EMPLOYMENT TRIBUNALS

Claimant: Mr K Joseph

Respondent: South West Yorkshire Partnership NHS Foundation Trust

HELD AT: Leeds **ON:** 13 and 14 March 2017
28 April 2017
(in Chambers)

BEFORE: Employment Judge Jones
Mr L Fawcett
Mr R W Grigg

REPRESENTATION:

Claimant: In person
Respondent: Miss K Jeram, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that the claimant was not unlawfully discriminated against by the respondent.

REASONS

1. By a claim form presented to the Tribunal on 30 September 2016 the claimant complained that he had been subjected to direct and indirect race discrimination by his employers. The indirect discrimination claim was subsequently withdrawn. The issues were identified at a preliminary hearing on 9 January 2017.

Witnesses

2. The Tribunal heard evidence from the claimant and Mrs Evelyn Beckley, his union representative.

3. The respondent called evidence from Dr David Hargreaves, Consultant Psychiatrist; Ms Maidei Hukuimwe, Band 6 qualified nurse and team leader

employed by the respondent; Mr Mzingaye Ngwenya, qualified nurse employed by the respondent; Mr Sam Barker, healthcare assistant employed by the respondent; and Ms Sue Threadgold, Deputy Director of Forensic Business Delivery Unit, employed by the respondent.

The Law

4. The relevant statutory provisions are contained within sections 9, 13, 23, 39 and 136[1] of the Equality Act 2010.

Background

5. The respondent is a National Health Service provider which operates the Bretton Centre. That is a secure mental health inservice user unit. The claimant was working in May 2016 on the Sandal Ward. There were 16 service users on the ward. They had all been detained under the provisions of the Mental Health Act. The majority of the service users at the Bretton Centre are prone to aggression and acts of violence.

6. The claimant has worked as a healthcare assistant since 2006. He was working on the Sandal ward at the time of the alleged discrimination.

7. When service users become a significant and severe risk to other service users, members of staff or themselves, it is necessary to place them for a short period of time in seclusion. That is by way of isolation until their condition reaches a manageable one when they are returned to their respective ward. The respondent has an inservice user observation and engagement policy. It provides guidance to professional staff in managing risks posed by service users and in respect of observation of them to identify and reduce the risks of potential suicide, violent or vulnerable service users from harming themselves or others.

8. In respect of observation levels the policy provides that the determination of levels is principally a task which falls to the nursing staff but good practice dictates it should involve as many members of the MDT (Multi Disciplinary Team) as possible. The nurse in charge of the ward establishes a rota of workers who are to carry out observation duties and for how long within their shift. On the handover of duties a clear exchange of information is required whereby one worker takes over from another. It is the responsibility of the oncoming nurse in charge to ensure that the handover procedure from the outgoing shift includes a review of the environment to establish that it is safe, that all service users being handed over are safe and accounted for and the responsibility for observations during the handover remains with the outgoing shift and they are only relieved from that duty when relieved by a colleague from the oncoming shift. There are four levels of observations. The fourth, general level, is a visual check on the service user every hour. It is formally recorded. This is the level of observation required when the service user is on the ward. The next level is intermittent which requires a visual check every 15 minutes. Level 2 observations involve continuous observation. The member of the nursing

[1] In this particular case there is no room for doubt as to the facts necessary to establish discrimination, see **Hewage v Grampian Health Board [2012] IRLR 870**.

staff must be within eyesight of the service user. That involves being close enough to respond immediately should an incident occur or be likely to occur. Specific arrangements are made for intimate activities and privacy when continuous observation may have to be adjusted. The top level 1 is observation within arm's length. That is where the risk assessment includes a high level of risk of self harm or harm to others.

The Facts

9. On 10 May 2016 at 6.15pm, a violent incident occurred. X was attacked by two service users, one of whom was Asian and one of whom was white. Staff intervened. X was in a very angry and volatile state following the assault and threatened that he was going to kill the Asian service user because of his condition. A decision was made to place X in seclusion.

10. On 11 May 2016 at 13:11 a decision was taken to remove X from seclusion and place him on level 2 observations. That decision was made by Dr Hargreaves, Ms H and Edward Bazunu, a band 5 nurse.

11. At 18:52 Mr Bazunu made an entry in the nursing progress notes providing a summary of the day. He recorded that, "*It was decided that certain staff should not be allowed to participate in any of his seclusion*". That was understood to mean that no members of staff who were black or Asian (described by the respondent as BEM) should be engaged in the level 2 observation.

12. The claimant attended at work on 12 May 2016 to undertake a 10.00am/6.00pm shift. He spoke to Mr Bazunu who told him that X was on level 2 observations but that an incident had taken place and no BEM nurse or healthcare assistant was to provide level 2 observations. The claimant was allocated other tasks. After an hour he informed Mr Bazunu that he was uncomfortable with the situation. He therefore went to speak to Dr Hargreaves.

13. Dr Hargreaves informed the claimant that he agreed with the decision. He said it had been put in place to protect nursing staff. The claimant said he was uncomfortable with it and believed that it was disturbing and discriminating. Dr Hargreaves said that X was being very aggressive and racist towards BEM staff and service users and that it was in the best interests of X, the BEM staff and service users that until X's presentation had improved that situation would be maintained. He said the potential for physical violence and harm was high. He drew attention to other practices which had taken place whereby female nurses had been asked not to carry out one-to-one observations or work in isolated wards in circumstances where a service user was thought to pose a specific risk to women. The claimant did not challenge that example at the time.

14. There was one further shift when the claimant attended at work when the arrangement was still in place, namely 16 May 2016.

15. On 19 May 2016 the presentation of X had improved. He had undergone a change in medication during the period at the time of and after his seclusion. The level of observations was reduced to a level 3 on 19 May 2016, and the restriction on BEM staff undertaking observations was removed.

16. Ms Beckley, the claimant's union representative, sent an email to Susan Threadgold on 17 May 2016 expressing the concern of the claimant about what had happened. A meeting took place on 24 May 2016 between Ms Threadgold, the claimant and his union representative. Ms Threadgold arranged for enquiries to be made as to what had led to the restriction being implemented. At a further meeting on 19 August 2016 the claimant's concerns were set out and a discussion about them followed. They were summarised as:

(1) As a BME member of staff he had been discriminated against and prevented from undertaking a full range of duties.

(2) There was an insufficient audit trail and records to explain the rationale for the decision.

(3) The service user had not actually done anything. Alternative actions were not considered, and the claimant believed the hostility towards certain staff members was more due to their interpersonal skills than their ethnicity.

(4) There was no consultation with a wider group of staff, including those who were prevented from undertaking the observations, to ascertain a wider range of options.

(5) That the wider implications for actions were not considered, potentially allowing a service user to dictate which staff looked after him.

(6) There was no process in place formally to review that decision or consider any alternatives.

17. On 13 September 2016 Ms Threadgold wrote to the claimant enclosing notes of the meeting. She said she was truly sorry that the situation had greatly affected him. She said she considered that the decision had been made on the basis of health and safety of a group of staff and was justified. She then said she acknowledged there was a good deal to learn from the situation which would hopefully result in a more robust practice and less likelihood of staff feeling undervalued and unsupported. She apologised that there had not been systems and processes in place to ensure that staff were consulted and involved in the initial decision making or the review in such cases, where the decision impacted significantly on their practice at work. She said she intended to address that matter in the future. She thanked the claimant for taking time to raise the concerns and discuss them. She assured him that feedback was welcome.

Discussion and Conclusions

18. Section 13 of the EqA provides that:

(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.

In addition to establishing that the definition of direct discrimination applied to the facts of the case a claimant must show that the act was unlawful. In the

employment context this is governed by Chapter 1 of the EqA, and in this case Section 39(2) which states:

> An employer (A) must not discriminate against an employee of A's (B) … (c) by subjecting him to any other detriment.

19. We analyse below each of the ingredients of the definition of direct discrimination and the component of unlawfulness.

"Treatment"

20. For a period of nine days the claimant was precluded from discharging the duty of level 2 observation of X. So too were all other nursing staff and healthcare assistants who were black or Asian and of ethnic minority. Although Mr Bazunu had not specifically written down that definition when he referred to "certain" people, it was plainly what he intended and put into effect and endorsed by Dr Hargreaves the following day.

"Because of a protected characteristic"

21. That was undoubtedly different treatment of the claimant because of the fact he belonged to the categorisation of relevant staff who were BEM; and that fell within the definition of race under Section 9 of the EqA, a protected characteristic.

22. We reject the submission of Miss Jeram that, for the purpose of Section 13 of the EqA, the claimant was precluded from these duties because of a concern for his safety or the welfare of the service user, X, as opposed to because of his protected characteristic of race. These considerations were, we find, important reasons for the imposition of the restriction, but they were no different to the benign motivation in **James v Eastleigh** or **Amnesty International v Ahmed**, which cannot save the respondent from having been found to have treated the employee differently because of his protected characteristic. The fact that a similar restriction might have been put in place precluding female staff from such observations had a service user presented a similar threat to women did not discount the necessary link within the words "because of a protected characteristic". It would simply substitute a different protected characteristic.

23. When there is an exact correspondence between the criterion and the protected characteristic the grounds for the different treatment are connected sufficiently for the purpose of establishing the casual link within section 13 of the EqA (see **James v Eastleigh Borough Council [1992] AC 751**; and **Bull v Hall [2013] UKCS 73**).

24. The scrutiny of the reason why an employer acted as he did, as explained in **Nagarajan v London Region Transport [1999] IRLR 572** and **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285,** was discussed by Underwood P in **Ahmed** and Baroness Hale in **Bull.** Such scrutiny is not necessary in a case in which the protected characteristic is the determining feature for the treatment.

"Less favourably" and "subjecting him to any other detriment"

25. The critical question in this case, in our judgment, is whether the different treatment was less favourable within the meaning of section 13 of the EqA, or a detriment within the meaning of section 39(2)(d) of the EqA. Whilst there may be certain situations in which detriment cannot be regarded as synonymous with less favourable treatment, we do not consider this one such case.

26. In **Ministry of Defence v Jeremiah** the Court of Appeal took a wide view of the words "any other detriment". Lord Justice Brandon held it meant putting the employee under a disadvantage and Lord Justice Brightman said a detriment would exist if a reasonable worker would or might take the view that the action of the employer was, in all of the circumstances, to his detriment. In **Shamoon v Chief Constable of The Royal Ulster Constabulary [2003] ICR 337** the House of Lords approved this approach but added that a sense of grievance which was not justified would not be sufficient to constitute a detriment.

27. In considering whether a reasonable employee would regard this as a disadvantage, or whether the claimant had a justified or unjustified sense of grievance it is necessary to examine the background and circumstances which led the respondent to impose the staffing restriction.

28. X had deep rooted and entrenched attitudes which any reasonable person would have regarded as racist. They were directed at black and Asian people. The circumstances in which he had been detained under the Mental Health Act were that he had threatened a man of Pakistani origin with a weapon and threatened to decapitate him. X had a delusional belief that this individual had raped his imaginary girlfriend. X had previously been the subject of an injunction after he had written racist graffiti on the wall of the café in which his victim worked. Ms Midei Hukuimwe and Mr Mzingaye Ngwenya gave evidence about repeated and frequent profanic and racist abuse and insults they were subjected by X. He used the "N" word about them. His targets were black, Asian and mixed race members of staff. X expressed his belief that black people intended to overthrow the white race. He had been admitted to the Bretton Centre in September 2015. His racist attitudes and behaviour had not modified since that time.

29. In the days prior to and after his seclusion his conduct was recorded in the nursing notes:

(1) 4 May 2016 6:12 – X said that "all black people are planning to make white people slaves as payback from the past slave trade". He believes that the team leaders, MH and SJ, are always smiling and happy because they are racist towards white people and they know that one day the white people will be slaves to them. While X was talking about this service user Y came on the ward and suddenly walked off towards his room after hearing the conversation. X then said "he's walking off now because he knows its truth, all Muslims want to take over the world and a black Jesus will arise killing all non-Muslins by decapitating their heads".

(2) 4 May 2016 6:55 – "Throughout the evening SU continues to voice negative/racist views regarding black and/or Muslim people who is in his proximity".

(3) 6 May 2016 – X did a displayed outburst and he made racist remarks against some staff.

(4) 9 May 2016 – X spoke about the lyrics to the song "black velvet" stating that it is about a man who wants to take over the world, he seemed to say this in a negative context.

(5) 10 May 2016 17:38 – Management of racist and abusive behaviour. I contacted Yvonne (Legal Services Adviser) today for advice regarding management of X's racist and abusive behaviour on the ward and the distress this is causing to other service users. Also X's vulnerability with the risk of other service users retaliating in an aggressive manner towards X when he behaves in this way.

(6) 10 May 2016 18:15 – Serious incident: the attack which led to the seclusion of the claimant set out above.

(7) 10 May 2016 23:20 (whilst in seclusion) – There had been ongoing issues with X in seclusion room as he started spitting and kicking the door. He remained aroused and made racist remarks to staff and called them "cunt". He displayed highly aggressive behaviour for about 15 minutes then superficially settled down.

(8) 11 May 2016 6:52 – He continues to voice paranoid delusion and grandiose ideas of self and others. Given his current limited treatment regime this makes X a potentially extremely dangerous individual, it is the opinion of the nursing team that should X be let out of seclusion and attempt to assault peers the nursing team would have difficulty in managing his apparent escalating behaviour and as such does not fit the remit of being nursed in a low secure environment and would be appropriate to transfer to higher forensic security.

(9) 11 May 2016 13:11 – The patient has engaged in racist abuse of other service users…he continues to express racist views of the two service users and views about a conspiracy for the subjection of white people. He expresses ongoing belief about Z being a Muslim (refers to his longstanding delusional belief).

30. Mr Bazunu, who was black, had been a particular subject of abuse and verbal assault from X. X believed that a Mental Health Tribunal application had not been allowed in his favour because of a report written by Mr Bazunu. Both Mr Ngwenya and Ms Hukuime described their own difficulty in copy with a continuous volley of racist abuse from X. Mr Ngwenya said emotional scars do not easily heal. In spite of this, his own view of the decision to exclude BEM staff from discharging level 2 observations during this period was not for his own protection, which he appreciated, but for the benefit it had to X. He considered its value to the recovery of X, during this transitional stage after he had finished seclusion, was of real importance. Dr Hargreaves explained that the presence of BEM members of staff could well have been aggravating factors to his verbally, or even physically, aggressive behaviour at this time.

31. At the time the restriction was imposed X had been undergoing a change in medication. This had occurred in part because he had ceased to take it in tablet form and it was therefore being injected. There was also change in the type of medication he was being prescribed. This led to further uncertainty and volatility. Dr Hargreaves believed that when the new medication took effect X's heightened sense of tension would reduce and he would be a lesser risk.

32. The claimant had himself witnessed the racist language of X but did not consider it to be beyond what he could be anticipated to tolerate in the course of discharging his duties. He felt that the decision had been an over-reaction and was inappropriate. It was not particularly the fact he had been precluded from discharging the observation Level 2 duty which concerned him, but the message it sent both to service users and to other members of staff reflecting negatively on black and Asian employees. In his witness statement he described how the dynamics of the ward were shifting as service users picked up on the difference in treatment in respect of X. He said it had a negative impact on the whole environment and this left him feeling exhausted and dejected. The fact that this limitation may reinforce X's racism and beliefs, sense of control and manipulation of the staff as well as the concerns expressed by other service users.

33. The duties themselves, Level 2 observations, were neither particularly desirable nor undesirable. The claimant undertook a series of activities, including security, quick response, physical observation, community meetings and activity and accompanying service users during the day, all of which were activities he would be deployed on the two days during the nine day period and these were no less or more onerous than those he could not undertake. It is not the claimant's case that the nature of the work he was precluded from was more enjoyable or attractive, but rather the impact upon the working environment caused by the perceptions to both service users and staff of removal of black and Asian workers from one specific aspect of their daily duties.

34. This case could be regarded as the mirror image to that of **Burton v De Vere Hotels Limited [1996] IRLR 596** in which a waitress who was black succeeded in a complaint of direct race discrimination when she complained that her employers had failed to protect her from the racist jokes of Bernard Manning. Her concern was that she should be precluded from exposure to his racist and offensive language when he was performing. Although that decision was reversed in **MacDonald v Attorney General for Scotland [2003] IRLR 512**, it was reinstated in a different formula by way of the third-party harassment provisions introduced in the Equality Act 2010, Section 40(2) to (3). They have since been repealed, in 2013. An employer will nevertheless have legal obligations to safeguard the workplace and to protect the employee from foreseeable acts of physical and psychological harm under implied contractual terms, tortious common law duties and statutory health and safety regulations. The facts of this case demonstrate the difficulties for employers when their employees are exposed to risks relating to a protected characteristic. In attempts to safeguard their staff finding a solution which avoids detrimental treatment because of a protected characteristic may prove problematic. The issue is exemplified by the fact that those in the group who share the protected characteristic may take differing views, as in this case. Mr Bazunu, Mr Ngwenya and Ms Hukuime, all of whom were black, considered the restriction which the claimant objected to as an appropriate and proper measure. They saw it as one which was in their interests.

35. Nevertheless the removal of a category of duties from a section of the workforce because of a protected characteristic would usually be both less favourable treatment and a detriment. That is because it is stigmatising and undermining for them to be not be seen to be able to do every aspect of their role in contrast to those who do not share their protected characteristic who undertake the full range of duties. It implicitly calls into question their capability and suitability. The purpose of the legislation is to eliminate inequalities of this type. It would be all too easy for an employer to justify such differences in treatment by reference to external forces or pressures.

36. This was, however, an unusual and untypical situation. In the ordinary course of events the working environment carried elevated risks to staff and service users because of the very nature of the illness being managed. During the 9 day period when the exclusion was in place the risk was of a greater magnitude.

37. The claimant is of the view that the respondent has overstated the potential for harm to BEM staff and X to justify the exclusion. The claimant was of the opinion, from his own experiences of working with X, that he would not have been placed at particular risk and a blanket ban was unnecessary. In cross examination the claimant said that there might be a basis to exclude BEM staff from the Level 2 observation duties if to include them would impact adversely upon the welfare of the service user X. In our view this was a concession that scenarios could arise where such selection of staff would not objectively be a detriment or less favourable treatment of those who shared the protected characteristic. The claimant qualified this by saying that there was little evidence to support such a situation.

38. The risk assessment of the respondent, as explained by Dr Hargreaves, was that for this short period BEM staff, including the claimant, required protection. The potential for physical violence and harm to them was high. He felt that their physical proximity to X, in undertaking level 2 observation, could make him more volatile. He took into account X's longstanding racist attitudes, instability whilst undergoing a change in medication, temporary disturbance to his mental state at a time he was volatile and explosive and had been voicing aggressive and threatening comments about black and Asian people including staff. This opinion was shared by other clinical staff including Mr Barker, Ms Hukuimwe, Mr Ngwenya. They also were of the view that not only were they at risk, but X was likely to suffer a setback in his own progression if he reacted in a violent or aggressive manner to staff.

39. Ms Threadgold recognised that lessons could be learned in the way such matters were handled in the future, including a better dialogue between the staff concerned before any decision were made. We agree. The claimant did not have a full picture of the degree to which other BEM staff felt threatened and had been abused. Nor was he told at the time that X's welfare had been a consideration. Had there been a meeting of all concerned staff, an exchange of information and discussion about the exclusion would have dispelled many of the claimant's reservations.

40. Having regard to all of the above, would or might a reasonable employee take the view that the action of the employer was in all of the circumstances to his detriment? With the benefit of a full explanation from Dr Hargreaves and the other nursing staff called by the respondent, we conclude a reasonable employee would

not. The reasonable employee would recognise the restriction was necessary for their protection and that of X. Objectively the treatment was different, not less favourable.

Employment Judge Jones

Date 28 April 2017