



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Miss O Odumenya

**v Care UK Community Partnerships
Ltd**

Heard at: Reading Employment Tribunal
On: 5-7 July 2023

Before: Employment Judge George
Members: Ms A Crosby
Ms J Pope

Representation

For the Claimant: In Person
For the Respondent: Ms Y Genn, Counsel

JUDGMENT

1. The claim of direct race discrimination is not well founded and is dismissed.

REASONS

2. Following a period of conciliation from 30 December 2021 to 9 February 2022, the claimant presented a claim form on 19 February 2022. It was responded to by the respondents in an ET3 grounds of response that was received on 12 April 2022, within the time specified. The claim arises out of the incident or incidents that happened when the claimant worked as a contract worker within s.41 Equality Act 2010 (hereafter the EQA) as a healthcare assistant (or HCA) at a care home operated by the respondent.
3. The claim was case managed by Employment Judge Forde on 28 November 2022 and his record of hearing at page 45 of the bundle sets out the issues in the case. Those were clarified by Employment Judge Gumbiti-Zimuto to only be those of direct race discrimination, see his letter of March 2023 at page 170 of the bundle.

4. To deal with the procedural history, the claimant replied to that letter and raised the question of whether she was, in the alternative, relying upon s. 26 EQA (race related harassment). That was also something that was raised in her witness statement, but following a discussion, on the first day of the hearing she said she was content to proceed solely on the basis of a direct race discrimination claim, those being the issues that had been clarified in November 2022 and reiterated subsequently by EJ Gumbiti-Zimuto.
5. The parties had put together a joint bundle of relevant documents. It initially ran to 183 pages, some additional paperwork was added during the course of the hearing, and it ultimately was 190 pages long. It was agreed that the issues were those under section 1 and 3 starting at page 48 of the bundle (set out below for ease of reference). Section 3 covers issues relating to compensation and we would, if necessary, go on to consider those following our decision on whether the respondents are liable to pay claimant at all. The claimant gave evidence on her own account and adopted a witness statement upon which she was cross examined.
6. The respondents relied on the evidence of Ms Jamieson and Ms Boyd who had also prepared witness statements which were adopted in evidence. The tribunal heard played an audio recording of one part of the interaction on the night of 9 to 10 December 2021, a transcript of which is also in the bundle.

Issues

7. The issues the Tribunal will decide are set out below.

Direct race discrimination (section 13 and 41 EQA)

7.1 the claimant's race is Black African and she compares herself to people employed by the respondent who do not share her heritage.

7.2 Did the respondent say or do the following things:

- 7.2.1 "you're always cold because of the colour of your skin"
- 7.2.2 "she doesn't belong here"
- 7.2.3 "you're not one of us, you don't belong here"
- 7.2.4 "black bitch"
- 7.2.5 "we don't need to hear"
- 7.2.6 make further comments such as "why don't you leave here you are useless to us", "you have a bad attitude".
- 7.2.7 Further, the claimant alleges that the respondent's failure to act on her grievance in a timely manner and reach appropriate findings as to the acts of

discrimination alleged amount to a further act of discrimination.

7.3 Was that less favourable treatment?

7.3.1 The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

7.3.2 If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated.

7.3.3 The claimant has not named anyone in particular who she says was treated better than she was.

7.4 If so, was it because of the claimant's race?

7.5 Did the respondent's treatment amount to a detriment?

Remedy

7.6 how much should the claimant be awarded?

7.7 Did the ACAS code of practice on Disciplinary and grievance Procedures apply?

7.8 Did the respondent or the claimant unreasonably failed to comply with it?

7.9 Is it just and equitable to increase or decrease any award payable to the claimant?

7.10 By what proportion, up to 25%?

Findings of Fact

8. When we make our findings of fact, we do not set out all of the evidence we have heard, but set out our findings that are necessary for us to make a decision on the above issues that have to be decided. Those are the issues that the parties have agreed need to be decided in order to dispose of the matters in dispute between them.
9. An outline chronology of the events is that the claimant registered with a particular agency used by the respondent on 13 July 2021, and following a period of training, she became eligible to work on jobs that she had found through that agency on 6 September 2021. She accepted a number of 12 hour shifts at Winchcombe Place Care Home and she worked there for 6 shifts without notable incident. During those she worked on a couple of occasions with Ms Boyd.

10. On the night of 9-10 December 2021, the claimant was working a night shift when there was an incident which can neutrally be described as an altercation involving the claimant, Ms Boyd and a Team Leader. Another HCA was also an observer, (hereafter referred to as the HCA Observer). During the course of the hearing we broke down the incident into 4 different stages. What we have described as stage 1 is covered by the claimant broadly in paragraphs 9 to 11 of her witness statement. Her account is that she started her break (which was due to be between 3 and 4 o'clock in the morning) and therefore the incident started close to 3.00am. She went into the room which has an open plan arrangement. It is set out on page 190, is the manuscript plan drawn by Ms Boyd. It has a lounge at one end and a dining/kitchen area at the other end. It is common ground that at some point the claimant switched the air conditioning off. Her account is that she then heard a resident's bell and left to answer it.
11. Of the issues to be decided, list of issues (or LOI) 7.2.2 is said to be a comment made by Ms Boyd during this stage 1. LOI 7.2.1, the alleged comment "you are always cold because of the colour of your skin", is something that was said on a previous occasion by the team leader, according to the claimant's paragraph 10.
12. Stage 2 of the contentious incident is covered by the claimant's paragraphs 12 to 17 and 21. According to her, she returned to the dining area and the Team Leader had switched on the air conditioning again. She says that he was still by the wall mounted unit. Ms Boyd said that he was in the kitchen area, but there was common ground that the altercation started between the claimant and the Team Leader and then Ms Boyd was also drawn into the altercation and made certain comments. The HCA Observer was still present but some other healthcare professionals who had been present when the claimant initially joined the room, had left.
13. By the claimant's account, LOI 7.2.3 was said by the Team Leader during stage 2, (her paragraph 13) and as was LOI 7.2.4. This stage came to an end when the Team Leader told the claimant that he was going to contact the registered nurse who was on a different floor. However, it was in fact Ms Boyd who went and told the registered nurse, known as Rose, that there had been this altercation.
14. Stage 3 is when the RGN came into the dining room. The claimant was still in there. By this point the Team Leader had left and the HCA Observer was sitting out in the corridor. Ms Boyd's account is that after telling the RGN about the incident she went for a cigarette break and then came back and sat in the corridor next to The HCA Observer. There was an exchange between the claimant and the RGN during stage 3, which we cover in more detail below. That exchange does not involve anything that has been relied on as an act of direct race discrimination within the list of issues, although the claimant does criticise the RGN's conduct in her paragraphs 18 to 20, which is where her account of this stage is set out.
15. Stage 4 happened outside room 11 a little later on. According to the claimant, the Team Leader, Ms Boyd and the HCA Observer were all present. What was said by Ms Boyd is not in dispute because it was

recorded and the comments that are listed in the LOI 7.2.5 and 7.2.6 were said at this stage. The immediate context is disputed in that Ms Boyd says that the claimant pursued her prior to this exchange happening and she acted out of irritation. The claimant said that she passed the three colleagues, permanent workers, and they were discussing her. We listened as we say to the audio and we re-listened to that during our deliberations.

16. The final allegation, LOI 7.2.7 is an allegation about the conduct of the subsequent investigation. Ms Boyd wrote a manuscript statement at some point on 10 December 2021, which is at page 81, and the claimant had a telephone conversation before the end of the shift with the Home Manager. She was advised to put in a report about her complaints and she did so by an email at page 84, to which the reports in two parts starting at page 85 were attached.
17. The claimant then worked another shift overnight from 10 to 11 December 2021. The claimant's reports were submitted on 12 December 2021 and on the following day (13 December 2021), she sent the voice recordings I have already referred to, to the Home Manager (page 91). Ms Jamieson was appointed to investigate the complaints.
18. The claimant worked another shift between 13 and 14 December 2021. On 14 December 2021, Ms Jamieson was already scheduled to meet with the Team Leader in relation to an unconnected matter and he agreed to answer questions about the incident on the night of 9/10 December 2021. The record of interview is at page 92. The 15 December 2021 was another shift worked by the claimant but then on 16 December 2021, when the claimant arrived to work at Winchcombe Place, she encountered Ms Boyd the first time since they had worked together on 9/10 December 2021 and experienced a panic attack. She asked to leave the shift. She made that request of another team leader, as she explains in her paragraph 38. She also reported the incident to the police and on 17 December 2021 she wrote to her agency to ask to cancel all further shifts with this care home (page 181). By this time, the Team Leader's employment had come to an end because he had failed his probationary period.
19. Between December 2021 and January 2022 Winchcombe Place experienced an outbreak of Covid-19. Specifically the Home Manager, tested positive and had to self-isolate. Also over this period Ms Jamieson experienced a family bereavement and had some compassionate leave through to 10 or 11 January 2022. On 30 December 2021, the claimant contacted ACAS in respect of a prospective claim to the Employment Tribunal. The investigation into her report got underway more particularly on 19 January 2022 when an investigation started with an interview of the HCA Observer which is at page 96. The following day Ms Jamieson interviewed Ms Boyd, page 100. On 26 January 2022 she interviewed the RGN, page 105. It was not until 7 February 2022 that the respondent wrote to the claimant which seems to have been the first direct contact since the telephone conversation with the Home Manager. In the meantime, as I said, the claimant had gone to ACAS. The date on which the Team Leader was let go is evident from page 111.

20. The claimant responded to Ms Jamieson's email on the following day, 8 February 2022 which is at page 114, asking why she was being contacted now and saying that it was too late because she had already gone to ACAS. The EC certificate was provided to her the following day. On 17 February 2022 Ms Jamieson replied to the claimant (page 131), apologising for the delay and asking if the claimant would be willing to consider some questions, instead of meeting her, as a way of making further enquiries about the details of what she said happened. The claimant replied (page 130) on 17 February 2022 saying Ms Jamieson could if she liked send her the questions but made clear that she intended to pursue litigation and in fact the claim was presented two days later.
21. Ms Jamieson's second meeting with the RGN on 24 February 2022 (page 116), and she had a further meeting with Ms Boyd on 28 February 2022, (page 122). A third HCA who had been mentioned as potentially present was interviewed although it is apparent from page 120, that she had nothing of substance to add. Ms Jamieson then had a telephone meeting with the Team Leader on 10 March 2022 and the notes of that are at page 126. As a result of what Ms Boyd accepted she had done, in fact was unable to contest that she had done because of the audio recording, a letter of concern was issued to Ms Boyd about her conduct during stage 4. That letter is at page 127. The letter of questions was written to the claimant on 29 March 2022, but the claimant replied the following day page 128, saying that coming six weeks after the last exchange that was too late.
22. The investigation report is at page 137. The findings of Ms Jamieson were that the letter of concern should be issued but not to uphold the most serious of the allegations against the care home staff.
23. It is important to note that this claim is not about an allegation of less favourable treatment on grounds of being agency staff. The Agency Workers Regulations 2010 is not a jurisdiction that is within the scope of this claim. In any event, the rights under the Agency Workers Regulations of an agency worker not to suffer less favourable treatment on grounds of their status are limited to those concerning terms and conditions. The detriment provision is akin to victimisation. There is not prohibition on of less favourable treatment on grounds of being an agency worker except in relation to terms and conditions. The other general point that we wanted to acknowledge is that emotions have run very high in this case which is entirely understandable. We thank the parties for their cooperation in doing their best in continuing with their evidence and (in the case of the claimant) in presenting her case in circumstances that all have found challenging. All, from their own perspectives, have done their best to assist the Tribunal in our decision making.
24. Both sides have made observations about the credibility and reliability of each other's evidence.
25. The claimant alleged that the tribunal should give less or little weight to some of what Ms Boyd said because of what she argued to be a tendency to make statements about the claimant's evidence which had not been corroborated by other members of the care home staff such as the HCA

Observer and the Team Leader. For example, she pointed to the Team Leader saying there had been no further confrontation, which the claimant contrasted with Ms Boyd's own account. Ms Boyd was also criticised for failing to include, in her original manuscript note, an account of the stage 4 part of the incident. Her response was that stage 4 had not happened at the time of that note. Our conclusions on that are in para.47 below.

26. The claimant also alleged that Ms Boyd had essentially, these are our words not the claimant's, exaggerated what the claimant had done but underplayed the conduct of the respondent's employees. She contrasted what she said were changes or differences between Ms Boyd's account on different occasions with her own account which she said had not varied. In respect of the audio, the claimant argued that the sound of the audio showed that she, the claimant, had not been sarcastic in her tone which contrasted with Ms Boyd's assertion in her witness statement (see our findings on this at para.47 below). In particular, she alleged that because Ms Boyd had not set out in full detail in her paragraph 16 the dialogue from the recording, that Ms Boyd was being evasive and that this adversely affected her reliability. We can deal with this last point briefly. We reject that because Ms Boyd has referred to the transcript and therefore, by implication, to its contents.
27. Although this was not mentioned directly in closing remarks, in cross-examination, the claimant pointed to comments that the HCA Observer made where she said that, separate to the incident of the 9/10 December 2021, she had encountered racist remarks and exclusionary behaviour that was not necessarily racist and the claimant relied on that. However, we think that this was countered effectively by argument by the respondent that the claimant herself had not experienced exclusionary behaviour or racist remarks.
28. Furthermore, there are no other allegations made against the Team Leader or Ms Boyd and so, such evidence as there is, because it is not specific in terms of time or shifts or against individuals, does not point strongly to this being something that is at all relevant to the likelihood of whether the claimant's account is true. The Team Leader does in his own interview, allege exclusionary behaviour towards him, unrelated to the circumstances of this case, but this is not sufficient for us to take into account because it is unspecific, it doesn't relate to the individuals, and it falls short of evidence of an endemic attitude or state of affairs. That simply wasn't the claimant's experience during her time working at Winchcombe Place and so it isn't something that is probative of her case against the Team Leader and Ms Boyd.
29. The arguments put forward by the respondent in relation to credibility are as follows. First, in cross examination it was suggested that the claimant had been choosing not to take medication that had been prescribed and suggested to her that her anxiety levels might have been elevated as a result. The inference or implication being that that affected her view of things on the night in question. That wasn't referred to in closing and so to some extent the respondents have withdrawn from that. If that was by deliberate choice then that was well advised. The claimant rightly said she

was entitled to choose whether she should or should not take medication; she may well have been feeling better and was the best judge of the needs of any underlying health condition. In any event, the medical evidence that she has produced suggests that she became ill after the upset of the night in question. We reject the suggestion that that is anything that affects our view of the claimant's credibility.

30. It was suggested that the claimant had not shown a genuine desire for the investigation to go ahead, but rather that the evidence suggested that she wanted to go to Tribunal, essentially suggesting that that put in doubt her credibility that she was not remotely concerned with the investigation and should cause us to be sceptical about what the object of the exercise of her raising the complaint should be. The fact that the claimant went relatively quickly to ACAS and then exercised her right to go to the employment tribunal is not something that causes us to doubt her credibility. She had moved on and she wasn't looking back. That does not of itself indicate that she had made a complaint that she did not genuinely believe.
31. It was then argued that had the events of the 9/10 December 2021 been as bad as described, the claimant would not have attended on three subsequent shifts before the final shift that she asked to be released from. It was also argued that the fact that the claimant hadn't volunteered information in her statement that she had worked those shifts, should cause us to give less weight to her credibility and cause us to doubt that she was being open with us or doubt her credibility. We accept the claimant's evidence that, in principle, a person's mental health means they can have a good day or a bad day. We accept that she went in to work the shifts that she had previously been booked for, for the reasons that she said and because she considered herself to be a strong person she was able to do so. She is manifestly very professional in her approach to her work. We accept that it was when she saw Ms Boyd that she became upset and her perception of what happened we consider to have been honest.
32. However, for reasons we explain below, we have come to the conclusion that her experience is not, objectively, what probably happened.
33. It is suggested that she has been selective about the disclosure of payslips in relation to remedy, but we do not think that an adverse inference can be drawn against her credibility in respect of that. She produced payslips that she thought supported what she wanted to say about remedy, she has not sought to be evasive in disclosure.
34. Where we think the respondent made a stronger point about the claimant's credibility was where they pointed to there not being any background to the incident in question and no previous complaint against the Team Leader in particular. We are quite satisfied that, had there been previous incidents, the claimant would have challenged them. The claimant is somebody with poise, experience and a justified sense of self-worth which comes from that experience and her qualifications. It seems to us improbable that had there been incidents with the Team Leader previously, that she would not have raised it, its improbable that she would have let it slide. She has an expectation of how she should be treated and there is absolutely nothing

wrong in that. There is nothing wrong with complaining but the fact that there was no complaint about previous alleged comments by the Team Leader is something that we think should be taken into account against the claimant as a credible witness of truth when she now asserts that there was a history to the central event. That does damage her credibility overall.

35. We also accept there is something in the respondent's allegation that the claimant was confrontational in her responses to the questions she received in cross-examination. We think the audio was relatively neutral as between who of the claimant and Ms Boyd was more sarcastic or confrontational. But the audio itself and the recording was relied on by the respondent who argued it supported a finding that the claimant was pursuing Ms Boyd.
36. We now set out more detailed findings about what happened at the different stages of the contentious incident. The initial stage was covered in the section of the report that the claimant provided shortly after the event (page 87). The particular elements that she complained about are that the Team Leader had said, on a previous occasion "you're always cold because of your skin"; not quite the way that its reflected in the list of issues where it is "you're always cold because of the colour of your skin". She also says that when she first entered the room she heard Ms Boyd say that "she doesn't belong there". Our finding on this specific allegation against Ms Boyd is that when the claimant entered the room, she didn't know what the care assistants were talking about and we are not satisfied that she heard a clear statement that was referring to her that included those words.
37. The HCA Observer's contemporaneous recollection is in the notes at pages 96 to 97 of the bundle. As far as Ms Boyd is concerned, we have to address whether there was a contrast or any conflict between her oral evidence and her statement evidence at paragraphs 5 to 8 and the account that she gave in interview at page 100. There are some points of variation but broadly the accounts seem to us to be the same. Although Ms Boyd says that the claimant didn't walk past people through the lounge and came in the back door, it seems to us that it is more likely than not that she hasn't remembered all of the detail.
38. The different versions given by Ms Boyd, the HCA Observer and the Team Leader (whose account is at page 93), are all given in response to open questions asked by the interviewers and not always by the same interviewer. The Team Leader, in particular, confirms that the claimant went out to answer a bell. It doesn't appear that Ms Boyd has remembered that and that potentially explains Ms Boyd's recollection that the claimant came in by the back door rather than the front. So, overall, we do not think that these points of distinction are enough to undermine Ms Boyd's evidence, we think that she has probably condensed the first two stages into one.
39. According to the claimant, when she came back from dealing with the resident's bell, there was a confrontation. It is the claimant's recollection that she confronted the Team Leader because she felt that he had turned the air conditioning back on deliberately. This is consistent with what the HCA Observer says at the top of page 97; she says "I did hear Violet say she was cold, that we are all equal and he should respect her and take her

needs into consideration". She then asked why he was not listening to her needs and accused him of discriminating against her. It does seem to us that the claimant was very quick to go on the offensive, so to speak, and make an accusation against the Team Leader. This was the point where the incident became more fraught.

40. There is a conflict between the claimant's account - who says she heard Ms Boyd say "your skin irritates me" - and that of Ms Boyd. The latter states she certainly said that the claimant was irritating her because she was causing a fraught discussion that stemmed out of whether an air conditioning unit should be on or not, when the claimant was not in the majority on whether the room was too warm. That seems to us to be consistent with the stance taken by the HCA Observer who described the difference between the claimant and the group as being that she was outnumbered in the sense that she didn't want the air conditioning on, and they did.
41. The claimant seems to have overlooked that she was not the only one in the room and we think that her stance was a confrontational one to take. We note the HCA Observer's honesty about problems elsewhere in the home and it seems to us that this is reason to think that, had there been something that she observed on the night of 9/10 December 2021 that made her uncomfortable, she is likely to have disclosed it. She had been open about the other matters; had she heard the Team Leader say or Ms Boyd say what the claimant alleges they said, then we think she would have disclosed it. After all, the Team Leader had been dismissed by the time of the HCA Observer's interview. We think that even though she was not a witness who gave evidence before the tribunal and was cross examined, her account in the interview record, so far as it goes, is a reliable account of the incident.
42. All say that it was the claimant who first alleged discrimination. Even on the claimant's account she did so prior to the alleged use of discriminatory language. She makes that accusation based on whether the air conditioner was turned on or off and because she thinks that as an agency worker she should be treated equally to the permanent staff. As a matter of what is morally right or what makes for a collegiate workplace, that is not in dispute. Ms Boyd said that the Team Leader told the claimant to leave (see her paragraph 8), or that he would arrange for her to be removed and that she had been somewhat shocked about that.
43. We do know that is it sometimes the experience of people from ethnic minorities that a person might tell them to go home and they mean to leave the UK. Where that happens that is probably indicative of a racist attitude. However, here it seems quite clear that the claimant's confrontational attitude about air conditioning was disruptive to the smooth running of work on the shift and that was probably what the Team Leader was referring to. Having said that, the Team Leader does seem to have lost control to some extent. The claimant, even on her version, was in part accusing him of discriminating against her as a member of agency staff. However, she also says in her paragraph 13 that she felt discriminated against on grounds of status and race. The bystanders say that she accused the Team Leader of discrimination on grounds of race: that is what the HCA Observer said and

what the Team Leader said (page 93). It is what caused Ms Boyd to get to see the RGN. We think that the Team Leader may very well have said you're going home or words to that effect but we are not satisfied that he said "you're going home, black bitch". No one else heard that comment. We think that the HCA Observer is a reliable witness, we accept from her evidence about other unrelated incidents (bottom of page 98) that she appears to have given thought to whether what she observed was racist when she stated that she was shocked at the claimant's allegations.

44. The claimant presented as quick to assume that she was being disregarded and that her interests were not being taken into account by the Team Leader; by the RGN. This also came across in cross examination. It seems to us as though there are times, when she doesn't like the way she's being treated, that she concludes that the difference must be something to do with status or something to do with race. We know that it is difficult to prove race discrimination, we know that we need to be very cautious and to look at the surrounding circumstances to see whether there are any matters from which inferences of race discrimination can be made. However, it is for the claimant in the first instance to prove, for example, that racially charged statements were made and we are not persuaded that they were in this instance. We find that the Team Leader had not made the comments on the previous occasion because in all likelihood she would have previously complained about them and that she has read into the words which were used elements that filled the gap between what was objectively happening and her perception.
45. As far as stage 3 is concerned, it is fair to say that the conduct of the RGN on this occasion is something that is open to criticism and may have fallen short of what one would expect of someone in her position – bearing in mind that we have not heard her version of events. She seems to have gone into the meeting, on her own account, with a preconceived idea that the claimant was in the wrong. That is not the right approach of anyone in leadership to a situation of conflict. It's not likely that such an approach is going to diffuse a situation of conflict. The claimant immediately accused the registered nurse of being racist and unprofessional.
46. On any view its unprofessional for the RGN to have gone in with preconceived ideas and she also seems to have lost control to some extent but that is not an issue in the case. We think that, notwithstanding our criticism of the conduct of the RGN, the claimant herself does seem to have been confrontational towards someone in authority. We think it can also be said that her attitude to her colleagues comes across as being someone who thinks very much less of them because she doesn't think that they do anything properly. However, we do not need to make detailed findings about what happened at stage 3 because it is not one of the issues to be decided in order to determine the claim.
47. What happened at stage 4 is detailed in the transcript. Having heard the audio twice now we think that both Ms Boyd and the claimant are quite confrontational and there are elements of sarcasm on both sides. They both seem to be standing up to each other. The claimant sounds a little bit

shaken, a little bit upset at this point but listening to it again does not persuade us that Ms Boyd was the aggressor. Her tone is consistent with her account of the emotional incident earlier on and there is certainly nothing overtly racial in the language used. We do not draw the inference that she has been concealing something by omitting reference to this incident from the manuscript note or that generally she was unreliable. That is because her actions on the night, by going and finding somebody more senior to deal with the situation and the report she made verbally, are consistent with what she described as happening.

Applicable Law

48. The claimant complains of a number of breaches of the EQA. Section 136, which applies to all claims brought before the Employment Tribunal under the EQA, reads (so far as material):

“(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.”

49. By s.41(1) EQA a principal (which the respondent accepts it was in relation to the claimant) must not discriminate against a contract worker as to the terms on which the principal allows the worker to do the work, by not allowing them to do or to continue to do the work or by subjecting them to any other detriment.

50. Section 13 (1) of the EQA reads:

“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.”

51. Although the law anticipates a two-stage test to discrimination, it is not necessary artificially to separate the evidence adduced by the two parties when making findings of fact (Madarassy v Nomura International plc [2007] ICR 867 CA). We should consider the whole of the evidence when making our findings of fact and if the reason for the treatment is unclear following those findings then we will need to apply the provisions of s.136 in order to reach a conclusion on that issue.

52. Although the structure of the EQA invites us to consider whether there was less favourable treatment of the claimant compared with another employee in materially identical circumstances, and also whether that treatment was because of the protected characteristic concerned, those two issues are often factually and evidentially linked (Shamoon v Chief Constable of the RUC [2003] IRLR 285 HL). This is particularly the case where the claimant relies upon a hypothetical comparator. If we find that the reason for the

treatment complained of was not that of race, but some other reason, then that is likely to be a strong indicator as to whether or not that treatment was less favourable than an appropriate comparator would have been subjected to.

53. The application of the burden of proof in direct discrimination claims has been explained in a number of cases, most notably in the guidelines annexed to the judgment of the CA in Igen Ltd v Wong [2005] ICR 931 CA. In that case, the Court was considering the previously applicable provisions of s.63A of the Sex Discrimination Act 1975 but the guidance is still applicable to the equivalent provision of the EQA.
54. When deciding whether or not the claimant has been the victim of direct race discrimination, the Employment Tribunal must consider whether she has satisfied us, on the balance of probabilities, of facts from which we could decide, in the absence of any other explanation, that the incidents occurred as alleged, that they amounted to less favourable treatment than an actual or hypothetical comparator did or would have received and that the reason for the treatment was race. If we are so satisfied, we must find that discrimination has occurred unless the respondent proves that the reason for their action was not that of race. Section 136 of the EQA applies to victimisation cases as well as to discrimination cases. If we find facts proved that are sufficient that the tribunal could decide, in the absence of any other explanation, that the respondents acted as alleged by the claimant and did so because he had done a protected act then we must hold that the contravention occurred.
55. We bear in mind that there is rarely evidence of overt or deliberate discrimination or victimisation. We may need to look at the context to the events to see whether there are appropriate inferences that can be made from the primary facts. We also bear in mind that discrimination and victimization can be unconscious but that for us to be able to infer that the alleged wrongdoer's actions were subconsciously motivated by race or by the protected act we must have a sound evidential basis for that inference.
56. The provisions of s.136 have been considered by the Supreme Court in Hewage v Grampian Health Board [2012] ICR 1054 UKSC – and more recently in Efobi v Royal Mail Group Ltd [2021] ICR 1263 UKSC. Where the Tribunal is in a position to make positive findings on the evidence one way or the other, the burden of proof provisions are unlikely to have a bearing upon the outcome. However, it is recognized that the task of identifying whether the reason for the treatment requires the Tribunal to look into the mind of the alleged perpetrator. This contrasts with the intention of the perpetrator, they may not have intended to discriminate but still may have been materially influenced by considerations of, in the present case, race or a protected act. The burden of proof provisions may be of assistance if there are considerations of subconscious wrongdoing but the Tribunal needs to take care that findings of subconscious wrongdoing are evidence based.

57. That said, if the Tribunal considers that there is evidence that could realistically suggest that there was discrimination it would risk failing to give the claimant to benefit of the burden of proof provision, which are designed to address the difficulties of proving discrimination, were that evidence merely to be added into the balance and weighed against other evidence in the case on the balance of probabilities. If the Tribunal does in that situation move directly to the second stage of the s.136 analysis, it should do so on the basis that it has presumed that the burden of disproving discrimination has passed to the respondent. Where the respondent bears that burden it can only be discharged with cogent evidence. The standard of proof necessary to discharge the burden is the balance of probabilities.
58. The unlawful motivation of race does not have to be the sole or even the principal cause of the act complained of, so long as it was a more than trivial part of the respondent's reasons.
59. In order to find that an act complained of was to the detriment of an employee, the Tribunal must find that, by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work: De Souza v Automobile Association [1986] IRLR 103, CA. This was explained in Shamoon to mean that the test should be applied from the point of view of the victim: if their opinion that the treatment was to their detriment was a reasonable one to hold, that ought to suffice, but an unjustified sense of grievance was insufficient for the claimant to have suffered a detriment.
60. The EHRC Code of Practice on Employment (2011) advises in para 9.8 that a detriment is "anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage."

Conclusions on the issues

61. We now set out our conclusions on the issues, applying the law as set out above to the facts which we have found. We do not repeat all of the facts here since that would add unnecessarily to the length of the judgment, but we have them all in mind in reaching those conclusions.
62. So far as the first issue is concerned (LOI 7.2.1), we are not satisfied that the Team Leader made the comment to the claimant that "you are always cold because of the colour of your skin". Had that been made, that is something the claimant would have complained about sooner. The allegation is unsuccessful because the claimant has not proved the core facts which amount the alleged act.
63. List of issues (or LOI) 7.2.2 is an allegation that Ms Boyd, in the early hours of 10 December 2021 said "she doesn't belong here". This is said to have happened before the claimant turned off the air conditioning for the first time. There was no background dispute, no previous incidents between the claimant and Ms Boyd, they seemed to have got on well and there was no

apparent provocation. Overall the evidence suggests that nothing of significance happened before the claimant challenged the Team Leader about turning the air conditioner back on and we are not satisfied that this was said. So this allegation fails because the core facts supporting it have not been made out.

64. LOI 7.2.3 and 7.2.4 are the allegations that in stage 2, the Team Leader said “you’re not one of us, you don’t belong here” and the words “black bitch”. What the Team Leader said was that he was going to arrange for the claimant to leave. The connotations of the claimant not belonging or exclusionary language were absent from what he said, specifically he did not say “you’re going home black bitch”. We are not satisfied that the racial element was included in his language. So, those fail because the comments were not, we find, made as alleged. In any event, there was no racial connotation to them.
65. It is accepted that the comments set out in list of issues 7.2.5 and 7.2.6 were made. Ms Boyd said “we don’t need you here” and comments such as “why don’t you leave here, you’re useless to us, you have a bad attitude”. That is not overtly related to race but, clearly, it is not language that should be used to a co-worker. We do not in any way condone this loss of control or unprofessional behaviour by Ms Boyd. However, what we are here to decide is whether, in saying that, she treated the claimant less favourably than she would have treated someone in a comparable situation and did so because of the claimant’s race.
66. To do that we need to consider the context. The context is that within the previous hour or two, the claimant – who had not been there long - had had, to all intents and purposes, a stand-up row with the team leader and Ms Boyd was of the view that she had falsely accused him of racially discriminating against her. Attempts to diffuse that by moving the claimant to a different floor had failed. By that we do not mean to say that we think it right that when someone makes an allegation of racism they that should be moved. We simply state that it was in fact part of the context to Ms Boyd becoming irritated and saying what she did that the protagonists had not been separated. It was towards the end of a night shift, there had been a significant dispute and a level of disruption that had started over something as simple as whether air conditioning should be on or off. In Ms Boyd’s mind that was a relatively trivial matter that had escalated quickly in a disproportionate way. So even if we look to the respondent for an explanation as to what happened, if we start by presuming that the respondent had to show to us on the basis of cogent evidence why this was said, we are quite satisfied that Ms Boyd’s reasons were nothing to do with race. She may have expressed irritation towards the claimant intemperately but for reasons entirely to do with the latter’s previous behaviour.
67. As far as the final allegation is concerned, that is of failure to act on the claimant’s grievance in a timely manner and failure to find appropriate findings as to the acts of discrimination. We set out above the chronology of events in the investigation (para.19 to 22). The claimant did not, in the end, challenge Ms Jamieson about the way the investigation was conducted in

any way apart from delay and she did not suggest that the outcome was one that was not genuinely reached on the evidence before Ms Jamieson. Ms Jamieson took an employee grievance policy and applied it to an agency member of staff and her evidence, which we accept, was that that seemed to her to be the most appropriate course of action. She did not have to do it; the ACAS Code of Practice only applies to employees and the respondents do not have a specific policy for agency workers. It is good practice to carry out a full investigation of something as serious as an allegation of racism when made by an agency worker. Clearly the obligations of a principal under s.41 EQA to an agency worker are equivalent to those to an employee, so Ms Jamieson was wise to do so and it is to her credit. It is not universal practice although it is good practice.

68. Ms Jamieson's evidence was that this is what the respondent would do generally with something akin to a grievance being brought by an agency worker. So whatever the policies may be, that is the way that management apparently conduct things generally. Ms Jamieson's letter at page 111 to HR and the operational support manager sets out the reasons for delay up to that point and we accept that those were genuinely the reasons. We would expect the first interview in investigating a grievance that had been brought on 12 December 2021 to happen before 19 January 2022. We have not seen the grievance policy so we don't know what the timescales are in the respondent's policy as a whole. We do take the point that when the respondents had the detailed complaint it made sense to ask the alleged perpetrators and other witnesses for their comments on that next. It is not the case that grievances have to inevitably start with a meeting with the person who has made the complaint.
69. The claimant's real concern is of a lack of care in terms of supporting her when was as she described "in great distress" following the incidents that seems very genuinely to have felt very deeply about. That is not really to do with the investigation of the grievance, but her desire understandably, for support. We accept that it is not the role of the investigating manager to give support because they have to stay neutral between the person making the complaint and those against whom the complaint is made. The respondent has acknowledged that it would have been better had she been contacted.
70. The timescale explained by Ms Jamieson fully explains the reasons for the unfortunate delay and they are non-discriminatory. There are non-discriminatory reasons to do with a family bereavement that the respondent has shown explain why Ms Jamieson was unavailable until 10 January 2022 and there was inactivity by the home in the meantime. It appears that letters of invitation to witnesses were sent out before Christmas and interviews happened shortly after Ms Jamieson was available. From the time she became available, there seems to have been reasonably prompt activity. They could and should have kept the claimant more involved. It does appear that the claimant then ceased to engage with the process but we cannot see anything from which we could infer that the home or the respondent would have dealt differently with a complaint made by any other member of agency staff in the context of Covid-19 in the home, the illness

and unavailability of the home manager and the personal circumstances that took Ms Jamieson out of circulation.

71. The claimant has set out the impact on her and has argued that the respondent did not acknowledge her distress. That may have affected the trust that she has in them. Although we accept that to an extent 1.2.7 is made out, in that there was a failure to act on the grievance in a timely manner, the reasons have been entirely explained and are non-discriminatory.
72. We accept that the outcome reached by Ms Jamieson was one which genuinely was on the basis of the evidence she had uncovered. To the extent that it is still argued that she rejected the grievance in an act of less favourable treatment on grounds of race, that is not one that we find any evidence to support. The fact that she administered a letter of concern, shows that she had an impartial approach to her task.

Employment Judge George

Date: ...13 September 2023.....

Sent to the parties on:

13 September 2023

For the Tribunal Office