



EMPLOYMENT TRIBUNALS

Claimant: Mrs Nicola Blackwell

Respondent: Smart Tax & Accountancy Ltd

Heard at: Manchester **On:** 29, 30 & 31 October and
1 November 2024

Before: A panel comprising Judge Callum Cowx,
Mr Keith Lannaman and Mr Anthony
Egerton

REPRESENTATION:

Claimant: In Person

Respondent: Mr Rafael Katz, Litigation Consultant

RESERVED LIABILITY JUDGMENT

1. The claimant's claim of direct discrimination on grounds of race contrary to Section 13 of the Equality Act 2010 is dismissed.
2. The claimant's claim of harassment contrary to Section 26 of the of the Equality Act 2010 is dismissed.
3. The claimant's claim of victimisation contrary to Section 27 of the of the Equality Act 2010 is well founded and succeeds.
4. The claimant's claim of breach of contract is dismissed.
5. The claimant's claim of unlawful deduction from wages contrary to Section 13 of the Employment Rights Act 1996 is dismissed.

REASONS

1.1 This was a final hearing conducted in person on 29, 30, 31 October and 1 November 2024.

1.2 The Tribunal had to decide the following claims against the respondent:

- a. Direct discrimination on grounds of the claimant's race, namely White British.
- b. Victimisation following the raising of grievances alleging racial discrimination.
- c. Harassment following the raising of grievances alleging racial discrimination.
- d. Unlawful deduction from wages or, in the alternative, breach of contract, on the basis sums for the payment of National Insurance (NI) contributions were deducted from the claimant's wages but for which His Majesty's Revenue & Customs have no record.

1.3 On the morning of the first day of the hearing, before the case was opened, I clarified with the claimant, Mrs Nicola Blackwell (NB) whether her breach of contract/unlawful deduction from wages claim was being maintained. She confirmed that it was on the basis that NI payments had not been received by HMRC. The respondent's position was that all NI payments for Mrs Blackwell's time in employment with the respondent had been paid to HMRC and that any error lies with HMRC. Mrs Blackwell confirmed that there was no issue regarding net wages payment during the time she was employed by the respondent.

1.4 Mrs Blackwell went on to invite the Tribunal to exclude the evidence of Mr Ashwin Juneja (AJ) on the basis that she did not believe he was the same person referred to in her witness statement as Ajay Bahl. The Panel decided after hearing evidence from AJ, and submissions from Mr Katz, that there was no basis for excluding AJ's evidence. The Panel was satisfied that AJ was in fact the person NB described in her evidence as being the person who hired her and subsequently dismissed her, but NB mistakenly believed his name was Ajay Bahl. Mr Navdeep Kamal Bahl was indeed the Director of the respondent company, but it was AJ who effectively ran the company on a consultancy basis. AJ was commonly referred to by the nickname "Ajay" and he signed his emails to NB as "Aj". The pair never met face to face and so the Panel found it was a misunderstanding on NB's part.

FACTS

2.1 The Panel found the following facts proved.

2.2 The respondent is a limited company based in Addlestone, Surrey and is a provider of accountancy and business outsourcing services. It is a small company with 11 employees (as at 21 December 2023).

2.3 The claimant, NB (whose surname was O'Connor at the time when she joined the respondent company) was employed from 11 August 2021 to 30 April 2022. She was employed as a payroll executive, working remotely from her home in Manchester.

2.4 The respondent company's director at the time when NB was employed was Navdeep Kamal Bhal (NKB). According to Mr Jag Jeer (JJ), NKB did not play an active part in the respondent company. In reality, AJ was in charge of the company, with a view to him eventually taking over the business. The respondent company was closely linked to a sister company called 'Maven' which had JJ as its Director. The respondent provided payroll services to Maven's clients.

2.5 Mrs Varsha Kapoor (VK) is AJ's mother. At the relevant time she was a manager within the respondent's business. As such she performed various roles, including managing the payroll team. When NB joined the business on 11 August, the payroll team comprised herself, Riddhi Vakaria (RV) and Elisabeth (no surname provided), with VK in charge.

2.6 NB was highly experienced in the management of payrolls, having worked in that environment for 14 years prior to joining the respondent. She was recruited on the understanding that she would eventually assume VK's role in running the payroll team.

2.7 Elisabeth's employment was terminated in October 2021 after moving back to her country of origin, Spain.

2.8 The respondent's payroll team, led by VK, worked in a virtual office environment using the Microsoft Teams platform. Payroll team members were required to log on at the start of the day and remain online together when working.

2.9 At times during the day, team members would have cause to leave the meeting for personal reasons or to take other calls connected to the business. VK in particular, as the team leader, with additional responsibilities within the business, would routinely have to leave meetings or take other calls. The result of taking other calls was that the Teams system would automatically put other colleagues present on the call on hold. It was a matter of routine, resulting from the operating constraints of Microsoft Teams, that payroll team members would be excluded from the virtual office when VK was taking or making another call on the system.

2.10 When NB started her employment with the respondent, it was agreed with VK that NB could take a late lunch break at 2.30pm, so that she could collect her daughter from school. On 28 September 2021, VK emailed NB and told her that she could take her break between 12 and 2pm. NB replied the same day, reminding VK of what had been agreed when she started her employment and informed VK that she would have to terminate her employment if she could not take the 2.30pm lunch break as agreed. VK subsequently agreed that NB could take a later lunch break.

2.11 NB complained that from 29 September 2021, VK and RV were either shutting her out of the Teams calls or she was the only one on the call. On 29 September NB tried to connect to Teams but there was no answer from the others. She emailed VK to this effect. On this occasion this was a technical issue and VK emailed NB explaining she and RV had tried to call her and were trying again to connect. In oral evidence NB accepted there was nothing untoward on this occasion.

2.12 On or about 11 October 2021 NB made a minor error on a client's payroll account by mistakenly replacing the number 9 in the client's bank sort code with the number 0. NB corrected the error and notified VK of the same on 11 October 2021.

2.13 On 31 October 2021 AJ called NB on Teams and informed her that she had successfully completed her 3-month probationary period with the respondent, and she was given a pay rise. During the conversation with AJ, NB complained to AJ about VK's manner, and that she was not happy about it, in that VK could be quite abrupt with her. AJ told NB that he would speak to VK about it. In his witness statement AJ referred to VK as "one of the managers". VK is in fact AJ's mother. This was not known to NB. This important fact was disclosed to NB and the Tribunal by Mr Katz on the first day of the hearing.

2.14 NB alleged that after making the above informal complaint to AJ, certain events occurred which she believed marked a deterioration in her relationship with VK.

2.15 NB alleged that on or about 4 November 2021 VK and RV were discussing Diwali and were critical of other cultures for not being more aware of Hindu culture. NB alleged that VK told her to dress in bright coloured clothes for the festival. The Tribunal was satisfied that VK did not apply any pressure on NB to conform to Hindu culture but was merely explaining the nature of the festival to NB, which included the tradition of wearing brightly coloured clothing.

2.16 NB complained about a Teams call on 30 November 2021. On the call NB said she overheard VK complaining to RV about work completed by NB, that it was incorrect, and that NB would have to do it again. VK admitted that she did speak about errors she had encountered, and she raised this with both RV and NB. The Tribunal found that VK did complain about mistakes made by either RV or NB which had to be corrected. VK was entitled to make such comments as she was accountable for any such errors. However, VK in oral evidence said she could not recall who made the errors and that it could have been RV. The Tribunal found that VK did not attribute blame to NB on this occasion but addressed her concern to both NB and RV.

2.17 NB alleged that on the same date as the above, she heard VK speaking to a client about a payroll error. NB said that she heard VK tell a client that a member of the payroll team had mistakenly double paid an employee on the BACS system. The Tribunal accepted NB's unchallenged evidence that VK had sole access to BACS, that VK made the error and that she did misinform a client that someone else in her team had made the mistake. It was concerning that misinformation which was a cause of NB's complaint to JJ on this same date.

2.18 Again on 30 November 2021, NB alleged that she was removed from a Teams call. The Tribunal accepted VK's evidence that NB was not removed from this call or removed or excluded from other Teams call. The Tribunal was satisfied with VK's explanation that a feature of the Teams system is to put other participants on hold when the person initiating the call is on another call on the same platform. This was a credible explanation because of VK's wide range of duties which were not limited to heading the payroll team.

2.19 As a result of NB blaming others for her own mistake, NB lodged an informal grievance with JJ, believing that her treatment by VK was "race related". With her informal grievance NB submitted a video and audio recording of the Teams call on 30 November 2021, which was obtained from her home security system. NB explained to JJ in a WhatsApp message on 30 November 2021 that she began recording Teams after an instance where VK had blamed NB and RV for something they had not done. JJ passed the grievance on to AJ for investigation. Again, neither JJ nor AJ divulged to NB that AJ would be investigating a grievance against his own mother.

2.20 Also on 30 November 2021, NB raised a concern with VK regarding the PAYE system; specifically, that VK had failed to make a number of "RTI" submissions to HMRC, which could result in fines for the business. This allegation was not addressed by VK, JJ or AJ in their witness statements. NB produced screenshots of images which she had sent to JJ on WhatsApp. She explained to JJ that the images were of "late filing notices". In oral evidence JJ said the company had never received any penalty notices. In the absence of cogent evidence to contradict the images sent by NB to JJ, the Tribunal found it more likely than not that the respondent did receive a number of late filing notices from HMRC and these were the result of errors made by VK. VK also admitted to making an error with NB's NI number. VK admitted that she was capable of making mistakes, although she said these were very few. The Tribunal did not have sufficient evidence to determine the number and nature of VK's mistakes, other than the aforementioned examples, but the Tribunal was satisfied those mistakes which could be attributed to her were no less serious than those attributed by the respondent to NB.

2.21 On the same day that NB raised the PAYE concern to VK, NB lost her access to the respondent's PAYE system. NB asserts this was done by VK. This was denied by VK. Despite repeatedly raising this loss of access with VK, who insisted she was attempting to resolve the problem, NB never regained her access to the system. Because NB lost access to the system on the very day she disclosed the PAYE error by VK to JJ, the Tribunal found that it was more likely than not that VK did intentionally remove NB's access to the system.

2.22 On 2 December 2021, NB was due to travel to London with RV, for the respondent's Christmas party. On the day they were due to travel, RV informed NB that they could no longer travel together as RV was going to stay with VK. Because of this change of plan, NB did not attend the Christmas function. The Tribunal found that this did happen as described but found no evidence of any underlying ill motive on RV or VK's part for RV's change of plan.

2.23 On 3 December 2021 AJ telephoned NB and told her he was investigating her informal grievance. NB alleged that AJ abruptly said to her that *“racial discrimination is an extremely bold statement to make.”* AJ denied using the word “bold” and said he instead used the word “serious”. Taken at its highest, AJ’s alleged use of the word “bold” was not unreasonable or worthy of criticism. However, the Tribunal again noted his failure on this further occasion to mention the fact VK is his mother.

2.24 On 10 December 2021 AJ emailed NB asking her to provide more detail on her complaint. NB responded by email on 13 December 2021 and told AJ about the occasion when VK spoke to a client and blamed her team for a mistake she had made herself. In the same email she said she did not want to make a *“huge drama about the situation”* but that she had been upset by the way VK spoke about her.

2.25 On 27 January 2022, AJ conducted a Teams meeting with NB. He informed her that he had found nothing of any concern in the recordings she had supplied. The Tribunal was not provided with the recording or a transcript of the same and in the absence of such evidence it found that AJ’s conclusion was reasonable. At the meeting, AJ told NB that she had wasted a lot of his time and that of NB’s manager. Again, AJ failed to identify VK as his mother. When asked in oral evidence about why he failed to tell NB that VK was his mother, he said he *“felt it was a personal decision”*. He went on to say *“I knew my mum and knew our family set up. We are a multi-cultural family. We have white members of the family. My immediate reaction was ‘this doesn’t make sense. It’s crossed wires.’ When it became a formal grievance I didn’t take part.”*

2.26 In the same meeting on 27 January 2022, having dismissed the concerns raised in NB’s informal grievance, AJ went on to criticise NB’s conduct and performance. Minutes of that meeting were recorded and produced as part of the bundle. The minutes include an assertion by AJ that NB had made numerous repeated mistakes with payrolls. NB denied this in oral evidence and said that she had made one or two mistakes. In oral evidence Mr Katz took NB back to the aforementioned minor error on 11 October 2021 where she made a single digit error when inputting a client’s bank sort code. On 15 December 2021 a client reported to VK an error with an employee’s monthly pay, which was then corrected by NB, from which the Tribunal concluded it was her mistake.

2.27 From January 2022 NB’s workload began to increase. Before NB could effectively deal with a particular client’s payroll, she was required to receive training from VK on the processes associated with that particular client. In practice the virtual office concept did not work as well as the respondent intended because NB was repeatedly excluded from calls throughout January to early February 2022. The Tribunal did not accept NB’s claim that this was intentional. She most likely formed that view because of her belief that VK was treating her differently because of her race. The Tribunal found there was insufficient evidence to support NB’s belief that any adverse treatment was motivated by race. However, the Tribunal accepted that the relationship between VK and NB must have been under strain from the point the latter made an informal complaint to AJ on 31 October 2021. Any adverse treatment was most likely caused by a deterioration in the relationship between VK and NB as a result of that complaint. This was exacerbated by the fact AJ was VK’s son, and

the likelihood that AJ disclosed more details of NB's complaint to his mother than one would expect in an ordinary workplace complaint scenario.

2.28 In the minutes of the 27 January 2022 meeting AJ recorded that NB rejected the suggestion of more training. In oral evidence NB did not accept the minutes as being an accurate record of the meeting. The Tribunal concurred with NB on this point as the minutes were inconsistent with the email sent by NB to VK on 28 January 2022, in which NB asked for training on nine different payrolls she had not run before or had little experience of. VK replied to that email on 31 January 2022, telling NB that she was happy to provide additional training the following week. On 2 February 2022 at 14:04 hrs NB sent an email to VK complaining again about being on hold. She stated *"This isn't really helping the training we discussed on Monday. Unfortunately, if you and Riddi (sic) are not online then I am unable to ask if I have a query which then causes payroll errors. This seems to be a recurring issue I have sent a number of emails and teams messages. The issue is preventing me from being able to do my job."* Although the Tribunal found that NB was not intentionally excluded from the virtual office, she did make it clear to VK that the recurring problem of being excluded from Teams meetings was interfering with her learning and development, and her ability to do her job properly. VK replied to NB's email at 17:53 hrs the same day and told NB that she was busy on other calls. VK told NB that she could contact her by email or text if she needed to, but VK did not address NB's concerns about training. Each client had different payroll processes which had to be learned by those working in the payroll team. Because of the repeated interruptions to the Teams meetings, NB was frequently isolated from VK and RV, which in turn prevented her from accessing the training required to complete certain elements of her role, and VK did not pay sufficient attention to NB's difficulties.

2.29 Returning to 28 January 2022, NB said that she overheard VK and RV talking about her in Hindi. VK twice said to RV in Hindi *"She is still there"* and this was a reference to NB. VK then added in Hindi *"Don't talk"*. On 31 January 2022 NB heard VK say to RV in Hindi *"She must be sat somewhere be careful"*. By this time VK had been made aware that NB had been recording her and RV on the Teams calls. This was clear evidence of a breakdown of trust within the team and VK was understandably wary about NB and her willingness to record their meetings. These instances revealed the deterioration in the relationship between VK and NB, but VK's decision to speak to RV was not motivated by a difference in NB's race.

2.30 Because she felt she was being ignored by VK and RV, and removed from Teams calls, NB submitted a formal grievance on 2 February 2022. NB alleged race discrimination by VK and sought her dismissal or some other disciplinary outcome.

2.31 The investigation of the formal grievance was outsourced to Peninsula. NB continued to work alongside VK and RV. NB claimed that RV posted derogatory comments about "backstabbers" on her WhatsApp page. But in oral evidence, NB withdrew this allegation, accepting that the comments were not about her.

2.32 After a short period of sickness starting on 7 February 2022, NB returned to work on 10 February 2022 and found she could not access her payroll account. Her password was no longer valid. NB said that she believed VK had accessed her account in her absence and purposefully made errors which would later be attributed

to her. The Tribunal was not satisfied that the evidence supported the proposition that VK or anyone else would access NB's account and intentionally create payroll errors.

2.33 On 24 February 2022 NB submitted the first of two Employment Tribunal claims against the respondent, in which she alleged race discrimination. The Tribunal found that the respondent did not become aware of this claim until after the termination of NB's employment on 4 April 2022.

2.34 Peninsula completed its investigation report on 18 February 2022. The report recommended that all five points raised by NB in her grievance should not be upheld. On 2 March 2022 AJ emailed NB to inform her that all five points were not upheld. In oral evidence, when AJ was asked about why he investigated NB's first informal grievance made on 31 October 2021, he referred to this later formal grievance, recognising he had a conflict of interest because he was VK's son, and implied that he played no part in the determination of the formal grievance. He said he arranged for an independent person to handle it, and that JJ dealt with the subsequent appeal. He went on to state that he played no part in the formal grievance. He said that Peninsula "decided not to uphold" NB's grievance. This part of AJ's evidence was patently untrue, and he knew it to be untrue. Judge Cowx suggested to AJ that Peninsula made recommendations on the outcome, and that he made the actual decision. AJ initially denied this suggestion, saying "No", but then went on to say he had a discussion with JJ about the report and he (AJ) decided not to uphold any of the grievance points. In his oral evidence, JJ said that he and AJ together decided not to uphold NB's formal grievance.

2.35 On 3 March 2022 NB lodged her appeal against AJ's decision. On 7 March 2022 NB was seen by her GP who signed her off work for 4-weeks as being unfit because of a "stress related problem". NB did not return to work before she was dismissed on 4 April 2022.

2.36 The appeal was decided by JJ. It was very clearly inappropriate for JJ to hear NB's appeal because he jointly, with AJ, made the original decision to dismiss her grievance. This should have been disclosed to NB, but it was not.

2.37 NB remotely attended an appeal hearing with JJ on 14 March 2022. On 22 March 2022 JJ emailed NB with his report, which contained his findings. JJ dismissed all points of appeal raised by NB.

2.38 On 24 March 2022 AJ emailed NB and told her that she was required to attend a remote formal capability hearing on 28 March 2022 to discuss her performance as a Payroll Executive and to provide an explanation for the following matters of concern:

- Entering incorrect bank details into the system
- Failing to check bank details with Bank Account Checker
- Not creating relevant folders in Registrations with registration details
- Registering CIS individuals as Self Employed
- Registering Self-Employed individuals as CIS
- Failure to process payrolls with expenses and deductions correctly

- Entering incorrect Week Ending dates on timesheet uploads
- Failure to verify CIS individuals

2.39 In his email AJ warned NB that her employment might be terminated if she did not provide a satisfactory explanation for the above concerns.

2.40 In regard to the above list of alleged errors, the respondent provided no supporting documentary evidence which might have identified the precise number of errors or the dates on which they occurred. However, in oral evidence JJ said that the capability review of NB's performance was limited to the period September 2021 to January 2022, and that the last error made by NB was in January 2022. During the 27 January 2022 meeting between AJ and NB, AJ discussed NB's performance and errors allegedly made. On 2 February 2022 AJ emailed NB with a summary of the points covered by AJ in the 27 January 2022 meeting. On the performance point discussed, AJ gave examples of error types which appear to be precisely the same as those raised by AJ at the 28 March 2022 capability meeting. From this, and the respondent's evidence that the last of NB's errors occurred in January 2021, the Tribunal concluded that in the 28 March 2022 meeting AJ did not raise any fresh matters of concern, but simply revisited the same matters he raised at the 27 January 2022 meeting, and which were evidently regarded as settled.

2.41 The Tribunal was referred to a transcript of the 28 March 2022 meeting. At the meeting AJ began by dealing with the first two points listed above relating to incorrect bank details. NB explained that she was not provided with a Bank Account Checker by the respondent, and she had to use a free online version which only permitted a limited number of uses. AJ accepted her explanation on these points by stating "*If the bank account checker's not working, how can you check the bank account details...I've noted that and that explain that issue in quite a straightforward manner.*" AJ did then go on to try to clarify whether NB was accepting she had made an error or whether was she claiming someone else had made the errors. NB said there was a possibility of both occurring. AJ did not enquire any further about these errors which were later attributed to NB.

2.42 AJ then went on to ask about not creating relevant folders with registration details. NB explained that this was due to a technical error with her laptop which did not always synch properly. She said RV experienced the same difficulty and that she, NB, had made VK aware of the problem. AJ did not challenge NB's explanation or probe her answer further.

2.43 AJ asked NB about incorrectly registering CIS individuals as Self Employed and vice versa. She explained that the system used for registering individuals did not allow the user to go back and change the CIS or Self-Employed status if necessary. AJ did not challenge this explanation or probe her answer further.

2.44 AJ questioned NB about her alleged failure to correctly process payrolls with expenses and deductions. She said that she did not think that had ever been done, ie. that she had made any such error. AJ accepted NB's response to that issue by saying "*OK, no fair enough. You don't think that's an issue that has come up.*"

2.45 NB was asked about allegedly entering incorrect Week Ending dates on timesheet uploads. NB said, *"I don't think that's come up either."* AJ replied "OK" and moved on to the next issue which was allegedly failing to verify CIS individuals. NB told AJ that she had no way to verify this, and it was VK who told them whether to verify individuals as CIS or not. Again, AJ responded "OK".

2.46 Before ending the meeting AJ summed up NB's responses to the allegations then assured her that he would investigate the matter further based on the answers she had provided. He said, *"I'll pull it all together and I'll make it all available to you as well so you can see."* AJ said that mistakes were being made but he acknowledged there might be mitigating circumstances or reasons for the mistakes, and that he wanted to get to the bottom of it.

2.47 If AJ did carry out a further investigation, as he told NB he would, he did not make the findings of that investigation available to NB as he promised. Instead, on 1 April 2022, AJ sent NB the respondent's decision to terminate her employment after rejecting all of the responses she gave to the allegations. The written decision was signed by JJ. In his report JJ wrote *"Having listened to your explanations I consider them to be unsatisfactory. I can see from the extensive research into your performance that the tools to do your job were working and readily available, that nobody has changed any of your work and that most of your performance issues related to lack of due care and attention."* The Tribunal found no evidence to suggest that any such "extensive research" was carried out into NB's performance.

2.48 On 28 March 2022, NB met each allegation of poor performance with a clear explanation, and AJ assured her he would explore those explanations and share his subsequent findings with her before a final decision was made. AJ ended the meeting on 28 March 2022 with a series of lines of enquiry and investigative actions to pursue. One would reasonably have expected AJ to speak to RV and VR about the explanations given by NB in regard to problems with her laptop not synching, the bank account checker, the inability to alter CIS and self-employed status and her emphatic denials regarding mistakes made with payroll processing and week ending dates. If AJ did genuinely make those further enquiries there would be some record of them which one would reasonably expect him to have disclosed to NB so that she might provide a further response. In the absence of such records and given the decision to terminate NB's employment so rapidly, only 4-days after the capability, the Tribunal found no true investigation into NB's alleged failings was carried out and the decision to terminate her employment was pre-determined by AJ prior to 28 March 2022.

2.49 The respondent attempted to give the impression of fairness by giving the task of dismissing NB to JJ. But the Tribunal found that AJ played at least an equal part in the decision to terminate NB's employment.

2.50 The Tribunal found the respondent's allegations that NB made repeated and serious errors to be unconvincing. As NB's line manager VK was best placed to spot any such errors and to deal with them if they were so serious and recurring as later alleged by the respondent. In her oral evidence VK said that she raised concerns with NB about the quality of her work and repeated the same to AJ, yet none of these discussions were documented. The Tribunal rejected VK's evidence on this

issue, finding her claim that NB made repeated and avoidable errors throughout her employment to be untrue and manufactured to provide a reason for terminating NB's employment. If NB was as bad at her job as claimed by VK, AJ and JJ then there would have been documented proof of actions taken by the respondent to address this, long before matters escalated to the point where a capability review was deemed to be necessary.

2.51 If NB had made the mistakes alleged by the respondent, then she would not have passed her probationary period when she did on 31 October 2021 and given a pay rise. In his oral evidence AJ referred to 28 January 2022 when he identified five alleged errors made by NB. Mr Katz referred NB to the bundle and a number of documents which were said to be evidence of her errors. The first example was her admitted minor error with a client's sort code on 11 October 2021. That of course pre-dated the end of her successful probationary period and was not therefore regarded by the respondent as being of serious concern. NB was taken to the error on 15 December 2021 when an incorrect payment was brought to her attention and which she corrected. If that was regarded by the respondent as a serious mistake then one would have expected some sort of documented follow up action by VK, AJ or JJ, but no such evidence was produced. On 4 January 2022 VK was notified by a client of mistakes made by NB. The mistakes were an incorrect week-end date where January was used instead of December and payslips were erroneously sent to an individual with the same name as another worker. These also appeared to be minor inputting errors which did not result in any sort of performance warning by the respondent.

2.52 In his evidence, JJ made repeated reference to error logs and spreadsheets which he said are maintained for every employee. He said he had a copy of NB's error log, and this was central to the respondent's concerns about NB and its decision to dismiss her. The only documented evidence of mistakes made by NB were those mentioned above on 11 October 2021, 15 December 2021 and 4 January 2022. Other documents were included in the bundle which were described as "Respondent's concerns with the Claimant" but these do not contain clear and unequivocal evidence of mistakes made by NB.

2.53 It was accepted by VK and AJ that VK herself made mistakes with payrolls. NB's assertion that VK made a mistake on 30 November 2021 yet told a client that someone else on the team was responsible for it, was not challenged by the respondent. It was accepted by VK that she made an error with NB's NI number and the Tribunal found that VK was responsible for late filing notices received from HMRC. The Tribunal was not satisfied that any errors made by NB, and which were used to justify her dismissal, were any more serious than errors made by VK.

2.54 The Tribunal found that AJ did telephone NB and did call her a "fucking bitch". The Tribunal rejected his explanation that he called NB in error. The call was made on the same day as a preliminary hearing for this case. The Tribunal concluded that the date of the call was not a coincidence. The Tribunal heard from AJ that he had been unwell and concluded that the additional strain of the proceedings took its toll on him and prompted the phone call.

2.55 The Tribunal considered NB's claim of unauthorised deductions from wages and breach of contract. NB gave evidence that she was paid her wages by the respondent and that she received the correct net amount on each occasion. Her complaint was that HMRC did not have an accurate record of the amount the respondent should have paid in NI contributions for her.

THE LAW

3.1 The relevant law is to be found in the Equality Act 2010 ("*the EqA*") and the Employment Rights Act 1996 ("*the ERA*") at:

The EqA

Section 13

(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.

Section 26

(1) A person (A) harasses another (B) if-

- (a) A engages in unwanted conduct related to a relevant protected characteristic, and
- (b) The conduct has the purpose or effect of-
 - (i) Violating B's dignity, or
 - (ii) Creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

Section 27

(1) A person (A) victimises another person (B) if A subjects B to a detriment because-

- (a) B does a protected act, or
- (b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

- (a) bringing proceedings under this Act;
- (b) giving evidence or information in connection with proceedings under this Act;
- (c) doing any other thing for the purposes of or in connection with this Act;
- (d) making an allegation (whether or not express) that A or another person has contravened this Act.

The ERA

Section 13

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

3.2 During the course of the hearing, Judge Cowx enquired with Mr Katz whether it was open to the Tribunal to find that NB's dismissal was an act of victimisation. Mr Katz submitted that this was not a finding which was open to the Tribunal because it was not included in the list of issues agreed at the preliminary hearing on 16 February 2024. Mr Katz made further submissions on this point in his closing submissions and cited the cases of *Parekh v London Borough of Brent* [2012] EWCA Civ 1630 and *London Luton Airport Operations Ltd V Levick* [2019] UKEAT/0270/18/LA in support of his submissions.

APPLYING THE FACTS TO THE LAW

Direct Discrimination

4.1 The Tribunal considered each of the issues identified at the preliminary hearing on 16 February 2024 which were said to constitute direct discrimination.

4.2 NB's conversation with VK and RV on 4 November 2021 was merely one about culture and an explanation of the Diwali festival. NB misunderstood the nature of the conversation. She was not told that she had to conform to the Hindu practice of celebrating Diwali. She was not told that she had to dress in bright colours. NB was not treated less favourably than anyone else.

4.3 On 30 November 2021 VK may well have complained to RV about an error made either by NB or VR. VK was entitled to make such comments as she was ultimately accountable to the respondent for the payroll team's performance. NB was not treated less favourably than anyone else. If the treatment had been less favourable, then it was not because of her race.

4.4 On 30 November 2021 NB was not in fact removed from a Teams call. There were occasions when NB could not join VK and RV on Teams calls because the system did not permit it when they were on other calls. There were occasions when VK was on other calls and occasions when VK and RV were on calls together, but this did not amount to less favourable treatment and being left out of calls was not because of NB's race.

4.5 On 2 December 2021 RV did change her travel plans but that had nothing to do with NB's race. She changed her plans because she had the opportunity to stay with VR which better suited her personal circumstances.

4.6 On 3 December 2021, in a telephone conversation with NB, AJ referred to her complaint of racial discrimination as "bold" or "serious". The Tribunal found that neither word was worthy of criticism, nor did they amount to less favourable treatment because of race. AJ formed an early view of NB's complaint which was not unreasonable, however, it was indicative of possible pre-determination, and it was remiss of him not to disclose the fact he was investigating a complaint against his own mother. It should have been obvious to him that he was not the appropriate person to investigate the complaint because to do so would surely result in actual or apparent bias. The Tribunal did not accept that failing to reveal the connection between VK and AJ was an innocent oversight, finding it was key information that was intentionally withheld and which rendered any grievance investigation worthless.

4.7 On 28 January 2022 VK and RV did switch from speaking in English to Hindi when talking about NB. This did not amount to less favourable treatment because of NB's race. At that time VK was aware that NB had been recording the Teams calls and was using those recordings to support her complaint about VK. It was therefore understandable that VK would be very cautious about discussing anything which might relate to NB for fear of it being used against her. By switching to Hindi VK was not treating NB less favourably but merely protecting herself from further allegations. The same was true when VK spoke in Hindi to RV on 31 January 2022.

4.8 AJ was verbally abusive to NB on 7 July 2023 after the preliminary hearing. The Tribunal concluded that this verbal abuse did not amount to less favourable treatment, and it had nothing to do with NB's race. AJ was at a low point due to his health and the additional strain of the proceedings caused him to act inappropriately in the manner he did.

4.9 The final act of alleged race discrimination was NB's dismissal. The Tribunal found that NB was treated less favourably than other employees when she was dismissed, but this treatment was not because of her being White British. The motivation behind NB's dismissal was the personality clash between herself and VK, and the complaints made by NB about VK. In a small family run business it was inevitable that NB's position would become precarious, if not untenable, once she had made accusations of the kind she did against VK.

4.10 For the aforementioned reasons the Tribunal found that NB was not directly discriminated against.

Victimisation

4.11 NB made three separate protected acts, namely her informal grievance on 30 November 2021, her formal grievance on 2 February 2022 and her first Employment Tribunal claim on 24 February 2022. Each of these were protected acts because NB either brought proceedings under the EqA (the claim on 24 February 2022) or she made allegations that another person, VK, had contravened the EqA (ie. racially

discriminated against her – the grievances on 30 November 2021 and 2 February 2022).

4.12 The Tribunal went on to consider whether the respondent did any of the things identified in the list of issues established at the preliminary hearing on 16 February 2024.

4.13 AJ was not rude or abrupt in his emails of 21 February 2022 and these could not be said to have made NB's working environment unbearable. AJ did not subject NB to a detriment.

4.14 NB complained about the tone and content of an email sent to her by AJ on 25 January 2022 in response to her requests for updates on her formal grievance. AJ's email concisely updated NB on the position. It was not rude or unreasonable in any way. AJ did not subject NB to a detriment.

4.15 NB complained about RV attending work remotely with her children in the room. In evidence NB's suggestion was that RV was given preferential treatment. There was nothing unreasonable in allowing RV to work with her children present because this was permitted by the respondent. NB admitted that she did not ask the respondent for the same privilege. NB was not subjected to a detriment.

4.16 On 25 April 2022 JJ asked NB about a broken key button on the respondent's laptop which had been issued to her and which she had returned. There was nothing unreasonable about JJ asking about possible damage to the respondent's property and so NB was not subjected to a detriment.

4.17 The Tribunal went on to consider whether NB's dismissal amounted to a detriment. The Tribunal considered Mr Katz's submission that the Tribunal was not permitted to consider any other acts of potential victimisation beyond those identified in the list of issues set down in EJ Aspinall's Case Management Summary of 16 February 2024. In reaching its decision on this point the Tribunal took into account the cases of *Parekh* and *Levick* to which Mr Katz referred.

4.18 The Tribunal decided that it was not bound to rigidly follow the list of issues identified at the preliminary hearing, particularly those under the heading "Victimisation", for the following reasons. In *Parekh* [31] Lord Justice Mummery stated the following:

A list of issues is a useful case management tool developed by the tribunal to bring some semblance of order, structure and clarity to proceedings in which the requirements of formal pleadings are minimal. The list is usually the agreed outcome of discussions between the parties or their representatives and the employment judge. If the list of issues is agreed, then that will, as a general rule, limit the issues at the substantive hearing to those in the list: see Land Rover v. Short Appeal No. UKEAT/0496/10/RN (6 October 2011) at [30] to [33]. As the ET that conducts the hearing is bound to ensure that the case is clearly and efficiently presented, it is not required to stick slavishly to the list of issues agreed where to do so would impair the discharge of its core duty to hear and determine the case in accordance with the law and the

evidence: see Price v. Surrey CC Appeal No UKEAT/0450/10/SM (27 October 2011) at [23]. As was recognised in Hart v. English Heritage [2006] ICR 555 at [31]-[35] case management decisions are not final decisions. They can therefore be revisited and reconsidered, for example if there is a material change of circumstances. The power to do that may not be often exercised, but it is a necessary power in the interests of effectiveness. It also avoids endless appeals, with potential additional costs and delays.

4.19 Lord Justice Mummery made it clear that the list of issues is an important case management tool which may be departed from, if it is necessary for the Tribunal to do so, in order to discharge its duty to determine the case in accordance with the law and the evidence. In light of this, the Tribunal carefully considered whether the circumstances of this case demanded deviation from the list of issues.

4.20 The claimant in this case, unlike the respondent, did not have the benefit of legal representation. She defined the nature of her claim in simple outline in her two ET1 claim forms. In both claim forms she identified her complaint in simple terms, as discrimination on grounds of race. Her first claim was submitted while she still worked for the respondent. The second claim was submitted after the date her employment was terminated. In that second claim form at part 9.2 she said this about her claim: *“I was racially discriminated against where I had to go on the sick and dismissed...”*

4.21 In her second claim form NB clearly identified the dismissal as an alleged detriment and linked that dismissal to her allegation of racial discrimination. It was not until the preliminary hearing before EJ Aspinall that a list of issues was identified. Inevitably, without legal representation, NB deferred to the EJ who had the task of teasing out the issues during the course of discussion with the parties. This is a task made all the more difficult when the claimant is not legally represented. At page 7 of her Case Management Summary EJ Aspinall described the list of identified issues as an “Indicative List of Issues to be Determined”. The word *indicative* contradicts the proposition that the list of issues generated was an exhaustive and authoritative statement of the issues.

4.22 The Tribunal acknowledged the general rule that if the list of issues is agreed, then that will limit the issues at the substantive hearing to those in the list. However, in this particular case, the Tribunal found that slavishly sticking to the list of issues would impair the Tribunal in the discharge of its core duty to hear and determine the case in accordance with the law and the evidence. It was not NB who compartmentalised her claim into the three heads of direct discrimination, victimisation and harassment. That compartmentalisation was done quite properly by the case management judge in an effort to ensure that a fair and efficient final hearing followed.

4.23 Direct discrimination, victimisation and harassment are all forms of prohibited conduct which sit under the umbrella of discrimination. In her second form ET1 NB made it clear that dismissal was a fundamental part of her claim, and she referred to that dismissal in general terms as racial discrimination. It is unfortunate that the dismissal was not included under the heading of “Victimisation”, but by stating her case from the outset as simply one of discrimination permits the Tribunal to consider

all forms of discrimination which might arise from the evidence. The dismissal was very obviously an alleged detriment, and the evidential skeleton of NB's case was clear to the respondent from the outset, which was that she was dismissed shortly after submitting complaints of discrimination on grounds of race.

4.24 At the preliminary hearing the respondent was content for NB's claim to be pleaded in broader terms than simply one of direct discrimination. It was accepted that the factual allegations described by NB could, if proved, also amount to victimisation and harassment. In the case of *Levick* the EAT disapproved of the EJ who found disability proved based on an entirely different medical condition to that pleaded by the claimant. But the facts in *Levick* are quite different to NB's case because NB's case has always included her dismissal following the protected acts. By sticking slavishly to the indicative list of detriments under the heading "Victimisation", the Tribunal would impair its ability to discharge its core duty to hear and determine the case in accordance with the law and the evidence.

4.25 The Tribunal was then permitted to consider the dismissal as an act of victimisation despite it not being expressed in the indicative list of issues.

4.26 NB suffered a detriment when she was dismissed by the respondent. The Tribunal then considered whether NB was subjected to that detriment because she had done a protected act or because the respondent believed she had done a protected act.

4.27 NB made three protected acts, namely her informal grievance of 30 November 2021, her formal grievance of 2 February 2022 and her first Employment Tribunal claim on 24 February 2022, all of which included complaints of racial discrimination. The Tribunal excluded the Employment Tribunal claim as a motivating factor because the respondent only became aware of it after the dismissal.

4.28 The respondent's case is that NB was dismissed on capability grounds. The Tribunal was not satisfied that this was the true reason for NB's dismissal. The Tribunal found that NB was dismissed because she had made complaints of racial discrimination against VK.

4.29 The Tribunal carefully considered the respondents evidence in support of its contention that NB was dismissed because of repeated poor performance. The evidence adduced did not support that contention. NB made a small number of mistakes in the first few months of her employment. Although an experienced payroll executive she and her colleagues required training or familiarisation on the different systems made by different clients. The respondent accepted that simple errors were to be expected and VK herself as the team leader made a number of mistakes, which were no less numerous and were potentially more serious than those attributed to NB, most obviously the HMRC late filing notices.

4.30 If NB made mistakes during her probationary period, then they were not serious mistakes because the respondent notified her that she had passed the probationary period, her employment was confirmed, and she was given a pay rise. The Panel was satisfied that two more minor errors were made by NB, but the last of

these was on 4 January 2022. Formal action was not initiated against NB for alleged poor performance until 24 March 2022. If the errors allegedly made by NB were of such serious concern to the respondent, then it would have initiated formal action long before it did, and soon after the last error, which on the respondent's evidence was on 4 January 2022.

4.31 It was not coincidental that the dismissal process was initiated only 2 days after NB was informed her grievance appeal had failed. Once NB had exhausted her appeal rights, and the complaint against VK had been finally dismissed, the respondent was at liberty to initiate the process to end NB's employment, and the motivation for doing so was because she had made the complaints against VK. The Tribunal carefully considered the evidence in the round. In doing so the Tribunal concluded that when it came to the capability review the respondent's witnesses were not credible. The relationship between AJ and VK was concealed from NB. Had NB known about it she would have raised a further concern about her grievance being dealt with impartially.

4.32 The manner in which NB's grievances were handled by the respondent was wholly improper. On any view, AJ could not investigate the complaints made by NB without actual or apparent bias because the person under investigation was his own mother. This fact should have been disclosed to NB at the outset. It was not and it was not in fact disclosed until part-way through the hearing. It would have been obvious to any well-informed observer that this familial relationship would prevent a truly impartial process being followed and that AJ would have been fully aware of that. The Tribunal was satisfied that AJ knew that was the case and chose not to disclose this vital fact in an effort to give the false impression that fair investigations had been carried out. AJ was not a truthful witness. He attempted to persuade the Tribunal that he played no part in the determination of NB's formal grievance, which he knew was untrue, only admitting he was the deciding body when it was put to him directly.

4.33 The list of concerns raised by AJ at his meeting on 28 March 2022 were a repeat of the concerns raised by him with NB in the 27 January 2022 meeting. On 27 January 2022 possible errors were discussed and dealt with, but on 28 March 2022 AJ revived the same alleged concerns as a device to engineer NB's dismissal. In the meeting on 28 March 2022 AJ gave NB false assurances that he would conduct a further investigation based on the answers she had given to him and that he would report back to her, implying she would have a further opportunity to respond to any further evidence. AJ did not fulfil that assurance and only 4-days later NB's employment was terminated. That short interlude and the absence of further discussion indicated that no meaningful investigation was carried out and that NB's dismissal had been predetermined.

4.34 Central to the respondent's case that NB had made serious and repeated mistakes were error logs which AJ and JJ referred to in oral evidence. If such evidence existed and was shown to NB at the time, then it would have been compelling evidence in support of the respondent's case that NB was dismissed on genuine capability grounds. One would expect such evidence, if it existed, to be presented as part of the respondent's case, but it was not. The absence of such

obviously cogent evidence satisfied the Tribunal that no such error logs existed at the time and were not disclosed to NB during the dismissal process.

4.35 Therefore, the Tribunal rejected as false the respondent's case that NB was dismissed on capability grounds. She was dismissed because of the protected acts made on 30 November 2021 and 2 February 2022.

4.36 The Tribunal therefore upheld the claimant's claim of victimisation.

Harassment

4.37 The Tribunal dismissed the claimant's claim of harassment which was founded on only two instances of unwanted conduct. In evidence NB accepted that the first of these, messages posted on WhatsApp by RV, were not meant as a reference to NB. The second was the allegation that VK twice ignored NB's concerns about incorrect pay on 25 March 2022. The evidence did not support this contention as VK did respond to NB's pay query. Even if NB was dissatisfied with VK's response it was not conduct which had the purpose or the effect of violating NB's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment.

Unlawful Deduction from Wages & Breach of Contract

4.38 The Tribunal dismissed NB's claim in regard to NI payments. The respondent did not breach its contract of employment with NB. There was no dispute that NB was paid her wages and there was no dispute that the sums for income tax and NI were deducted from her gross pay. There were no unlawful deductions because income tax and NI are lawful deductions. The issue before the Tribunal was whether or not the monies deducted were correctly recorded by HMRC against NB's personal tax and NI record. That is not an issue which falls within the jurisdiction of the Employment Tribunal.

Judge C J Cowx
29 November 2024

JUDGMENT AND REASONS SENT TO THE PARTIES ON
29 November 2024

FOR THE TRIBUNAL OFFICE