EMPLOYMENT TRIBUNALS

Claimant:	**Mr Colin Sorby**		
Respondent 1:	**Bradford Management Services LLP**		
Respondent 2:	**Debarred, Mr Azeem Akhtar**		
Heard at:	**Leeds by CVP**	**On:**	**26 and 27 November 2020**
			22 December 2020
Deliberations:			**23 December 2020**

Before: **Employment Judge T R Smith**
Mr M Brewer
Ms W Harrison

Representation

Claimant:	In person
Respondent 1:	Mr B Akbar
Respondent 2:	Debarred from defending as a party
Interpreter:	Mr Kiani

Note: This has been a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V-video. It was not practicable to hold a face to face hearing because of the Covid19 pandemic.

RESERVED JUDGMENT

1. The complaints of the Claimant that he was subject to harassment on the grounds of his race are well founded.
2. The complaints of the Claimant that he was victimised for undertaking a protected act are well founded.
3. The complaint of the Claimant that he was subjected to direct discrimination on the grounds of his race by telling the Claimant on 05 November 2019 that he was “on call” and would get no further work is well-founded.
4. The complaint of the Claimant that he was subjected to direct discrimination on the grounds of his race by being told on 10 December 2019 that he would have to leave his employment to obtain money owed to him is not well-founded.

REASONS

The Preliminary Issues

1. Two preliminary issues arose. Firstly, whether the Second Respondent (Mr Azeem Akhtar) had filed a valid response and secondly, if not, whether he should be permitted to participate in the proceedings as a witness.
2. The Second Respondent lodged at the Tribunal at 20.54 on 25 November 2020 a document labelled "defence and witness statement".
3. The document was not on a Tribunal prescribed form.
4. In essence the Second Respondent denied that he had harassed the Claimant.
5. The procedural history was that the Claimant, having presented a claim form on 18 December 2019 against the First Respondent, stated at a preliminary hearing held on 13 February 2020 that he wished to join Mr Akhtar to the proceedings as the Second Respondent. That application was granted and the Second Respondent was served on or about 03 March 2020. He did not enter a response.
6. The Second Respondent explained to the Tribunal that he was in Pakistan at the time, looking after his sick mother and had not made arrangements for his family to open any post addressed to him.
7. He wrote to the Tribunal on 16 November 2020 stating he had returned to the United Kingdom on 20 October 2020 and discovered the claim form addressed to him. He asked for the opportunity to defend.
8. The Second Respondent's explanation for the delay in not lodging documentation until the night before this substantive hearing was that first of all he was in lockdown and secondly, he did not have a computer. He said he does not speak English and the document that has now been lodged was prepared by his friend Mr Bilal Akbar, a director of the First Respondent
9. Under Rule 16 of the Employment Tribunal's (Constitution and Rules of Procedure) Regulations 2013 a response form *"shall"* be on a prescribed form and presented within 28 days of the date that the copy of the claim form was sent by the Tribunal.
10. The document submitted by the Second Respondent is not on a prescribed form and therefore the Tribunal must reject the same having regard to the wording of Rule 17 (1) (a).
11. To the extent therefore that the document lodged by the Second Respondent purports to be a response it must be rejected.
12. The next question was whether to permit the Second Respondent to give evidence, having regard to the fact that his statement was lodged outside the time limits set for filing such documents (statements were due to be exchanged on the 22 May 2020).
13. The Tribunal carefully considered the issue of prejudice. The Claimant indicated that whilst he received the statement late at night he was prepared to proceed.

He also, rather nobly, stated that he felt the Second Respondent should have the right to respond to the allegations.

14. Given the concession made by the Claimant the Tribunal determined that the Second Respondent would be permitted to participate in the proceedings as a witness only. The allegation against the Second Respondent was serious and as the Claimant was not prejudiced it was just and equitable, even at this very late stage, to allow the Second Respondent to so participate.

Documentary Evidence.

15. The Tribunal had before it a bundle in two sections, the first numbered A 1 to A40 and the second B1 to B126. A reference in this judgement to a number in brackets is a reference to the respective bundle.

Witnesses

16. The Tribunal heard oral evidence from Mr Sorby, the Claimant. Generally, the Tribunal found the Claimant to be a reasonably reliable witness although there were aspects of his evidence the Tribunal found unsatisfactory, for example his insistence he had a written contract guaranteeing him 40 hours per week.

17. The Claimant produced an unsigned email from Mr Paulo Silva. Mr Silva undertook HR for the First Respondent. The Tribunal gave the statement very little weight for the reasons set out below.

18. Whilst the statement made specific reference to what he perceived was race discrimination within the First Respondent and how Asian Muslims were favoured over other nationalities and that he left the First Respondent's employment because he had to do *"dirty tasks"* he was not called to give evidence. The First Respondents produced a note dated 18 November 2019 (B76) from Mr Silva which appeared to show that he disputed what was in the Claimant's grievance (details of which are set out below). He was not available for cross-examination and, given there were substantial contradictions in his written evidence the Tribunal did not regard him as a witness who could be regarded as reliable

19. The Tribunal heard oral evidence from Mr Akbar, on behalf of the First Respondent. It was necessary for the Tribunal to warn him in the course of the hearing as to coaching of Mr Akhtar whilst he was giving evidence. This occurred again when the Tribunal noted, as did the interpreter, that coaching continued. The interpreter reported that he could hear answers being given in Urdu that were then repeated by Mr Akhtar. Given the Tribunal had made it clear to all parties at the start of the hearing that witnesses were not to be coached or prompted the behaviour of Mr Akbar was such that it led the Tribunal to have concerns as to the integrity of his evidence.

20. The Tribunal heard oral evidence from Mr Akhtar. The Tribunal found him an unreliable witness. By way of illustration, he initially stated that Mr Akbar had drafted his statement and then sought to argue that it was drafted by his wife. Even allowing for possible difficulties in translation Mr Akhtar was vague and at times evasive.

21. On behalf the First Respondent a statement was put forward from Ms Scarlett Dotkova. She was not called to give evidence. She was not able to comment upon any of the alleged incidents. Her evidence was simply limited to how much she enjoyed working for the First Respondent and how she considered that she was treated fairly.

The Issues

22. At a preliminary hearing held on 13 February 2020 the parties agreed the issues to be determined. The Tribunal checked with the parties at the start of the hearing if there was any change and, subject to one minor modification, were agreed as drafted. The slight amendment is reflected in the drafting below.

"Section 26 Harassment related to race

Did the Respondent engage in unwanted conduct as follows: –

- *Mr Azeem Akhtar telling the Claimant on 16 October 2019 that this is an Asian company and that he should go and work for an English company*
- *Mr Paolo Silva telling the Claimant that he had been told that complaints had been made that the Claimant was English, not Asian, and did not understand the Respondents recipes.*

Was the conduct related to the Claimant's nationality/colour/race?

Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant

If not, did the conduct have the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant

In considering whether the conduct had that effect, the Tribunal will take into account the Claimant's perception, the other circumstances of the case, and whether it is reasonable for the conduct to have that effect

Section 13 direct discrimination because of race

Has the Respondent subjected the Claimant to the following treatment falling within section 39 of the Equality Act, namely:-

- *telling the Claimant on 05 November 2019 that he would be place "on call" with the effect he would get no more work*
- *in Mr Shokaib Karim telling the Claimant on 10 December 2019 that he would have to quit his job to get the money which was owed to him*

Has the Respondent treated the Claimant as alleged less favourably than it treated or would have treated the comparators? The Claimant relies upon hypothetical comparators

If so, has the Claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of race

If so, what is the Respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

Section 27 victimisation

Has the Claimant carried out a protected act in complaining of unlawful discrimination in a grievance he submitted on 12 November 2019?

If there was a protected act has the Respondent carried out any of the treatment identified below because the Claimant has done a protected act?:

- *ignoring the Claimant's grievance*
- *informing the Claimant that he was going to be investigated potential gross misconduct."*

Background

23. The Claimant commenced employment with the First Respondent as a production operative.
24. The First Respondent predominantly, but not exclusively, employs Asian staff.
25. Mr Akhtar was employed by the First Respondent as a production supervisor.
26. Mr Akbar is a member of the First Respondent LLP. The other members are corporate bodies which are all part of the Mumtaz group of companies
27. The Claimant reported to Mr Akhtar. He is a British Asian.
28. The Claimant is white British
29. Although the Claimant was employed by the First Respondent, he carried out work for Mumtaz Foods PLC.
30. Mumtaz Foods PLC is one of the United Kingdom's leading Asian food manufacturers. The directors are Mr Akbar, his brother Mr Ismail Akbar and his sister Miss Aqsa Akbar.

Start date, the Claimant's contract and documentation

31. There was a dispute as to whether the Claimant started employment on 07 July or 15 July 2019. It is more likely than not it was on the 15 July as there was a document (B55 to B63) signed by the Claimant confirming he'd undertaken induction training on that date and the Tribunal considered, having regard to the nature of that training which included hygiene and reporting infectious diseases, the Claimant would have been required to complete the same before being allowed to engage in food production.
32. The Claimant alleged that when he was recruited, he was told he would be contracted to work 40 hours a week and be subject to a five-week probationary period.
33. The First Respondent contended the Claimant was on a zero hours contract. The First Respondent was unable to produce a contract signed by the Claimant to support its contention.
34. The Tribunal concluded on the balance of probabilities that the Claimant did not have a contract guaranteeing him 40 hours per week. He was on a zero hours contract. It came to this conclusion for a number of reasons.
    - Firstly, the First Respondent produced a number of other contracts for production/factory operatives which were all zero-hour contracts.

- Secondly the Tribunal studied the hours the Claimant actually worked. Even allowing for pre-booked holiday he did not regularly work 40 hours per week. His hours were subject to considerable variation.
- Thirdly, and linked to the second point, the Claimant sought to explain the variable hours on the basis that when production ended, he was told he could go home and he understood that if he went home, he would not be paid for the residue of his hours. It was more likely, in a business where production is variable that an employer would not use a fixed hours contract, given the potential financial exposure when a production line had to close.
- Fourthly if the Claimant really had the contract for 40 hours the Tribunal considered he would have raised a grievance at an early stage for weeks when he wasn't offered 40 hours and not paid for 40 hours.

35. It is, however, important the Tribunal emphasises that there were no weeks, other than in respect of pre- booked holiday, when the Claimant didn't work, and he worked significant hours most weeks. The First Respondent's figures are confusing, but over a 15-week period the First Respondent contended the Claimant worked 379 hours (B108). Three of those weeks can be virtually discounted because the Claimant started work partway through a week, ended partway through a week and also took a week's holiday. The Claimant contended he worked a total of 429.60 hours which did appear to tally with another document of the First Respondent, B103. It is not necessary for the Tribunal to resolve this discrepancy at this stage. The Tribunal simply concluded that the Claimant had a reasonable expectation that he would have work from the First Respondent each and every week, and for a considerable number of hours, evidenced by the work he had undertaken in the past.
36. The First Respondent had an employee handbook (B11 / B42). The handbook contains an equal opportunity policy. It made clear the First Respondent would not tolerate unlawful or unfair discrimination and that anyone found to be acting in a discriminative manner would face disciplinary action which could include dismissal. There was also an obligation on all staff to report any unlawful or unfair discriminatory behaviour (B22)
37. The Claimant received no training on equality and diversity when he joined the First Respondent.
38. The Respondent produced no documentation to show any form of training in respect of equality and diversity of staff.
39. Specifically, there were no training records produced in respect of Mr Akhtar.
40. No documentation was before the Tribunal as to how the First Respondent monitored and assessed its equality and diversity principles against behaviour in the workplace.

16 October 2019.

41. The Claimant was not a man of particular sensitivities. For example, when he informed an Asian colleague that he liked curries and was told that was surprising as English people generally did not, he took that a simple workplace banter.

42. The Tribunal is satisfied that Mr Akhtar called the Claimant to one side in the production area on 16 October 2019 and told the Claimant that this was an Asian company and he should go and work for an English company. The Tribunal attached considerable significance to the contemporaneous text sent by the Claimant to the First Respondent's HR Department on that same day, asking HR to speak to Mr Akhtar as to his remark. (B84).

43. This can be contrasted with the evidence of Mr Akhtar who was adamant he did not say this, but then gave contradictory accounts in his evidence as to what he did say. In oral evidence he suggested he said *"quickly quickly Asian food".* In his written statement he said he told the Claimant *"this is an Asian food company you have to work faster".*

44. Nor was the Tribunal attracted to the argument that there was a misunderstanding due to language difficulties with Mr Akhtar.

45. Although Mr Akhtar utilised an interpreter it preferred the Claimant's evidence that Mr Akhtar was able to clearly express himself in English on everyday matters although accepted, he might need assistance on technical issues. Indeed, on one occasion Mr Akhtar started answering a question in English in a perfectly comprehensible manner and had to be reminded by the Tribunal to utilise the services of the interpreter he had requested.

46. Mr Akhtar claimed he apologised to the Claimant over the remark, which the Claimant immediately accepted and both parties agreed it was a misunderstanding. The Tribunal did not accept his evidence.

47. It preferred the Claimant's evidence that there was no apology. The First Respondent placed heavy reliance on various notes which appeared to suggest that an apology had been offered. The Tribunal had the greatest of concerns as to whether they were contemporaneous notes as it did not make sense that if all parties had agreed that there was a misunderstanding, and an apology given, that the First Respondent should then take disciplinary action against Mr Akhtar and apparently tell him if there was a repetition his employment could be terminated for gross misconduct. Mr Akhtar could not explain what he got a disciplinary warning for, or why he did not protest if there had been a genuine misunderstanding and all parties had accepted it was such. In addition, no satisfactory explanation was given as to why the Claimant was not told that disciplinary action was taken against Mr Akhtar. A further point that weighed against an apology having been given was the inconsistency in the evidence as to when it was tended and accepted. In cross examination Mr Akhtar said he apologised to the Claimant a few days after 16 October 2019. However, the First Respondents note dated 17 October 2019 stated that Mr Akhtar had <u>already</u> apologised. The statement of Mr Akhtar (paragraph 9) is even more contradictory as he suggested he apologised at a meeting on 16 October 2019 which was a joint meeting. There was no joint meeting and indeed Mr Akhtar accepted that in cross examination.

48. In addition, the imposition of a disciplinary warning (B69 for use of offensive/inappropriate language) is in direct contravention of the alleged contemporaneous note of the First Respondent (B68) that no further action was to be taken and this <u>predates</u> the date of the imposition of the alleged disciplinary penalty

49. The Tribunal concluded the incident did occur as related by the Claimant, there was no misunderstanding or apology and no action was taken against Mr Akhtar. That would also explain why the Claimant was never told that any form of disciplinary action was taken against Mr Akhtar.

Events leading up to and on the 5 November 2019

50. There was a meeting on 01 November 2019 between the Claimant and Mr Silva which was documented. It indicated there was a discussion as regards the Claimant's performance but *"points taken in consideration regarding manufacturing"*. The Claimant explained, and the Tribunal found it credible, that there had been a productivity issue but that was caused by an issue with the machine he was working upon which was faulty and which he had reported. In terms of attendance the note said *"attendance wise Colin is not exemplar"* but did not go further. The note concluded with a reference to meeting again in two weeks' time. Thus, at its highest Mr Silva was going to review matters. The Tribunal observed from notes of a staff meeting held on 15 October 2019 (B97) that there were general concerns as to staff time keeping.

51. Other than the above, no concerns had been raised as regards the Claimant's attendance or performance and he'd never been subjected to any form of attendance or performance management policy or proceedings.

52. However, things changed on 05 November 2019. The Claimant was told that he was placed *"on call"*. This was a euphemism for being dismissed because he was asked to clear his locker and hand in property belonging to the First Respondent. He was also advised to look for another job because he was told he would not be offered any more work. The Tribunal found the assertion of Mr Akbar that there was a general reallocation of lockers, which was wholly unconnected with the Claimant, to lack credibility particularly when the Claimant wasn't challenged on the fact or that he had to return the Respondent's property.

53. The Claimant was initially told this action be taken because of his poor attendance and performance. The Tribunal could find one text in the bundle where the Claimant reported in this period his bus was running late. All the Claimant was told as regards his performance was, he was English and not Asian and therefore didn't know the cuisine and didn't know how to cook food properly .When he pressed where these allegations came from, he was told by Mr Silva that they emanated from Mr Akhtar.

54. The Tribunal considered it important to remember in the timeline that only three weeks prior to the events of 05 November 2019 the Claimant had made a complaint about his supervisor, Mr Akhtar, who'd been employed by the Respondent for over 15 years. No mention was made at the meeting on 01 November 2019 of any problems the Claimant had with following recipes.

55. As Mr Silva handled the meeting on 01 November and 05 November 2019, and had no significant concerns on 01 November 2019, but now was effectively telling the Claimant he was being dismissed the Tribunal concluded that the evidence of the Claimant that Mr Silva said it was not his decision but he'd been told to do it by higher management was credible. In the Tribunal's judgement Mr Akhtar was a long serving employee who described himself as a friend of Mr Akbar (it is also noticeable that even though he was in Pakistan for a lengthy period of time his job remained open for him on his return) who considered a white person

should not be working for an Asian company and together a decision was taken to remove the Claimant from the First Respondents employment. There is a measure of support for this conclusion from a text exchange which took place that same day (B87), when the Claimant said he had to go to the job centre and could Mr Silva confirm he was put on call through no fault of his own and it was a management decision, Mr Silva responded *"yes I confirm that statement".* This points away from there being concerns as regards the Claimant's timekeeping or performance. The Tribunal is alive to the fact that it is possible that Mr Silva was trying to be kind to the Claimant to assist him in getting benefits. However, the Tribunal considered that the Claimant's account was true as the fact he referred to going to the job centre supported his assertion that he been told by Mr Silva that he would not get any more work from the First Respondent and he should look for another job.

56. Given the First Respondent produced various notes it is surprising that the only note about this meeting was dated 28 November 2019 but then altered to 18 November 2019 (B76). The Tribunal considered it relevant that this note post-dated the Claimant's grievance, further details of which are set out later in this judgement. The Tribunal did not regard the note as reliable preferring the evidence of the Claimant.

57. Allegedly on the same day, 05 November 2019 as the Claimant was leaving, he saw Mr Akhtar in the canteen and told him to *"fuck off"* and made a gesture with his finger to him. Mr Akhtar, if the First Respondent's documents are accurate, then made a complaint that same day and management noted further action was to contact the Claimant for an investigatory meeting. (B72). The Tribunal concluded that the incident did not take place as it simply does not fit with the documentary trail. What is known is the Claimant met Mr Silva on 07 November 2019 to discuss collecting the monies due to him and to try and understand why he had been effectively dismissed. At no stage was there any discussion of any inappropriate behaviour by the Claimant towards Mr Akhtar, yet the First Respondent's documentation suggested a statement had been taken from Mr Akhtar and there was to be an investigatory meeting. If there was such an incident Mr Silva would have mentioned it . In addition, in a document prepared by Mr Silva on 18 November 2019 (B 76) when he makes reference to 05 November he made no reference whatsoever to any complaint from Mr Akhtar. Further there were no steps taken to invite the Claimant to an investigatory meeting immediately, even though on the face of it, the incident was serious. It was only raised <u>after</u> the Claimant raised a grievance.

<u>The Grievance, 12 November 2019.</u>

58. On 12 November 2019 the Claimant lodged a grievance (B74/75). In summary he complained that on 05 November he was told he would not get any more work, despite the fact the First Respondent had been hiring new labour. He said he'd been told that complaints had been made by Mr Akhtar and he considered this was retribution for the fact the Claimant had raised concerns as the comment made to him by Mr Akhtar on 16 October 2019.

59. The Claimant asserted that allegations were now only being raised after he complained of a racist remark. He complained he had been given no notice of the meeting on 05 November 2019 or any opportunity to challenge the evidence. He said he'd been told by another member of staff just before the meeting that the problem was that he was English and not Asian and it would be best if he

kept his head down. He made specific reference to the Equality Act 2010 and that he considered he had been subject to direct discrimination. He said he had tried to resolve matters with Mr Silva the First Respondent's HR manager on 07 November but without success and he considered that the treatment he received was racially motivated and wanted to formally raise his concerns via the First Respondent's grievance procedure.

25 November 2019

60. On 25 November 2019 a letter was sent to the Claimant inviting him to a meeting on 28 November (B 77) stating *"We are inviting to ask you to attend an investigatory (gross misconduct) meeting. This meeting has been arranged because we are in the process of investigating allegations that have been made relating to your conduct in the workplace."* The Claimant was not given any details of those investigations. No reference was made to the Claimant's grievance although the tribunal is satisfied it was received.

61. The invitation was issued to the Claimant before the First Respondent had taken a statement from an apparent witness Mr Adeel Ashraf (B83) to the complaint made by Mr Akhtar. It would be surprising in the Tribunal's industrial experience for a statement not to be taken from a person who was said to be an eyewitness to the incident before an investigatory meeting.

62. The Claimant responded promptly the following day(B78) and observed that it seemed a strange letter as he put a grievance in. He indicated he was not able to attend the meeting suggested but offered to attend on 02 December. He specifically stated that considered that he was now being victimised and had suffered a detriment as a result of raising a grievance relating to breaches of the Equality Act 2010.

63. It was claimed that the First Respondent replied on 29 November 2019 and stated they had no member of the management team available to conduct an investigatory meeting on 02 December and they would need to reschedule and invited the Claimant to contact them to arrange a suitable time and date. The letter also purported to acknowledge the grievance and stated *"we will propose a separate meeting to investigate your allegations once our investigations have been concluded in regards to the grievance made against you on 5 November 2019"*

64. The letter was correctly addressed but the Claimant contended he never received it. On the face of matters that is a high hurdle for the Claimant to surmount to persuade the Tribunal that either no such letter existed at the time or he did not receive it.

65. Despite the high threshold the Tribunal accepted the Claimant's evidence on this point because not only did the Tribunal have the Claimant's evidence but there was also documentation that provided some support for his account. On 03 December 2019 the Claimant sent an email to the Respondents stating that he had not received a reply to his grievance dated 12 November (B80). If he had really received the letter of 29 November 2019 the email would not make sense. It would make sense if he had never received it. More significantly there was no correspondence from the First Respondent pointing out that they had already acknowledged his grievance, assuming the letter of 29 November 2019 had been written when dated. Nor when they failed to hear from the Claimant with a proposed date for the investigatory meeting did the First Respondent seek to

chase the matter up. The Tribunal considered it particularly strange that the letter of the 29 November 2019 asked the Claimant to suggest a date for the investigatory meeting. Normally, in the Tribunal's industrial experience, the date would be issued by the employer. If the letter had been prepared after 29 November 2019 this would allow the First Respondent to say why the investigation and the grievance not been processed namely the fact the Claimant had not responded to seek to deflect from his assertion it was an act of victimisation.

66. Nothing was done to progress the Claimant's grievance. There was no reason for the Respondents to retain money due to the Claimant as he had returned all the First Respondents property and emptied his locker on 05 November 2020.

67. Pulling all these matters together the Tribunal concluded that no letter was sent to the Claimant by the First Respondent on 29 November 2019 and the letter had been fabricated after the event.

10 December 2019

68. The Tribunal is satisfied on the basis of the evidence presented to it that on this date Mr Shokaib Karim told the Claimant that the only way he would get his lying on pay (that is the Claimant worked a week in hand) would be if he resigned. This is entirely consistent with Mr Karim's own note of the same date (B81).

69. The First Respondent considered on the basis of a rather ambiguous document that the Claimant had resigned and thus he was paid the sums due to him.

Submissions

70. Each party made submissions on the evidence and how it should be interpreted. The Tribunal was not taken to any specific case law. The Tribunal means no disrespect to either party by not repeating those submissions. Where relevant, any conflict of evidence have been addressed in the Tribunals judgement.

Discussion

71. The Tribunal reminded itself of the statutory provisions in respect of the burden of proof.

72. Section 136 Equality Act 2010 ("EQA10") sets out the burden of proof.

"136(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) that subsection (2) does not apply if A shows that A did not contravene the provision

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

73. The Tribunal reminded itself that even if he found the First Respondent had acted unreasonably or unfairly it did not have to establish that it acted reasonably or fairly in order to avoid a finding of discrimination. What the First Respondent had to establish was that the true reason for any treatment was not discriminatory.

Harassment.

74. Section 26 of the EQA 2010 defines harassment as follows:

(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 an offensive environment for B

(2) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –

(a) the perception of B

(b) the other circumstances of the case

(c) whether it is reasonable for the conduct to have that effect.

75. Under section 26 (1) the Claimant can succeed if he can show that the unwanted conduct has the purpose of violating his dignity or it has the effect of violating his dignity. The two are separate and distinct.

76. In **Richmond Pharmacology Limited v Dhaliwal 2009 IRLR 366** Underhill P (as he was) set out three essential elements of a harassment claim namely:

- Did the respondent engage in unwanted conduct?
- Did the conduct have either (a) the purpose or (b) the effect of either (i) violating the Claimants dignity or (ii) creating an offensive environment?
- Was the conduct related to a relevant protected characteristic? This means that the conduct must be more than have a simple association with the relevant protected characteristic.

77. This test was clarified and extended in the case of **Pemberton v Inwood 2008 EWCA Civ 564** where the court added that when considering where the conduct had the prescribed effect the Tribunal must take into account the following factors:

> *" In order to decide whether any conduct falling within sub-paragraph (1)(a) has either of the prescribed effects under sub paragraph (1)(b), a Tribunal must consider both…..whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and ….whether it is reasonable for the conduct to be regarded as having that effect (the objective question). It must also…take into account all the other circumstances-subsection (4)(b)."*

78. The Tribunal is satisfied for the reasons already given in its findings of fact that Mr Akhtar told the Claimant on 16 October 2019 that the First Respondent was an Asian company and he should go and work for an English company. The fact the Claimant wanted the First Respondent's HR Department to address the issue indicated that he regarded the comment as unwanted and impacting upon his dignity. The comment also has to be viewed in the particular circumstances of the case. This was a comment made by the Claimant's supervisor, at a time when the Claimant did not have unfair dismissal protection, and by a person who'd worked for the First Respondent for approximately 15 years. It was likely that Mr Akhtar view would carry weight with the First Respondent as to the Claimant's continued employment.

79. The comment had the purpose, or in the alternative, the effect of violating the Claimants dignity or creating an offensive environment as he was been told that because of his race, and not because of any issues to do with his performance, he should no longer work for the First Respondent. The Claimant believed from this point in time he was effectively a marked person and that subjective belief was reasonable. The Claimant was a person of some fortitude and had regarded other comments which some may have taken more seriously as simply banter. The Tribunal is satisfied that the comment made by Mr Akhtar was made in the performance of his duties as the First Respondent's supervisor. The Claimant, objectively was entitled to take the view that he perceived the comment had the connotation he placed upon it. The Tribunal found that the reason for Mr Akhtar comment was related to the Claimant's protected characteristics of race

80. The comment was not trivial or unintended and Mr Akhtar intention was to try and persuade the Claimant to leave the First Respondents employment.

81. The First Respondent did not seek to justify the comment (indeed on its account it regarded it as a serious act of harassment hence its case that it took disciplinary proceedings against the perpetrator) and Mr Akhtar denied the comment was made. In the circumstances the Tribunal concluded that the remark of 16 October 2019 was an act of harassment within the meaning of section 26 of the Equality Act 2010.

82. The Tribunal then turned to what Mr Silva reported to the Claimant had been said about him, again by Mr Akhtar, at the meeting on 05 November 2019. The effect of the comment was that due to the fact the Claimant was not English he could not cook Asian food properly. This was a stereotypical assumption that was not predicated on any factual basis. Again, the context is everything. Mr Akhtar was seeking to justify why the Claimant's employment should, effectively, be terminated. The Tribunal also considered the fact the Claimant had complained as regards Mr Akhtar behaviour on 16 October 2019 also played a part in the allegation being made by Mr Akhtar.

83. In the Tribunal's judgement the mere fact Mr Silva was relaying the comments of Mr Akhtar did not support an assertion that there could not be an act of harassment. In that was the case there would be an obvious lacuna in the law whereby harassers, by means of an intermediary, could escape liability.

84. The Tribunal is satisfied that the remark was made and it was used to justify what was effectively the Claimant's termination of employment all be it he was told was placed *"on call".*

85. It had the purpose or effect of violating the Claimant's dignity because his employment was effectively been ended on the basis of a racial stereotypic typic comment that had no objective justification. The Tribunal noted that at the meeting on 01 November 2019 no criticism had been made of the Claimant's ability to follow the First Respondent's recipes.

86. The Claimant subjectively believed the comment violated his dignity given the impact it had on his continued employment and the Tribunal found that subjective belief was reasonable in all circumstances.

87. The comment was related to the Claimant's protected characteristics of race as is clear from the very nature of the same.

88. No justification was put forward for the comments and indeed the First Respondent's position was the comments were not made. In the circumstances the Tribunal concluded that the remark made on 05 November 2020 was an act of harassment within the meaning of section 26 of the Equality Act 2010.

Direct discrimination.

89. Section 13 EQA 10 sets out the definition of direct discrimination.

> *"13(1) A person (A) discriminates against another person (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."*

In other words, there is a requirement for an actual or hypothetical comparator.

Guidance is given as to the construction of a hypothetical comparator in Section 23 EQA 10.

> *"23(1) on a comparison of cases for the purposes of section 13 …. there must be no material difference between the circumstances relating to each case".*

90. The Tribunal focused its attention on the two alleged acts of direct discrimination utilising a hypothetical comparator.

91. The first alleged act was telling the Claimant on 05 November 2019 that he would be placed on call with the effect he would get no more work. The Tribunal accepted that the First Respondent had placed none white staff in the past *"on call".* That, however, is not the end of the matter. The Tribunal analysed why the Claimant was put *"on call"*. The reason he was put on call was because, in the Tribunal's judgement, firstly Mr Akhtar objected to the Claimant raising an allegation of racial harassment against him and secondly Mr Akhtar wanted the Claimant removed from employment as he considered he did not fit in as he was not Asian.

92. A hypothetical comparator would be a person who did not share the same protected characteristic as the Claimant. The Tribunal considered that Mr Akhtar would not have behaved in a similar manner to an Asian production operative.

93. The Tribunal was satisfied that as Mr Akhtar was acting in the course of his employment and that the Claimant was subject to direct discrimination.

94. Whilst the First Respondent argued that an Asian employee, Mr Adeel Ashraf was put *"on call"* at the same time as the Claimant comparators must be truly comparable. For the reasons already given the Tribunal is not satisfied there were any timekeeping or performance concerns as regards the Claimant. No

documentation was produced in respect of Mr Ashraf's circumstances firstly to establish he was put *"on call"* and secondly what his personal circumstances were. The Tribunal does not know, for example whether he may have had a number of warnings whereas the Claimant clearly did not.

95. In the circumstances therefore the fact that Mr Ashraf was also put "*on call"* at the same time as the Claimant does not dissuade the Tribunal's from its judgement that the Claimant was subject to direct discrimination.

96. The Tribunal then moved to the second alleged act of race discrimination.

97. The Tribunal has already found the Claimant was told on 10 December 2019 by Mr Shokaib Karim that he had to resign to receive his week in hand pay. Of course, in the Tribunal's judgement, effectively the Claimant had already been dismissed when he was placed *"on call",* told he would get no more work and to empty his locker and return the First Respondent's property

98. Whilst the treatment may be unfavourable and to be deplored that does not mean it was an act of race discrimination. The Tribunal concluded that on the evidence placed before it zero-hour contracts were used by the First Respondent and it did withhold a week in hands pay until a person resigned. As the production operatives were relatively low paid workers, and would need their week in hand, they were therefore persuaded to resign which in turn minimised the risk to the First Respondent of a claim of unfair dismissal.

99. Given the Tribunal finds this was the practice utilised by the First Respondent and applied to all members of staff, utilising a hypothetical comparator an Asian production operative in the same situation would have been treated in the same manner. It follows therefore that this was not an act of direct race discrimination.

Victimisation

100. Under Section 27 (1) of the EQA 2010 :-

"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"

A protected act is defined in section 27 (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."

101. The Tribunal must ask itself three questions.

102. Firstly, did the alleged victimisation arise in any of the prohibited circumstances covered by the EQA 10.

103. Secondly did the Respondent subject the Claimant to a detriment

104. Thirdly it so was the Claimant subjected to that detriment because she had done a protected act, or because the Respondent believed that she had done or might do a protected act.

105. The prohibited circumstances relevant to this case set out in section 39(4) EQA 10 namely; -

- an employer (a) must not victimise an employee of (A's) (B)
- as to these terms of employment
- in the way A affords B access, or by not offering B access, to opportunities for promotion, transfer of training, or for any other benefit, facility or service
- by dismissing B
- by subjecting B to any other detriment

106. The Tribunal is satisfied the grievance (B74/75) was a protected act within the meaning of section 27 (1) (d) EQA 10. It contained specific allegations of discrimination under the Equality Act and asserted that being put *"on call",* effectively being dismissed, was in the Claimant's opinion because he had complained of an alleged discriminatory act by Mr Akhtar. He also made mention of other alleged discriminatory acts on the grounds of his race.

107. The Tribunal is further satisfied that the said grievance and allegations contained therein were made in good faith.

108. The grievance was received by the First Respondent before the Claimant was informed, he had to attend an investigatory meeting for potential gross misconduct.

109. The Tribunal is satisfied that indicating that a person might well be dismissed for unspecified gross misconduct and also failing to promptly pursue the Claimant's grievance in accordance with the First Respondent's own grievance procedure set out in the handbook are both acts or omissions that may amount to a detriment. In **Shamoon -v- Chief Constable of the Royal Ulster Constabulary [2003] UKHL11** the House of Lords explained that for a detriment to be established it was sufficient to show that a reasonable employee would or might take the view that they had been disadvantaged in the circumstances in which they had to work. The Tribunal was satisfied on its findings that a reasonable employer would find the above matters amounted to a detriment.

110. The final question in determining the reason for the Claimant's treatment is what consciously or subconsciously motivated the First Respondent. The Tribunal reminded itself that it was not necessary to show that any less favourable treatment was solely by reason of protected act. It sufficed if it was a significant influence on the Respondent's decision-making. Further there did not need to be conscious motivation. If the earlier protected act subconsciously influenced the employer to treat the Claimant as it did, that would suffice.

111. The Tribunal considered that the motivation for inviting the Claimant to an investigatory meeting to address unspecified gross misconduct was in reality to seek to persuade the Claimant to withdraw his grievance which contained serious allegations of race discrimination. As the correspondence from the First Respondent made clear the grievance was not going to be addressed until the issue of gross misconduct had been dealt with. The Tribunal found as a fact the allegation of the behaviour of the Claimant to Mr Akhtar was fabricated. The Tribunal concluded that the reason for the Claimant's treatment by the First Respondent was because of the protected act. Linked to the above was the fact the first respondent did not process the claimant's grievance. It did nothing. There was no reason why the grievance could not have been processed. As part of any investigation into alleged conduct by the Claimant to Mr Akhtar the relationship between the parties would need to be examined. The Claimant's grievance clearly was therefore relevant. In any event the Tribunal concluded the letter making this assertion was an invention. In reality nothing was done with the grievance because Mr Akhtar was a valued and long serving member of staff who was to be supported over and above the Claimant.

112. In the circumstances therefore the Claimant is entitled to succeed in his complaint of victimisation.

113. Although the First Respondent did not raise the statutory defence, given it was not legally represented the Tribunal should very briefly deal with the matter.

114. The starting point is that anything done by an employee in the course of their employment is treated as having been done by the employer –Section 109(1) EQA10. However, the Respondent can defend itself if it can show it took *"all reasonable steps"* to prevent the employee from doing the discriminatory act –Section 109(4) EQA10. This is often known as the statutory defence.

115. The statutory defence is construed relatively tightly. The cases of **Caniffe v Yorkshire Council 2000 IRLR 555** and **Croft v Royal Mail 2003 IRLR 592** illustrate this. The test is not whether there were any further steps that could have been done which could have made a difference, but the Tribunal must look at the preventative steps taken by the employer and then whether there were any further steps that it would have been reasonable for the Respondent to take, and the fact that those steps would not necessarily have prevented the harassment is not determinative.

116. The statutory defence is not established. At its highest the First Respondent simply had a policy in its handbook. The Tribunal had no evidence that employees were inducted into equality and diversity. There was no evidence of training of staff in equality and diversity. There was no evidence of monitoring the performance or otherwise of the equality and diversity measures, if any, taken in the workplace.

117. There was no evidence of any training of supervisory staff in equality and diversity.

118. The First Respondent could reasonably have taken steps to train and monitor staff, particularly supervisory staff in equality and diversity but failed to do so on the evidence placed before the Tribunal. It could have taken steps to monitor the effectiveness of that training.

119. In the circumstances statutory defence is not made out.

120. The matter will now be listed for a remedies hearing.

Employment Judge T R Smith

Date: 4th January 2021