



EMPLOYMENT TRIBUNALS

Claimant: Mr H Hasha

Respondent: Notting Hill Genesis

Heard at: London Central **On:** 4, 5 and 16 July 2019

Before: Employment Judge Wisby
Mrs Olulode
Mr McLaughlin

Representation

Claimant: In person
Respondent: Mr T Perry (Counsel)

JUDGMENT

The unanimous judgment of the tribunal is that the claimant's claims are dismissed.

Reasons

Evidence before the Tribunal

1. The tribunal was presented with:
 - 1.1. An agreed bundle, with additional appendices;
 - 1.2. For the respondent, witness statements and oral evidence from Mr Pace, Mr Halligan, Mr Evans, Mr Brannon and Mrs Sonola; and
 - 1.3. For the claimant, a witness statement and oral evidence from the claimant.

The Issue

2. The discrete issues to be decided were recorded by the EJ Burns Order dated 5 June 2019 and are as follows:

Claimed Direct Race Discrimination and Victimisation in May and June 2018

- 2.1. The protected act for the purpose of the victimisation claim is a complaint of race discrimination which the claimant made against Mr Pace earlier in 2018 and which was at least partially upheld.
- 2.2. The claimed less favourable treatment/detriment was Mr Pace instigating a flawed and unjustified disciplinary investigation against the claimant in May 2018 causing the wrong procedure to be applied to a claimed health and safety matter, and procuring misleading photographs to be taken and produced by Mr Halligan. The investigation was terminated on 20 June 2018 with a recommendation from the investigating manager not to take further action against the claimant in respect of the allegations which had been raised against him.
3. Issues of time limits have already been addressed by employment EJ Burns on 5 June 2019, paragraph 8 of that Order setting out the reasons why it was found to be just and equitable to extend time so that the issues identified above could be heard by the tribunal.
4. Issues relating to the amendment of the ET1 and the withdrawal by the claimant of allegations concerning delays in the investigation and outcome of the claimant's June 2018 grievance are also dealt with by that Order.
5. The claimant's position in respect of race discrimination is that the alleged less favourable treatment was because he is black.
6. By way of background as to the specific focus of the issues to be considered in this claim, the nature of the comment that formed the basis of the first grievance (the grievance is accepted, as set out below, to be a protected act), is not an act of discrimination in this claim, the claimant having settled such claims under a COT3 agreement; issues in respect of the support offered to the claimant following his grievance have been considered under case number 2205464/2018; and, as set out above, issues concerning the delay to and outcome of the later grievance issued on 29 June 2018 were withdrawn by the claimant and subsequently dismissed by the tribunal at the preliminary hearing on 5 June 2019.
7. The respondent accepts that the grievances raised on 27 March 2018 amount to a protected act

The Law

Direct race discrimination

8. Section 13(1) Equality Act 2010 (EqA) provides that:

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 23 EqA - Comparison by reference to circumstances

.

(1) *On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.*

Victimisation

9. Section 27(1) EqA provides that:

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.*

Burden of proof

10. Section 136 provides:

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

11. There is an initial burden of proof on the claimant and the tribunal must look at the entirety of the evidence to establish if the first stage of s136 is reached (*Ayodele v Citylink Ltd and anor* [2017] EWCA Civ 1913). We acknowledge that it is very unusual to find direct evidence of discrimination.

12. The tribunal bore in mind the guidance it was referred to in the *Igen v Wong Ltd* and *Madarassy v Nomura International Plc*, cases in relation to what is now s. 136. At the first stage, the tribunal should consider whether, the facts are such that, in the absence of an explanation from the respondent, it could properly conclude that discrimination had occurred. For that conclusion to be reached, there would have to be something more in the evidence than a difference of treatment and a difference of protected characteristic (although the “something more” need not be in itself very significant). If the facts were not of that nature, the complaint would fail. If they were, then the burden would be on the respondent to prove that discrimination had not occurred. The tribunal also had in mind the Supreme Court guidance in *Hewage v Grampian Health Board*.

13. For victimisation it is not necessary for the protected act to be the principal cause of the employer’s detrimental action.

Findings of Fact

14. The respondent is a registered provider of social housing. It was formed in April 2018 by the amalgamation of Genesis Housing Trust with Notting Hill Housing Trust.
15. The claimant was employed from 1 April 2011 to 31 January 2019 as a quality assurance surveyor. The claimant's employment ended by mutual agreement under the terms of a settlement agreement.
16. The claimant at the time of the relevant events was a Regional Supervisor. As part of his role he managed operatives and approved work that was to be carried out by them, on, for example, building repairs. He was also responsible for ensuring the health and safety of operatives and the respondent's customers. At the time in question he was managed by Ms Reilly, who in turn was managed by Mr Pace.
17. Mr Pace was employed by the respondent between September 2017 and April 2019. When Mr Pace joined the respondent there were significant issues with the working relationships between the respondent's staff members and a general blame culture in which individuals did not own their own mistakes. The tribunal notes by way of example a grievance investigation finding that: "Generally there is an environment of people being disrespectful to each other and not caring about how their actions impact others however these same people are complaining that others are treating them in an unwanted way."
18. The claimant's most recent role was within the regeneration and assets directorate.
19. On 27 March 2018 the claimant raised a specific grievance against Mr Pace in respect of a comment made by Mr Pace on 16 November 2017 to another employee, who was going on holiday. The comment was that he hoped [that employee] was not heading to Lagos to "start a coup Howard who was doing in Zimbabwe". It was also alleged Mr Pace additionally said: "I'm starting to wonder if even Howard exists, he's been off for so long". The respondent accepts this grievance was a protected act.
20. The grievance in summary was that Mr Pace had made distasteful comments about the claimant, that there had been no apology from Mr Pace to the claimant and that the comments amounted to racial discrimination and bullying. The grievance was investigated by an independent HR professional.
21. The tribunal heard from several witnesses that there were a number of workplace issues between colleagues, that several employees did not have good working relationships and a number of formal grievances were raised about various issues. Wide-ranging performance improvement measures were being undertaken and the respondent was also facing a merger and redundancy programme as a result of the amalgamation referred to above.
22. On Tuesday 24 April 2018 Mr Evans, a repair operative, undertook repairs on steps at what, for the purpose of this judgement will be known as "the property". Mr Evans telephoned Mr Humphreys, a resource scheduler, at approximately 3 pm. Mr Evans explained to Mr Humphreys that he was concerned about the job as the step was sloping in and had a drop under it. Mr Evans gave evidence that the tribunal has no reason to dispute, that the top step was wobbly and when he applied weight to the

second step it broke, revealing a drop under the steps. The tenant had expressed concern to Mr Evans as she had grandchildren who played on the steps. Mr Evans found a piece of board to cover the step. He asked if there was another operative in the area as he needed longer screws to help batten the board to the step. Mr Humphreys discussed the job with Mr Evans, who advised him to take pictures and send them through so that the claimant could view them. Taking and sharing photos of jobs in this way is standard protocol. Mr Halligan, who at the relevant time was a regional supervisor in the same region as the claimant, was sitting next to Mr Humphreys and overheard the discussion about the concrete step having broken and the drop below it.

23. Mr Humphreys spoke to the claimant. The claimant called Mr Evans to discuss the repair once he had viewed the three photographs that had been sent through the respondent's systems by Mr Evans. Mr Evans asked the claimant to go to the site to inspect the issue. Based on the photos the claimant had seen however, the claimant was satisfied that the temporary work would be fine until an operative carried out proper repair works. The claimant suggested filling in the hole under the step with cement. Mr Evans however explained that would not work. The claimant understood that an operative had time in the diary to attend and carry out proper repairs on the Thursday or Friday of that week (2-3 days later).
24. Mr Evans was satisfied that the repair he had carried out was an okay temporary fix but remained concerned about the state of the steps and the drop the broken step had revealed.
25. The claimant and Mr Halligan had a good working and personal relationship up to the point the claimant was assigned to work in Region 3 with Mr Halligan. An issue over desk allocation and a comment from the claimant about Mr Halligan having 'chosen sides', which Mr Halligan understood to be a comment in respect of issues arising from another work issue that had arisen, led to them not speaking for a couple of days. Their relationship was affected further by a comment made by the claimant about their manager being female and her knowledge of the building industry, that Mr Halligan found disparaging. Mr Halligan's partner had a senior role in the industry and he did not like to think of people making such comments about her. Mr Halligan was clearly upset by the change in his relationship with the claimant, as he had been looking forward to working with him and had thought they would make a great team. Unfortunately their relationship did not improve and communication between them was limited.
26. As a result of overhearing the call between Mr Evans and Mr Humphries, on Wednesday 25 April, Mr Halligan spoke to Mr Humphries about the steps at the property. Although Mr Halligan had no reason to doubt the claimant's competence and the safety of the temporary repair job that had been undertaken, he was curious, as a builder, about what had caused the step to collapse. Since it was in his region he wanted to check the steps out. The property was only 10 minutes from the office so he asked Mr Humphries to book a site visit on Monday 30 April. Due to the poor relationship and lack of communication between the claimant and Mr Halligan, he did not discuss this with the claimant.
27. Since Mr Halligan was visiting the site on Monday 30 April, Mr Humphries, of his own volition, decided to book Mr Evans and another operative to attend at the same time as Mr Halligan, on the basis that Mr Halligan could give instant advice, if needed, on the repairs to be carried out. The claimant however, remained under the impression that

operatives would attend when the diary had initially shown there was a free slot and was not aware of the change in plan as to when the operatives would attend to carry out repairs.

28. The claimant went on annual leave on Friday 27 April 2018, believing the repair works had been booked in at the time he anticipated. He did not follow up on the job to check whether the works had been completed and that the steps were safe.
29. Mr Halligan inspected the steps on Monday 30 April 2018. He was shocked by what he saw. He took several photographs of the steps. On arrival the steps were covered but the wood covering moved when pressure was applied to or around it. When he removed the board and applied more pressure to the top step it collapsed into the drop below.
30. There was dispute between the parties about precisely how deep the drop was and how wide the hole was. The tribunal finds it was a significant drop. Mr Evans was able to stand up straight in it and needed to stretch his arms up above his head in order to be pulled out. Mr Evans is 5' 8". The tribunal also finds that, as a result of the top step collapsing in, there was a sizeable hole that a person could have fallen into or through. The tribunal notes that the top step had not collapsed at the point Mr Evans sent the original 3 photographs to the claimant.
31. As a result of his concerns Mr Halligan called Mr Pace, who was not available to discuss how dangerous the steps were, he therefore left a voicemail. He also called his line manager Ms Reilly, who was on annual leave. He expressed concern to her about the safety of the steps and the potential for a severe fall into the void below them. He explained what he thought was required to repair the steps and Ms Reilly instructed him to carry out the works needed to make the area safe. Mr Halligan was also concerned that press had been taking photographs and that there was potential for reputational damage to the respondent.
32. On 1 May 2019 Mr Halligan emailed the photographs he had taken to Mr Pace, stating "fyi". These photos gave a very different perspective to the state of the steps and issues involved than the three photographs that the claimant had seen had done. They showed the serious damage to the steps, the large hole where the steps had collapsed (that someone could have fallen into) and the significant drop. Mr Pace replied by email the same day saying: "what is this?" Mr Halligan replied that it was the collapsed Yorke stone stairs leading to a basement flat that he had left a voicemail about the previous day. It was reasonable to conclude from the photographs that if an adult or a child (the tenant had said to Mr Halligan her grandchildren had been jumping on the steps the previous day) had fallen into the hole, that individual could have been seriously injured (or potentially worse).
33. Mr Halligan's view was that the temporary fix was not safe and that nobody should have been using the steps. He therefore remained at the steps until interim work he was satisfied with had been carried out. Full repairs were then undertaken.

34. On 2 May 2018 Mr Pace spoke to Mr Halligan about the incident. Mr Halligan explained to Mr Pace that Mr Evans had raised concerns about the state of the steps with the claimant when Mr Evans had initially attended the site and that Mr Evans had asked the claimant on two or three occasions to attend the site. He also expressed concern that the claimant had relied on Mr Evans to inspect the site when Mr Evan's specialism was drainage works.
35. On 3 May 2018:
- 35.1. The claimant returned from annual leave;
 - 35.2. Ms Reilly asked the claimant to write an account of what had happened in relation to the job at the property, which the claimant did and emailed to her;
 - 35.3. The independent HR investigator considering the claimant's grievance, in summary concerning the coup comment, met with the claimant to inform him of the outcome of her investigation and to provide feedback. The outcome letter dated 11 May 2018 summarised those findings. These were that: (i) allegation one (that Mr Pace made distasteful comments about the claimant) was upheld (Mr Pace accepted that he had made the alleged comment); (ii) allegation 2 (that there had been no apology from David Pace to the claimant) - was partially upheld, based on the findings that Mr Pace did not know that the claimant was expecting an apology and he was willing to give the claimant an apology; and (iii) allegation three (the comments be considered as racial discrimination and bullying) was not upheld, on the basis that Mr Pace "did not make the comments as distasteful, racist or bullying comments as witnesses clarified that Mr Pace was having a laugh and it was said as colleague banter and his intention was to wish a colleague a good holiday"; and
 - 35.4. As a result of a request from Mr Pace, Ms Reilly emailed Mr Pace information about the job at the property. The email dated 3 May at 14:22 shows the attachments included written accounts from the claimant, Mr Evans and Mr Halligan's as well as the status log screenshot. Mr Evans' statement included the statement that he had advised the claimant on 24 April 2019 that he personally thought the steps were 'not safe at all and ready to fall any time'.
36. On 4 May 2019 Mr Pace forwarded to Mr MacKay (Head of Compliance) by email the information Ms Reilly had provided to him, explaining that this was the job that he would like investigating from a health and safety point of view. There was no mention of disciplinary investigations or proceedings in that email. Mr Pace also asked who would be the best person to investigate it outside of his own department. He expressed concern because he believed that press had been on site taking photos. Mr Pace said that when he was made aware of the issue it had been like that for a week and the supervisor had been aware of it for a week (which was Mr Pace's understanding). Mr Pace expressed that he wanted to be 'ahead of the game', deal with the lack of action and implement the learning from it

37. Following their discussion their previous day, on 11 May 2018 Mr McKay asked Mr Brannon (Strategic Lead of Mechanical and Electrical), by email, to investigate the incident raised by Mr Pace. Once again there was no mention of disciplinary investigations or disciplinary action. The focus of the investigation was set out to be a clear time line of actions, an assessment of the effectiveness of actions taken, a root cause analysis and recommendations for improvements to the processes from a lessons learned perspective. Mr Brannon was to liaise with Mr Pace to agree the formal scope if it was beyond what had been highlighted in the email and timescales. The tribunal accepts that the formal scope did not go beyond what had initially been set out in the email.
38. Meanwhile during one of the weekly catch ups between Mr Pace and Mrs Sonola (HR) Mr Pace mentioned that a serious health and safety matter had arisen. The tribunal accepts that Mr Pace did not mention it was an act of gross misconduct nor disciplinary processes. Mrs Sonola however gained the impression it was very serious and may end up as a matter with HR.
39. Mr Brannon asked Mr Mackay by email on 11 May 2018 whether HR were involved. Mr Brannon asked as he had not been involved in such a large, serious health and safety investigation before. Mr Mackay did not know so directed him to Mr Pace, who by email, copying Mrs Sonola in, confirmed he had spoken to Mrs Sonola about it. Mrs Sonola then emailed saying that she had sent investigation instructions to Mr Brannon and she would handle the process with Mr Brannon going forward.
40. Mr Brannon subsequently met with Mr Pace. Mr Pace expressed his opinion that leaving a step that had not been repaired properly with a 10' hole underneath it amounted to gross misconduct. The claimant's name was not mentioned. Mr Brannon said that Mr Pace's opinion did not affect his investigation. The tribunal accepts Mr Brannon's evidence that it did not. Mr Brannon accepted that the primary focus of his investigation was on claimant's actions, as he had been supervising Mr Evans when Mr Evans raised his concerns initially and the first temporary repair took place.
41. As set out above, separately on 11 May 2018 Mrs Sonola emailed Mr Brannon, explaining that she had gathered there was an investigation regarding a member of property services but she only had sketchy information, that as the investigating manager Mr Brannon would need to conduct a timely investigation with the key people. Mrs Sonola attached to the email a summary process sheet for him to fill in and guides on how to conduct investigations.
42. The templates attached to Mrs Sonola's email were templates for use in disciplinary investigations. Mrs Sonola explained to the tribunal that she understood there was a serious issue to investigate, that she was not asked to use the disciplinary investigation process by Mr Pace but independently reached for her own pack of procedures to assist Mr Brannon. Mrs Sonola felt that of the procedures available to her the guidance on disciplinary investigations was the most appropriate template documentation. It is accepted by the tribunal that she did not have a specific health and safety set of templates but the actual investigation process was the same. The tribunal finds Mrs Sonola was not motivated by the claimant's race nor by the claimant's protected act when making that choice, it was made because those templates were the most appropriate templates HR had.

43. On 14 May 2018 Mr Brannan asked Mrs Sonola for a letter template to invite the claimant to an interview. Mrs Sonola provided one in response the same day, with follow-up invite templates as well and a report template. These templates once again referred to 'disciplinary investigations'.
44. On 14 May 2018, Mr Pace saw on top of some papers a template disciplinary invite letter. He asked Mr Brannon if that was the template he was using. Mr Brannon said it was. Mr Pace raised his concern that Mr Brannon was incorrectly using the disciplinary procedure for the investigation. Mr Brannon asked Mrs Sonola and another HR Adviser if he should stop using that procedure. He was advised by HR to continue using the process to prevent causing unnecessary confusion, as both processes were fact finding investigations that may or may not lead to disciplinary action.
45. On 23 May 2018 Mr Brannon emailed Mrs Sonola to ask if she was happy with him sending the letter attached to the email (which was an invitation to the claimant to attend a following up investigation meeting). Mrs Sonola suggested that "perhaps you need to remove the word disciplinary (which is in the title of the document and within the invite letter" and that that they could discuss. Mr Brannon emailed in response to say that he had left it in, as the original invite letter had it in, that he "did remove it at first but when I checked the first invite I thought he had better keep it the same?" Mrs Sonola replied to say "I see what you mean. I suppose for consistency, then we leave it in".
46. On 12 June 2018 Mr Brannon produced his investigation report.
47. On 20 June 2019 Mr Brannon wrote to the claimant to state that in respect of the allegation that the claimant did not attend the property 'to assess the repair to a stone stair case which could have resulted in serious injury to a customer or visitor to the property' that his recommendation was to not take any further action. It was explained that this was because, based on the information which was available to the claimant when he made the decision not to attend the site, Mr Brannon believed his actions to be appropriate. Mr Brannon went on to say that had all the information been available to the claimant at the time the claimant took the decision not to attend and then did not attend, there would be a case to answer.
48. On 22 June Mrs Sonola emailed Mr Pace to inform him that the investigation outcome in respect of the claimant was "no case to answer". Mr Pace asked for the investigation to understand the reasoning behind that finding.
49. On 27 June 2018 an outline of the findings was sent by Mrs Sonola to Mr Pace.
50. Mr Pace accepts that he did not agree with the findings, as based on the outline he was given, they did not accord with the understanding he had of events at that time. Additionally he considered that the findings did not provide the level of detail that the remit given for the investigation required. The report seen by Mr Pace did not set out a chronology of what had happened on each day and when in the timeline different people had been involved in the incident. Additionally it was not clear from the report that the claimant had in fact seen different photos to the photos that had been provided to Ms Riley and to Mr Pace. Had these matters been clear from the report seen by him his reaction to it may have been different. Mr Pace accepts that he should have

followed up on the report but did not do so. Mr Pace explained it was a particularly busy time, soon after the amalgamation but he should have taken further action to clarify the findings. He did not however have direct contact with Mr Brannon, as the report was provided to HR.

51. It is accepted by the respondent that Mr Pace was not happy with the outcome of the report, based on the facts as understood by him. The report however did correctly identify the communication issues that existed in the team.
52. In an email to Jill Cook (Human Resources Director) dated 29 June 2018 the claimant raised an allegation that there had been an attempt to 'frame him for wrong doing' and that he suspected 'foul play' because of his blemished history with Mr Pace and Ms Reilly.
53. An investigation into the claimant's formal grievance that "a subsequent disciplinary investigation raised against you was malicious in its intent" was undertaken. This resulted in an outcome letter dated 2 April 2019.
54. The findings set out in that letter were:
 - 54.1. The incident involved a broken step which had it given way while someone was walking on it could have caused serious injury.
 - 54.2. A complaint was made to Mr Pace and Ms Riley by a member of staff who stated this was a dangerous incident and required investigation, that in the circumstances it was correct to initiate a health and safety investigation into the incident.
 - 54.3. The letter inviting the claimant to an interview referred to a disciplinary investigation, possible misconduct and to the disciplinary policy but the investigating manager confirmed the documents were sent to him by the HR team.
 - 54.4. There was no formal process for carrying out health and safety investigations but the process is similar to that used for disciplinary investigations, although there would not be normally any reference to misconduct or disciplinary procedures. The finding was therefore that it was clear that the incorrect procedure was used, although the error was identified by Mr Pace prior to the first interview.
 - 54.5. The investigating manager's report contained a number of recommendations regarding practice around health and safety matters. The report was sent to the HR adviser who then discussed the findings with Mr Pace.
 - 54.6. Mr Pace did not meet with the investigation manager to discuss the recommendations nor share the recommendations with members of staff.

54.7. The investigators could see no evidence to support the assertion made by Mr Pace that he initiated the investigation in order to learn lessons and that this was necessary to prevent issues such as this recurring. Mr Pace took no action to address the recommendations made or to share them (even if he disagreed with them).

55. The overall conclusion was to partially uphold the claimant's grievance against Mr Pace. The rationale for this being:

"We believe that it was right for David Pace to ask for the near miss incident to be investigated by the health and safety team. However, we also know that David Pace spoke to HR about the fact he had requested an investigation into this incident. We believe it was David's action of involving HR in a Health and Safety incident that confused matters and led both [Mrs Sonola] and [Mr Brannan] to think that the investigation they were being asked to carry out was a disciplinary investigation.

It is very difficult to prove whether there was malicious intent behind David's actions. Although we believe that as a senior manager and by David's own admission he has much experience of dealing with H&S incidents, therefore he should have known he was not following the process for the investigation of health and safety near miss incidents when he involved HR. In addition to this, we received evidence from some of the witnesses to suggest that at the very outset of the investigation, David had made clear his views about what the outcome should be and had said that it should end in dismissal.

On the basis that no learning from this investigation was shared with the wider team, nor actions followed up once the investigation was complete, we conclude that this raises questions about David Pace's true intentions in initiating this investigation. However, we also recognise that it was the role of the HR department to ensure the correct procedures were being followed.

The HR adviser should have recognised that using the disciplinary procedure before a thorough H&S investigation had been carried out was not the correct course of action.

It could be argued that if [David Pace] had intended that this matter be dealt with as a disciplinary investigation he would not have flagged to both the investigating manager and to the HR team that the wrong letter had been sent to you. Therefore on the evidence we have seen it is difficult to prove that [David Pace] acted maliciously. However we recognise that some of his actions are questionable and as such we are able to conclude that we partly uphold this part of your grievance."

Discussion and conclusion

56. As set out in the issue section, the claimant's case is that he suffered less favourable treatment and detriments. The tribunal considered each alleged act of less favourable and/or detrimental treatment, these being:

56.1. Mr Pace instigating a flawed and unjustified disciplinary investigation against the claimant in May 2018;

- 56.2. Mr Pace caused the wrong procedure to be applied to a claimed health and safety matter; and
- 56.3. Mr Pace procured misleading photographs to be taken and produced by Mr Halligan.

57. On the basis of the findings of fact that have been made that: (i) grievances were made by the claimant against Mr Pace regarding the coup comment; (ii) the grievances about the coup comment were partially upheld; (iii) the grievance outcome coincided in time with the investigation into the property incident; and, (iv) Mr Pace did consider at the initial stages the matter could amount to gross misconduct, the tribunal considers it could decide in the absence of any other explanation that unlawful direct discrimination and victimisation had occurred. The tribunal therefore considered whether the respondent had provided a non-discriminatory explanation for Mr Pace's actions.

Instigating a flawed and unjustified disciplinary investigation

58. The tribunal finds that as a result of the seriousness of the incident, Mr Pace commissioning and the respondent undertaking a health and safety investigation was entirely appropriate. This was not a situation that was appropriate to be dealt with by an informal investigation alone. A member of the public could have been seriously injured by falling into the deep hole and the steps could have collapsed under them.

59. In light of the seriousness of the near miss health and safety incident, Mr Pace's decision to ask someone outside of the Department to investigate was appropriate. The claimant accepted that had he seen the later photos (taken after the top step had collapsed) he would have visited the site.

60. The timing of the investigation into the incident at the property, in relation the grievance outcome, was entirely coincidental.

61. Mr Pace did not request that a disciplinary investigation be undertaken, nor did he dictate or control the process used. In respect of a flawed process, other than the inappropriate disciplinary labeling, the investigation was carried out by Mr Brannon in an appropriate way. Mr Brannon was not influenced by Mr Pace's initial views that matters could amount to gross misconduct and he largely exonerated the claimant. Mr Pace himself pointed out the error in respect of the word 'disciplinary' being used on the template letter. It would have been inappropriate for Mr Pace to dictate what happened next, when the investigation was being carried out independently.

Mr Pace caused the wrong procedure to be applied to a claimed health and safety matter.

62. In relation to the use of the disciplinary process there was no evidence to suggest that Mr Pace had requested a disciplinary investigation. Mr Pace did not ask Mr Brannon to liaise with HR, nor did he ask HR to liaise with Mr Brannon, he merely confirmed that he had mentioned the matter to HR. HR then moved matters forward with Mr Brannon.

63. The tribunal finds the word 'disciplinary' came into the investigation as a result of the use of the templates provided by HR to Mr Brannon. Mrs Sonola provided these as Mr

Brannon had not been involved in such a large investigation before and he had looked to her for guidance. The templates were the most appropriate ones that HR had to follow. Mr Pace raised the issue of the disciplinary template with Mr Brannon when he spotted it. Mr Brannon spoke to HR. HR's advice was for consistency the process should continue to prevent there being any confusion, since fundamentally the investigations with the same procedure. Mr Pace was not involved in these discussions.

64. The claimant criticises Mr Pace for not intervening when he spotted the error and forcing Mr Brannon and/or HR to change the process. However the tribunal accepts that having asked for the matter to be investigated independently of his department for impartiality, it was not appropriate the him to direct how the investigation was undertaken.

Mr Pace procured misleading photographs to be taken and produced by Mr Halligan

65. In relation to the photographs the tribunal accepts the evidence of Mr Pace and Mr Halligan that these were taken by Mr Halligan of his own volition and provided to Mr Pace as a result of Mr Halligan's serious concerns. This conclusion is supported by Mr Pace's email in response to receiving the photos from Mr Halligan - stating "what is this?", indicating he did not have prior knowledge of the situation.
66. In respect of the number of photographs the respondent accepts that there was a far higher than usual number of photographs taken of the initial damage and the repair process. The tribunal accepts however that this was a more serious job than normal and that there had been concerns about potential claims, press, and reputational damage. Once the steps were concreted over the structural repairs that were underneath the steps could no longer be seen. Photographic evidence of the works was therefore required for insurance purposes.
67. It appeared to the tribunal that it was only during the hearing that the claimant realised the timing of when the top step collapsed and why the photographs taken by Mr Halligan looked so different to the ones he had seen initially. In relation to the photographs themselves there was a clear difference between the photographs that the claimant saw initially and the later photographs. The later photographs showed a far more serious incident; with a significant hole where the top step had collapsed when Mr Halligan had applied pressure to it. The photographs themselves therefore were not misleading as they were images of the situation at different points, indeed it was the first three photos that the claimant saw that were misleading as they did not show how serious the situation really was.
68. The claimant stated in his final submissions everything went astray when Mr Halligan became involved. The claimant stated that the health and safety issue arose because Mr Humphreys did not do as he was instructed by the claimant and book operatives to go to the site two or three days after Mr Evans had done the initial repair. Mr Humphreys instead delayed the operatives until Monday 30 April when Mr Halligan went to the site, without discussing matters with the claimant. The claimant said therefore that it was Mr Halligan who caused the whole confusion. At no point has the claimant suggested that Mr Halligan's actions were because of the claimant's race. In respect of victimisation, the claimant seemed to suggest in the hearing itself that Mr

Halligan was aware of his grievance. Mr Halligan explained that he had been interviewed as part of the grievance process but he did not know who had initiated that process. The tribunal in any event finds that Mr Halligan was not motivated to act the way he did because of the claimant's race or because of any protected act. The tribunal finds that Mr Halligan's motivation was his genuinely held concerns about the dangerous state he found the steps in.

Summary

69. In summary the tribunal finds that the investigation into the step incident was justified and in line with the respondent's procedures concerning formal investigations, bearing in mind the severe sanctions that flow from health and safety breaches. Mr Pace did not commission or support the use of a disciplinary investigation. The use of that process flowed from independent HR advice. Mr Pace therefore did not instigate a flawed and unjustified disciplinary investigation, nor did he cause the wrong procedure to be applied. In fact he raised concerns about the template being used. Mr Pace did not procure misleading photographs to be taken and produced by Mr Halligan. The tribunal finds that the investigation itself was not influenced by Mr Pace, the claimant's race, nor by the protected act. In the whole it exonerated the claimant and no further action was taken against him. The tribunal finds that the respondent has shown non-discriminatory reasons for its actions.
70. The tribunal has set out in detail the outcome of the claimant's grievance that the disciplinary investigation raised against him was malicious in its intent, since the claimant both commenced the hearing (when directing the tribunal to its findings) and closed the hearing (in his closing submissions) on the basis that the tribunal should adopt the grievance investigation findings and that those findings mean that the tribunal should find in his favour when considering the claim before it.
71. Addressing those findings therefore the grievance outcome found that:
- 71.1. A complaint was made to Mr Pace by a member of staff. The tribunal finds that that was correct. Mr Halligan raised that it was a dangerous incident that required investigation.
 - 71.2. It was correct to initiate a health and safety investigation - the tribunal concurs with that finding.
 - 71.3. The disciplinary investigation documents were sent to Mr Brannon by the HR team. The tribunal agrees with that finding.
 - 71.4. The investigation process was similar to the disciplinary investigation process but normally there would not be a reference to disciplinary proceedings until after the health and safety investigation had established that there was a case to answer. The tribunal does not disagree with this finding. It is accepted it was not correct for the investigation to be referred to as a disciplinary investigation. The tribunal has found that error came from HR advice not Mr Pace's actions.
 - 71.5. Mr Pace identified the procedural error; the tribunal agrees that was the case.

- 71.6. Mr Pace did not seek to meet with the investigating manager to discuss recommendations and did not share the report or findings. The tribunal accepts this is correct but does not accept that Mr Pace's subsequent failure to act on the report means that he did not initially initiate the investigation to learn lessons to prevent such issues re-occurring.
- 71.7. Mr Pace involved HR in a health and safety incident and that this confused matters. As set out above the tribunal has found that was not what actually happened. Mr Pace had mentioned the serious health and safety incident to HR but did not involve HR in the investigation. HR independently liaised with Mr Brannon. Mr Brannon needed guidance as he had not carried out such a serious investigation previously.
72. The grievance investigation was not asked to investigate race discrimination or victimisation and found it difficult to decide that Mr Pace had acted maliciously. The concern being that learnings had not been shared and that this raised questions about Mr Pace's true intentions. As set out in our findings the tribunal accepts Mr Pace's evidence that he considered the outline of the findings that were shared with him were of little value, as they lacked detail. The tribunal has also accepted that it was a busy period post-amalgamation and that Mr Pace accepts he should have followed up but did not, in part, because there was no direct contact between him and Mr Brannon, the report having been provided to HR. The tribunal does not find Mr Pace's inaction following the receipt of report's outcome amounts to evidence of race discrimination or victimisation. Had the outcome seen by him been more detailed, he may have valued it more. Mr Pace's opinion of the report did not lead to any action being taken against the claimant.
73. In light of the above findings the tribunal finds that the claimant did not suffer less favourable treatment because of his race, nor was he subjected to a detriment because the claimant had done a protected act and his claims are, by the tribunal's unanimously decision, dismissed.

Employment Judge Wisby

Date 5th August 2019

JUDGMENT and REASONS SENT TO THE PARTIES ON

06/08/2019

FOR THE TRIBUNAL OFFICE