**Notting Hill Genesis**

REASONS FOR THE JUDGMENT SENT TO THE PARTIES ON 28 JULY 2023

Introduction

1 The Respondent is a substantial housing association formed in 2018 by the merger of Notting Hill Housing and Genesis Housing Accociation.

2 The Claimant, Daniel Adeyemi-King, who describes himself as a black man of African ethnic origin, worked for the Respondent as full-time temporary cover for a vacant Housing Officer position for a period of some months ending on 6 June 2022. He was not directly employed by the Respondent but supplied to it by an employment agency ('the agency') as a contract worker. The engagement ended on the Respondent exercising the power under its agreement with the agency to bring it to an end.

3 By a claim form presented on 22 August 2022, the Claimant brought complaints of unfair dismissal and race and sex discrimination and a claim for arrears of pay. All claims were disputed.

4 The matter came before Employment Judge Gordon-Walker on 14 December 2022. The judge recorded that the Claimant was pursuing complaints of direct race and sex discrimination. She also noted the claims for unfair dismissal and arrears of pay (interpreted as a claim for notice pay) and gave directions from them to be clarified. Both faced obvious difficulties and were later withdrawn. A proposed complaint of 'automatically' unfair dismissal never materialised.

5 In an annex to her Order, EJ Gordon-Walker summarised the dispute on the discrimination claims – the only matters ultimately pursued – as posing the following questions (we paraphrase).

(1) Was the Claimant a 'contract worker' within the meaning of the Equality Act 2010, s41?
(2) Did the Respondent, by terminating the Claimant's engagement, treat him less favourably than it would have treated a hypothetical comparator of different race?

(3) Did the Respondent, by terminating the Claimant's engagement, treat him less favourably than it treated a female ('actual') comparator?
(4) Was any such less favourable treatment 'because of' race and/or sex?

6 The comparator for the purposes of the sex discrimination claim was later identified as 'Jag', a directly-employed, female member of the Respondent's workforce.

7 The matter came before us on 25 July 2023 in the form of a 'face-to-face' final hearing of the discrimination claims with four sitting days allocated. The Claimant was represented by Mr N Ijaola, a legal representative and the Respondent by Mr A Line, counsel. We are grateful to both advocates for assisting us to complete the hearing well within the generous time allocation.

8 Having read into the case on the morning of day one we completed the evidence and argument on the morning of day three. The same afternoon, following private deliberations, we delivered an oral judgment dismissing the claims.

9 These reasons are given in writing pursuant to a timely written request by the Claimant.

The Legal Framework

10 The Equality Act 2010 (to which all section numbers below refer) protects specified categories of persons, who include contract workers, from 'prohibited conduct' based on or connected with specified 'protected characteristics', including race and sex (ss 9 and 11 respectively).

Direct discrimination

11 Chapter 2 of the Act identifies the various forms of prohibited conduct. The first of these is direct discrimination, which is defined by s13 in (so far as material) these terms:

> **(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.**

By s23(1) and (2)(a) it is provided that there must be no material difference between the circumstances of the claimant's case and that of his or her comparator and that (for these purposes) the 'circumstances' include the claimant's and comparator's abilities.

12 In *Nagarajan*-v-*London Regional Transport* [1999] IRLR 572 Lord Nicholls construed the phrase 'on racial grounds' in the Race Relations Act 1976, s1(1)(a), in these words:

> **If racial grounds … had a significant influence on the outcome, discrimination is made out.**

It is not in question that introduction of the 'because of' formulation under the 2010

Act (replacing 'on racial grounds', 'on grounds of age' etc in the pre-2010 legislation) effected no material change to the law.[1]

Protection against discrimination

13 It was common ground before us that the Claimant was at all material times supplied to work for the Respondent as a contract worker, within the meaning of s41. Discrimination against contract workers is prohibited by that section which, so far as relevant, states:

> **(1) A principal must not discriminate against a contract worker –**
>
> **…**
> **(d) by subjecting the worker to any other detriment.**

A 'detriment' arises in the employment law context where, by reason of the act(s) complained of a reasonable worker would or might take the view that he or she has been disadvantaged in the workplace. Treatment which gives rise to an unjustified sense of grievance cannot amount to a detriment: see *Shamoon v Chief Constable of the RUC* [2003] IRLR 285 HL.

14 2010 Act, by s136, provides:

> **(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.**

15 On the reversal of the burden of proof we have reminded ourselves of the case-law decided under the pre-2010 legislation, including *Igen Ltd v Wong* [2005] IRLR 258 CA, *Laing v Manchester City Council* [2006] IRLR 748 EAT, *Madarassy v Nomura International plc* [2007] IRLR 246 CA and *Hewage v Grampian Health Board* [2012] IRLR 870 SC. In the last of these, Lord Hope warned that it is possible to exaggerate the importance of the burden of proof provisions, observing (judgment, para 32) that they have 'nothing to offer' where the Tribunal is in a position to make positive findings on the evidence. Recently, in *Efobi v Royal Mail Group Ltd* [2021] 1 WLR 3863, the Supreme Court held that the changes in the wording of the burden of proof provisions introduced by the 2010 Act, s123 did not bring about any change in the law. Dealing with the proper approach to the drawing of inferences, Lord Leggatt, who gave the only substantial judgment, commented (para 41):

> **I think there is a risk of making overly legal and technical what really is or ought to be just a matter of ordinary rationality. So far as possible, tribunals should be free to draw, or decline to draw, inferences from the facts of the case before them without the need to consult law books before doing so.**

[1] See *eg Onu v Akwiwu* [2014] ICR 571 CA.

Evidence and Documents

16 We heard oral evidence from the Claimant and, on behalf of the Respondent, Mrs Jo Hagan, Housing Operations Manager, and Mr Owen Wiggins, Housing Operations Manager. All three witnesses gave evidence by means of witness statements served before the hearing in accordance with the case management timetable. On the afternoon of day one, Mr Ijaola applied for permission to serve a short second statement in the Claimant's name, which was intended to 'clarify' his case on sex discrimination. Although no good reason was given for the failure to include the new evidence in the original statement, we were marginally persuaded to grant the application. As we explained in our oral ruling, doing so appeared to entail no risk of prejudice to the Respondent or to the orderly disposal of the issues between the parties.

17 In addition to witness evidence we read the documents to which we were referred in the admirably slim agreed bundle, to which one addition was made in the course of the hearing.

18 The paperwork was completed by the chronology and closing submissions produced by Mr Line and the closing submissions of Mr Ijaola.

The Primary Facts

19 We have had regard to all the evidence, but it is not our function to recite an exhaustive narrative. The facts essential to our decision we set out below.

20 In arriving at our primary findings we have had careful regard to the coherence, internal consistency and general plausibility of the witness evidence. We have also attached importance to the corroborative effect of contemporary documents and, in some instances, the extent to which witness evidence has been undermined by the *absence* of consistent contemporary documentary material.

The main narrative

21 To set the scene, it is necessary to mention some unfortunate background events in the Claimant's personal life. His marriage broke up in or around 2016 or 2017 and the one child of the family, a boy born in 2016, remained with his wife. The boy is autistic. Bitter divorce proceedings followed the separation, involving sustained hostilities over the question of contact between the Claimant and his son. These difficulties were unresolved when the Claimant joined the Respondent in February 2022 and he was open with his colleagues about them.

22 Mrs Hagan gave some evidence concerning the Respondent's arrangements for the booking of leave. She told us that any employee wishing to take leave must first approach his/her line manager. If the request is approved, the next step is for the employee to book the leave through the (digital) portal and, it seems, on the shared Outlook calendar. With agency workers, the process is different as such staff do not have access to the portal. Here, the worker approaches the line manager and, if approval is given, then books the leave

directly with the agency. But it seems that the agency worker should also log the leave on the shared calendar. (In any event, the line manager no doubt has a separate responsibility to keep the shared calendar up to date.) Although Mrs Hagan did caution that practices may vary somewhat between teams, we accept her evidence (which was not directly challenged) as broadly correct.

23 The Claimant was initially assigned to Housing Team 8, which was managed by Mrs Hagan (a witness before us). Towards the end of May 2022 he was transferred to Housing Team 5. That team was under the management of Ms Ludmila Garrett, who was due to leave the organisation shortly and in the process of handing over her responsibilities to Mr Wiggins, the incoming Team 5 manager (also a witness before us).

24 Not long before his transfer to Team 5 was due to take effect, the Claimant approached Ms Hagan and asked for permission to take Monday, 30 May to Wednesday, 1 June 2022 as leave, explaining that he was going to have his son to stay with him as his wife had dropped her objection to contact. Those three days would give him a full week away from work because the Thursday and Friday were both Bank Holidays. Ms Hagan replied that the matter must be raised with Ms Garrett and/or Mr Wiggins, his (soon-to-be) new managers, but that she was sure that there would be no difficulty if he explained the circumstances.

25 The Claimant told us in his evidence that he got Ms Garrett's agreement to take leave on 30 May-1 June 2022 in a conversation following a dinner. He did not put a date on that conversation. We are not persuaded that Ms Garrett gave him permission as he alleged, and we strongly doubt whether he raised any clear, formal request to take the three days off (or any of them).

26 In the late afternoon of 27 May 2022 the Claimant telephoned Ms Garrett. The line was poor and she had some difficulty in following him. Her understanding was that he was asking for permission to work from home for three days. She believed he was referring to the week commencing 6 June, but was not sure. The conversation ended without anything being agreed. She contacted Mr Wiggins immediately and relayed the gist of the conversation as best she could.

27 Mr Wiggins, who seems to have formed the view that the request was likely to have related to the forthcoming (three-day) working week, then sent a message to the Claimant timed at 16:18 pointing out that working from home could only be considered for one day in a five-day week and that only if a particular need was shown and the individual's performance was 'on track'. (This advice was consistent with the Respondent's post-pandemic policy, introduced on 4 April 2022, which sought to ensure that full-time operational staff spent two days per week in the field and at least two days per week in the office.) Mr Wiggins also sent a separate message at about the same time asking the Claimant to call him.

28 The Claimant did not respond in writing or by telephone, but Mr Wiggins was aware that he had read the message (the digital system displayed a symbol – an image of an eye – to that effect).

29 The Claimant did not attend work on 30 May-1 June 2022. Nor did he carry out any work from home. He spent those days caring for his son.

30 Mr Wiggins told us that he probably attempted to speak with the Claimant at some point during his three days of unscheduled absence to ask why he was not in the office, but at all events there was no contact.

31 On the morning of Monday, 6 June 2022 Mr Wiggins held a meeting with the Claimant by video conference call. He challenged him for being absent from work the week before. The Claimant made the case that it had been necessary to be away as he had had to look after his son. In his evidence he claimed that he had explained to Mr Wiggins that he had been authorised by Mrs Hagan, Ms Garrett and the employment agency to take the three days as leave. We find as a fact that he did not put forward that explanation. We find on balance that he did not convey to Mr Wiggins that any question of taking leave arose. If we are wrong about that, we are in any event satisfied that he went no further than saying that he had told Ms Hagan that he would be needing time off to look after his son.[2] He also gave evidence that Ms Garrett joined the call at Mr Wiggins's invitation and corroborated his defence about taking leave. Again, we reject his evidence. We are satisfied that Ms Garrett did not participate in the meeting in any way. The meeting became somewhat uncomfortable. Mr Wiggins was irritated that, as he saw the matter, the Claimant had simply defied his implicit instruction to attend the office, and did little to conceal his feelings. The Claimant said something about his rights and about being treated like a human being. Mr Wiggins's response was to the effect that if he wanted to talk about his rights he could leave his equipment and go.

32 Later the same morning Mr Wiggins told his contact at the agency that the Claimant's engagement with the Respondent was to end at once.

33 By an email of 8 June 2022 the Claimant complained about Mr Wiggins's treatment of him on 6 June. On 13 June he presented a 'formal grievance' in which he cited the statutory protection against unfair dismissal and referred to his rights as an agency worker.

34 Although the Respondent's primary position was that, given the Claimant's status as an agency worker, the grievance was a matter for the agency, it seems that Ms Bailey asked for Mr Wiggins's account, resulting in his email of 5 July 2022. We were also shown an exchange of emails between Mr Wiggins and the agency in which the latter confirmed that it had not authorised leave for the Claimant on 30 May-1 June. Asked by a member of the HR team, Mrs Hagan also checked and confirmed that the Respondent's digital records were consistent with her recollection: no leave had been approved for the Claimant.

35 The Claimant was not able to identify any contemporary, documentary corroboration of his assertion that his absence from work on 30 May-1 June 2022 had been authorised by anyone.

[2] This interpretation of events would fit with Mr Wiggins's email of 5 July 2022 to Ms Akima Bailey, a Regional Head of Housing to whom the Claimant's grievance was referred, if his reference to 'Cathy' was a slip and he intended to refer to Mrs Hagan.

36 Neither before nor in the weeks following the termination of his engagement did the Claimant make any recognisable complaint of discrimination in any form.

Miscellaneous matters

37 It was not in dispute before us that the Respondent is thoroughly diverse, racially and culturally. We were shown statistics for the two Housing Officer teams to which the Claimant was assigned, which showed that the majority racial group in each was 'black', and the minority racial group in each was 'white'. The picture in other groups for which statistics were supplied was similar. The racial profile of the managerial grades was not given to us. Mrs Hagan is visibly a member of a non-white racial group. Mr Wiggins is a white man who originates from South Africa. We were not told anything about Ms Garrett's ethnicity.

38 There was no suggestion before us of any history prior to 6 June 2022 of discrimination by the Respondent, or any employee or agent of the Respondent, against the Claimant, on grounds of race, sex or any other protected characteristic.

39 The Claimant relied on a female employee of the Respondent, 'Jag' as his comparator for the purposes of his sex discrimination claim. She is a permanent employee of long standing. She has a son who is autistic and has difficulties with speech and language. He started school in September 2020. Before that, Jag requested unpaid leave over the summer months to enable her to support him in his learning. This request was granted. More recently, Jag has been permitted to change her working pattern to enable her to take her son to speech and language sessions on Fridays.

40 The Respondent operates a number of policies for employees, including a flexible working policy and a dependants' leave policy.

Secondary Findings and Conclusions

41 As we have noted, the detriment relied upon, termination of the Claimant's engagement with the Respondent, is not in question. The case turns entirely on the *reason* for the detrimental treatment. In our judgment, the answer is dictated by our findings of fact. Although it involves some repetition of matters already recorded in our primary findings, we set out here what we regard as the key facts. The dates all refer to 2022.

(1) On 27 May Mr Wiggins understood from Ms Garrett that the Claimant was seeking permission to work from home on 30 May-1 June.
(2) On 6 June Mr Wiggins knew or believed that:
    (a) He had sent a message to the Claimant on 27 May telling him that he could not work from home on 30 May-1 June and asking him to call;
    (b) The Claimant had read the message and had not called;
    (c) The Claimant had absented himself from work on 30 May-1 June without offering any explanation at the time;
    (d) The Claimant had put forward no explanation when asked (on 6 June) other than that he had had to look after his son.

(3) Mr Wiggins judged on 6 June that the explanation offered by the Claimant (whether true or not) was unacceptable and that in effect he had simply defied an instruction and absented himself from work for personal reasons.
(4) Mr Wiggins judged on 6 June that the Claimant's conduct warranted the termination of his engagement.

42 Mr Wiggins's state of mind as we have summarised constitutes, in our view, at least the central reason for his decision to terminate the Claimant's engagement.

43 That does not necessarily dispose of the claims. Is there an evidential basis for the theory that race and/or sex, if not the core reason, may have operated as a *material influence* upon Mr Wiggins's decision?

44 For the purposes of race discrimination, Mr Ijaola sought to rely on Jag as an 'actual' comparator (apparently on the basis that she is said to be of Asian descent). That was not permissible. The issues had been clearly defined and the race discrimination claim was put firmly on the basis of a hypothetical comparator. But the argument was hopeless in any event. There was no possible 'like for like' comparison of the sort required by the 2010 Act, s23(1) between Jag's circumstances and the Claimant's. Jag was a permanent employee; the Claimant was not. And, much more fundamentally, there was no suggestion that Jag had ever absented herself from work without authorisation, as Mr Wiggins believed the Claimant to have done.

45 Is there anything else to lend support to the notion that race played any part in Mr Wiggins's treatment of the Claimant? In our judgment, there is simply nothing. We were shown no evidence pointing to a tendency to treat the Claimant less favourably than other non-black colleagues or to treat black staff generally less favourably than any other group. And even if Jag is considered as a mere 'evidential' comparator (rather than a genuine, s23(1) comparator) the Claimant's case on race discrimination gets no better. The fact that the Respondent has responded positively to her family needs lends no support to the notion that the Claimant, making a similar request for assistance in circumstances comparable to hers, would have been treated less sympathetically, or that she, in circumstances comparable to his, would have received more favourable treatment at the hands of Mr Wiggins. (Of course, the requirement of comparability dictates that, for these purposes, one is imagining Jag as an agency worker and the Claimant as a permanent employee of long standing and the custodial parent of a child with special educational needs.)

46 As for sex discrimination, our reasoning already offered on race discrimination disposes of the comparison with the treatment of Jag. She is not a valid s23(1) comparator. Nor does an 'evidential' comparison with her case lend any support to the complaint of sex discrimination any more than the complaint of race discrimination.

47 For the reasons stated, the complaints of direct discrimination are, in our view, wholly unfounded. We are very clear that any non-black and/or female agency worker whose circumstances were otherwise the same as the Claimant's would have been treated exactly as the Claimant was and his personal

characteristics of race and sex had no influence whatsoever on Mr Wiggins's decision to terminate his engagement.

Outcome and Postscript

48 The claims fail and the proceedings as a whole are dismissed.

49 In our analysis we have not applied the burden of proof provisions as we have been presented with the evidence we need to make all necessary findings. But had we applied them, we would have arrived at the same outcome. We would have found that the Claimant had failed to make out a *prima facie* case, with the result that no burden had passed, and that if, contrary to that view, it had shifted, the Respondent had in any event amply discharged it by showing that that the termination of his engagement was not to any material extent tainted by race or sex discrimination.

50 Finally, we should add that in deciding this case we have been mindful of two things which it does *not* address. The first is the status of agency workers and the protection provided under the Agency Workers Regulations 2010. Although the Claimant was clearly alive to the fact that he belonged to a protected group, he has not brought a claim under those Regulations. Nor has he brought any claim tangentially reliant on his status under the agency worker legislation (an indirect discrimination claim, for example, might have been at least a theoretical possibility). The second matter is fairness. We have said nothing about fairness, because it is not our function in this case to measure or evaluate the fairness of Mr Wiggins's decision-making. Direct discrimination is about treating people *differently*. It is to that alone that we have addressed our minds.

51 Finally, we should add that we accept that the Claimant feels genuinely aggrieved by Mr Wiggins's treatment of him and has pressed his claims in good faith.

Employment Judge Snelson
16th August 2023

Judgment entered in the Register and copies sent to the parties on : 16/08/2023

..... for Office of the Tribunals