EMPLOYMENT TRIBUNALS

Claimant: Mr J Palka

Respondent: South Manchester Maintenance Limited

HELD AT: Manchester **ON:** 29 – 31 January 2020

BEFORE: Employment Judge Phil Allen
Mr G Pennie
Mr C S Williams

REPRESENTATION:

Claimant: Mr Alemoru, Solicitor
Respondent: Ms Smith, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:-

1. The claimant was not discriminated against because of his nationality and his claim for direct discrimination is not well founded.

2. The claimant was not subject to harassment related to nationality and his claim for harassment is not well founded.

3. The claimant was not victimised by the respondent and his victimisation claim is not well founded.

4. The claimant was not dismissed by the respondent. His unfair dismissal claim is not well founded.

REASONS

Introduction

1. The claimant was employed by the respondent as a General Maintenance Worker, most recently from 14 July 2010 until 22 February 2019 (having

previously been employed between 1999 and 2009). The claimant resigned on 24 January 2019. The claimant's claim was based upon the assertion that he was paid less than two of his colleagues, Mr Wilmott and Mr Currie. The claimant believed that he was paid less because of his Polish nationality. In 2018 the claimant raised these issues with the respondent and, as a result of his treatment, claims victimisation and harassment. He also contends that he was constructively dismissed.

Claims and Issues

2. The issues in the claim were identified by Employment Judge Feeney at a Preliminary Hearing held on 18 September 2019. At the start of the final hearing it was confirmed with the parties that those issues remained the issues which would be determined.

3. In the course of the hearing, it was confirmed by the respondent that: it was not contending that the unfair dismissal claim or the direct race discrimination claim were out of time; it was not relying upon a fair reason for dismissal (if the other elements of the claimant's constructive unfair dismissal claim were made out); and it was not relying upon alleged blameworthy conduct from the claimant to reduce any award.

4. The issues in relation to the breach of contract relied upon for the constructive dismissal claim were also clarified in the hearing and the issues to be determined below reflect the clarification provided.

5. The issues to be determined were as follows:

Direct Discrimination because of nationality - Section 13 of the Equality Act 2010

Has the respondent subjected the claimant to the following treatment:-

a. Paying the claimant less than Mr Currie and Mr Wilmott. Was that treatment less favourable treatment i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others (comparators in not materially different circumstances). The claimant relies on the following comparators: Mr Wilmott and Mr Currie.

b. If so, was this because of the claimant's protected characteristic i.e. his Polish nationality, or was it, as the respondent claims, because there was a difference in skills between the claimant and his comparators. Can the respondent show that an assessment was made in respect of their respective skills at the time and evidence how such an assessment was carried out.

Harassment related to nationality - Section 26 of the Equality Act 2010

Did the respondent engage in unwanted conduct related to the claimant's race which had the purpose or effect of violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment by:-

a. Monitoring the claimant's work as if to demonstrate that his performance as compared to his colleagues was the reason for any difference in pay;

b. Criticising the claimant for working too slowly so as to justify the difference in pay between the claimant and his colleagues.

Victimisation - Section 27 of the Equality Act

It is agreed that the claimant did a protected act i.e. raising a grievance in October 2018.

Did the respondent subject the claimant to any detriments, as described above under harassment?

If so, was this because the claimant did a protected act and/or because the respondent believed the claimant might do a protected act?

Time Limits

Are any of the claimant's victimisation or harassment claims out of time? This includes considering whether there was a course of conduct ending with the termination of the claimant's employment. If so, would it be just and equitable to allow the claims to proceed out of time in accordance with Section 123(1)(b) Equality Act 2010.

Constructive Unfair Dismissal

Was the claimant dismissed i.e. was there a fundamental breach of the implied term of trust and confidence in the employment contract in that the respondent: failed to pay the claimant the same pay as his non-Polish comparators; and/or put forward spurious reasons for the difference in pay and was not able to produce evidence to substantiate them;

If so, did the claimant affirm the contract of employment before resigning.

Remedy

Did the claimant unreasonably fail to comply with the ACAS code of practice on disciplinary and grievance procedures and, if so, would it be just and equitable in all the circumstances to reduce any award and, if so, by what percentage?

Procedure, documents and evidence heard

6. The claimant was represented throughout by Mr Alemoru, Solicitor. The respondent was represented by Ms Smith, Counsel. An interpreter attended each day of the hearing to interpret for the claimant.

7. On the morning of the first day the respondent's representative contended that the allegation of victimisation was one which was not included in the claim form and argued that if the claimant wished to pursue the claim, leave to amend was required. The claimant's representative submitted that the claim was included in the claim form, but if not, applied for leave to amend. The issue had been identified at the Preliminary Hearing as one to be determined, both parties had prepared for the hearing on this basis, and the factual issues to be determined were substantially the same as those which were relied upon for the harassment claim. The Tribunal considered the application to amend, concluded that amendment was required, and granted the claimant leave to amend his claim to include the allegation of victimisation, as it had been particularised in the orders made at the Preliminary Hearing (Case Management) on 18 September 2019. The reasons for doing so were explained to the parties, including in particular the Tribunal's determination of the hardship or prejudice to the parties.

8. The Tribunal heard evidence from the claimant and from Ms Cuthbert, a director of the respondent. Each witness had prepared a witness statement which was read by the Tribunal and each witness was cross examined.

9. The Tribunal was also provided a bundle which ran to 450 pages. The Tribunal read only the documents to which they were referred in witness statements or in the course of the hearing. Just before lunchtime on the second day, the respondent identified a number of additional documents which were relevant to the issues in the claim. Those documents were added to the bundle and considered as part of the evidence.

10. The parties each made submissions. The claimant relied upon a skeleton argument as well as oral submissions, the respondent relied upon oral submissions only. At the end of submissions, the Employment Tribunal reserved judgment and accordingly provides the judgment and reasons outlined below.

Facts

The claimant's employment and pay history

11. The claimant commenced employment with the respondent in 1999. There was no contemporaneous evidence before the Tribunal about the reason for the initial rate of pay for the claimant. The rate of pay was determined by Mr Cuthbert, who passed away in 2013. Ms Cuthbert, a current director, gave evidence to the Tribunal that her father, Mr Cuthbert, had long experience in the industry and that he would identify the pay rate that he thought appropriate. The claimant's evidence was that he just accepted what was offered to him without question.

12. During his employment prior to 2009, the claimant received pay rises in most years (but not always). The claimant resigned from his initial period of employment with the respondent on 11 December 2009. He chose to return to employment with the respondent on 14 July 2010. The claimant accepted the same rate of pay on re-joining as he had been receiving when he left. There was no contemporaneous evidence about why that specific figure was offered to him.

13. Following his return to employment with the respondent, the claimant's evidence was that he did get pay rises most years, but not always.

14. A statement of main particulars of terms of employment for the claimant with the respondent was provided to the Tribunal. The claimant's evidence was that he was given the document when he returned to work in July 2010, but the documents states it was issued on 16 March 2015. The document records that the claimant's working hours were 40 hours per week over five days (page 39).

Mr Wilmott

15. Mr Wilmott started employment with the respondent on 1 April 1996. The Tribunal only had pay details provided for him from 12 April 2013. Since that date Mr Wilmott has always been paid more than the claimant.

16. Ms Cuthbert's evidence was that, prior to 2012, the claimant was employed to work as part of the construction team, whereas Mr Wilmott worked on the building and maintenance team (albeit people could be moved between the teams for pieces of work). The respondent had two work streams prior to 2012. One was undertaking project work, with little work being undertaken internal to properties. The other was undertaking maintenance of occupied properties, which was mainly internal work. The occupied properties team generally were paid a higher salary.

2012

17. In 2012 the respondent undertook a redundancy exercise which resulted in some employees being made redundant. The respondent also ceased to operate the two separate teams, as construction work reduced or stopped. The claimant was not made redundant as a result of the score he received using a scoring matrix. As part of that exercise the claimant scored himself on 11 October 2012 (pages 25A and 25B), as well as him being scored by Ms Cuthbert and a senior manager who was a qualified plumber employed by the respondent at that time. In terms of the redundancy scoring, as an example, in the category of plumbing: the qualified plumber scored the claimant 0; Ms Cuthbert scored the claimant 10; and the claimant scored himself 5. The claimant was given a score of 5.

18. As part of the redundancy scoring exercise, Mr Willmott was also scored, and his skills were scored more highly than the claimant at that time (page 26).

19. Mr Cuthbert was unwell in 2012 and ceased actively working in the business almost immediately. From 2012 onwards, Ms Cuthbert became the primary decision maker in relation to the claimant's day to day work and pay. Ms Cuthbert's evidence was that, prior to his death in 2013, Mr Cuthbert passed on information to her as part of day to day contact. He did not pass over any documentation about individual employees and their skillsets or the specific reasons for their levels of pay.

Pay from 2013

20. The Tribunal had the benefit of a Schedule (supported by pay slips) which recorded the comparative pay from 12 April 2013 of: the claimant; Mr Wilmott; and (once he joined the business) Mr Currie (page 83). As at 12 April 2013: the claimant was paid £249.21 per week; with Mr Wilmott being paid £384.27. From April 2013 until the end of his employment in 2019, each year the claimant received either higher percentage pay increases than Mr Wilmott, or (in some years) comparable increases. However, he continued to be on a lower rate of pay. For example, on 3 May 2013, the claimant's pay increased by 20.38% to £300 per week, Mr Wilmott's increased by 3.29% to £396.90 per week. In 2013 the hourly pay differential between the two was £2.42, whereas by May 2018 the gap had narrowed so that the difference was £1.62.

21. Ms Cuthbert gave evidence that, following 2012, the claimant had moved into undertaking a greater amount of internal work on tenanted properties, which the company valued more highly than construction work.

22. Ms Cuthbert gave evidence for the differences in pay between the claimant and Mr Wilmott. There were no documents, matrices or performance systems operated by the respondent which identified what was assessed and how pay was determined, and the Tribunal notes that it would have expected the respondent to have had something in place. Ms Cuthbert's evidence was that she visited the sites on a regular basis and kept an overview of the work undertaken. Her evidence was that she paid employees based upon: their skills, meaning the skills that they had demonstrated in the work undertaken; their value to the business; and the pay felt to be appropriate for the roles undertaken. The Tribunal finds that Ms Cuthbert did genuinely assess the skills of the employees, including the claimant. This was an ongoing process, rather than skills being formally reviewed at a set time. Ms Cuthbert gave evidence that her view of the skillset of an individual was based upon the skills that she saw demonstrated and that those reporting to her saw the individual demonstrate.

23. Miss Cuthbert also gave evidence that she spoke to other organisations to identify the rate to be paid for a particular skill. Her evidence was that a challenge for the respondent was identifying the correct rate of pay for a multi-skilled worker, in contrast to someone who was specifically undertaking only work utilising a particular skill.

24. It was clear from Miss Cuthbert's evidence that she clearly valued Mr Wilmott's skills and experience highly, for reasons that she explained to the Tribunal which were related to his work. Ms Cuthbert's statement stated that

Mr Wilmott was more experienced in refurbishment projects as a result of his length of service with the company and was more familiar with the properties. Ms Cuthbert's evidence was that Mr Wilmott was a highly valued employee. She rated his skills, in particular his ability to look at a flat and appraise what could fit into a room, and in finishing off a refurbishment (described as property release preparation). Her evidence was that this was his understanding of the details required in completing the property and making the final appearance welcoming. She described how it was the final finishing touches to make the property more attractive which he was particularly good at, to make it appeared loved and cared for. The Tribunal found Ms Cutherbert's evidence to be convincing and to be fact based, when she was explaining her reasons for Mr Wilmott's level of pay.

Mr Currie

25. Mr Currie was recruited by the respondent to commence work on 31 October 2016. His contract records that he is required to work 42.5 hours per week over 5 days, that is 2.5 hours per week more than the claimant (51). As at 4 November 2016 (at the time of his recruitment) he was paid £403.35 (£9.49 per hour), being more than the claimant (£355.57 and £8.89 per hour), but less than Mr Wilmott (£425.19 and £10.63 per hour).

26. Ms Cuthbert's evidence was that Mr Currie was paid at that rate because of what he said at interview about his skills, and, in particular, his experience of plastering. She gave evidence that he oversold his skills at interview and that he was not in practice as good at plastering as he had made out. After this was identified, Mr Currie received substantially lower pay increases than the claimant. Mr Currie continued to be paid more than the claimant on an hourly basis until May 2018, but after May 2018 the claimant's pay on an hourly basis was higher than Mr Currie's (£9.86 for the claimant, compared to £9.71 for Mr Currie).

27. Even after May 2018, Mr Currie was paid more than the claimant in total each week because Mr Currie worked more hours (£412.81 for Mr Currie compared to £394.23 for the claimant). Mr Currie worked 42.5 hours and the claimant worked only 40. In evidence the claimant confirmed that as Mr Currie was still working when he finished, the claimant did not know the hours that Mr Currie worked.

28. It appeared to be accepted by the claimant's representative that at the end of his employment the claimant was paid more than Mr Currie on an hourly basis, but that prior to the issue of proceedings he erroneously believed that he was paid less. What was clear to the Tribunal from the claimant's evidence was that he did not consider the question of pay reflecting hours worked at all, he only considered overall pay.

The pay differential being identified and raised

29. In March 2018 there was a conversation between the claimant, Mr Wilmott and Mr Currie about their pay, based on payslips only. The claimant was

understandably aggrieved because he identified that he was paid less than the other two employees.

30. The claimant raised his pay with Ms Cuthbert in late March or early April 2018. There was a subsequent meeting on 30 April 2018 attended by Ms Cuthbert, the claimant and Ms Wolska. Ms Wolska was: another employee of the respondent; Polish; the employee paid the most by the respondent; and someone who translated for the claimant in certain meetings. At this meeting Ms Cuthbert informed the claimant of the increase in his salary for May 2018. She also asked the claimant to undertake a specific project (which subsequently became two projects). Ms Cuthbert gave evidence to the Tribunal that where the claimant had been working as part of a team she was less able to identify his work and skillset, and therefore he was given a stand-alone project in order to demonstrate his skills. Ms Cuthbert's evidence was that she was looking for an assurance that her assessment of his skills was accurate. She gave evidence that this was the claimant's opportunity to demonstrate that he had greater skills than she considered to be the case. The Tribunal can understand the claimant's unhappiness about being tested on work that he was used to doing, having done similar work for a number of years. However, there is no evidence that the claimant voiced any unhappiness about this at the time and there is no evidence that he was as aggrieved at the time as has been argued on his behalf. The Tribunal finds that the projects were given to the claimant for the reasons explained by Ms Cuthbert, and do not find that this was inappropriate monitoring or that reasons were put in place simply to demonstrate the difference in pay. The aim of the projects was to assess and evaluate.

31. On 24 August 2018, after the two projects had been completed, the claimant was provided with feedback and was told that his pay would not be increased. Ms Cuthbert told the claimant the job had taken a little longer, but the quality was good, and that the claimant could be more efficient. Ms Cuthbert's emphasis on efficiency, linked speed to the value of the work undertaken for the business. Ms Cuthbert explained to the Tribunal that what had been done was a four-week job that took five weeks, and therefore the costs were higher and the property could not be rented out as quickly. The claimant was not given any information at the time about the timescale against which he was being assessed, Ms Cuthbert's evidence being that she did not tell employees about the expected time scale in advance of work because she wanted the work done appropriately. The Tribunal does not find that the reason for this feedback was either to criticise the claimant or to justify the difference in pay in an inaccurate way. This feedback was genuinely Ms Cuthbert's view of the time taken, which was one of the factors she took into account in assessing pay (and an employee's skillset). The record of the meeting (such as it is) records the claimant being told that his work quality was good.

32. On 24 August 2018 the claimant was also offered additional hours to enable him to earn more money. This would have had the effect of increasing his weekly pay so that it was higher than Mr Currie's. The claimant declined to work more hours.

33. Part of the claimant's case was that when he raised a concern about pay an explanation was given to him to make the concern go away which bore no resemblance to the facts and/or which could not be evidenced. The Tribunal is satisfied that the explanation provided by Ms Cuthbert to the claimant, when the issue of pay was raised with her, was what she genuinely believed to be the reason for the differential. The Tribunal finds that there was a degree of difference between the claimant's recollection of meetings and that of Ms Cuthbert, which was perhaps inevitable. It is clear that a number of things would have contributed to misunderstandings between them and/or differences in recollection including: language; translation; the claimant had difficulties in recalling meetings in late 2018 and early 2019 because of the fact that at the time he was taking anti-depressants (as he said in evidence); and the claimant would have found such conversations about work to be difficult as they were not his natural environment. The claimant was clearly emotional about these issues. Where there was any difference between the evidence about the meetings and the projects undertaken, for the reasons explained, the Tribunal preferred Ms Cuthbert's evidence to that of the claimant.

Mr Wilmott's increase

34. In May 2018 Mr Wilmott's pay was increased because of his potential departure to another job for higher pay. Ms Cuthbert's evidence was that Mr Wilmott approached her to say that he had been offered a higher rate of pay and a job with another company. Ms Cuthbert agreed to a pay rise for him on that basis. Ms Cuthbert's evidence was that this occurred prior to the claimant raising his pay with Ms Cuthbert, albeit the claimant disputed this. The Tribunal accepts that this was a reason for the increase in Mr Wilmott's pay in May 2018 (and therefore the fact that he continued to earn more than the claimant). The Tribunal also finds that these circumstances differed from the claimant's own subsequent resignation, as there is no evidence that the claimant sought a pay increase in the same way.

35. In any event, the Tribunal notes that the claimant still received a higher pay increase in May 2018 in percentage terms when compared to Mr Wilmott, the claimant received an 8.32% pay increase in May 2018, whereas Mr Wilmott received 5.52%.

36. The claimant appears not to have known about the real reason for Mr Wilmott's increase. He believed, incorrectly, that the increase had solely been because Mr Wilmott had asked for more. Mr Cope's report (into the claimant's grievance - 69) records the claimant as saying that Mr Wilmott was aggrieved at only earning £14 per week more than Mr Currie following their conversation about pay. He believed that Ms Cuthbert had given Mr Wilmott an increase just because he wasn't happy, with no problems, observations or requiring him to undertake projects. The claimant was asked by Mr Cope about when this was, and he confirmed that it was the end of April 2018. It is clear that this erroneous view (without having a full awareness of the facts) contributed to the claimant's dissatisfaction with the respondent's response to his own pay enquiries.

Grievance

37. The claimant raised a grievance on 2 October 2018 (62-64). In this document, for the first time, the claimant alleged that the difference in pay amounted to race discrimination. The claimant's evidence was that he had spoken to a friend of a friend who had experience of employment law matters. The claimant's evidence was that the only reason for the difference in pay that he could think of between him and the two colleagues, was that they were British and he was Polish.

38. Mr Cope was brought in to address the grievance. He was an HR consultant external to the respondent. He spoke to the claimant and then spoke to Ms Cuthbert. The grievance outcome (67-74) records what was said to him. Mr Cope asked Ms Cuthbert to undertake a skills assessment process to compare the three individuals, which she did (it records Mr Wilmott as having the highest score and Mr Curry the lowest). This was done with some input from Mr Wilmott (which increased the claimant's score in one respect). Mr Cope accepted what he was told by Ms Cuthbert and therefore did not uphold the claimant's grievance. The Tribunal does agree with a criticism made of this report on the claimant's behalf, that the responses from Ms Cuthbert appear to have been accepted in an uncritical manner. The scoring undertaken was also somewhat subjective and a little haphazard. However, the scoring does broadly reflect the reasons as evidenced by Ms Cuthbert for why she perceived Mr Wilmott's skillset to be of greater value to the company than the claimant. The Tribunal does not find that the skill score was created as a sham or was created simply to retrospectively justify a difference in pay that already existed.

39. Following the outcome of the grievance, there was no change in the claimant's pay. One of Mr Cope's recommendations was that there should be a development plan put in place to enable the claimant to develop his skills. A meeting took place with the claimant on 17 January 2019 which is briefly documented (77). That records the claimant's development objectives being identified only as the need to attend a first aid course, and working at heights and ladders safely. The Tribunal was concerned by the fact that the courses offered and what is recorded do not appear to address the skills issues identified or their development, at all. However, the document also records that the claimant had stated at the meeting that he was seeking new employment, was not prepared to commit himself to the respondent, and felt that personal goals were not required for him. The Tribunal accepts that this explains the reason why the respondent did not put in place the plan recommended by Mr Cope.

40. The claimant did not appeal against the outcome of his grievance, even though he was given the opportunity to do so. In the context of a company of the respondent's size and where the claimant's original grievance had effectively been about decisions made by the most senior person in the business (particularly when coupled with the Tribunal's reservations about the content of the grievance report), the Tribunal does not find that there can be any genuine criticism of the claimant for not appealing. It was understandable that he did not do so.

Resignation

41. Mr Currie left the respondent's employment at the end of December 2018.

42. The claimant resigned on 24 January 2019 in a letter which gave the appropriate notice period, stated that he had enjoyed being part of the team, and was thankful for the opportunities that he had been given (78). Ms Cuthbert did offer the claimant the opportunity to reconsider (79) but he chose not to do so. Whilst the claimant did make positive comments in his resignation letter, the Tribunal accepts that the claimant left his employment because of his concerns about his pay and his sense of grievance about how it had been addressed, even though he left for new employment and did so in a positive way.

The Law

Unfair (constructive) dismissal

43. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996. An unfair dismissal claim can be pursued only if the employee has been dismissed as defined by Section 95. Section 95(1)(c) which provides that an employee is dismissed by his employer if:

> **"the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."**

44. The principles behind such a constructive dismissal were set out by the Court of Appeal in **Western Excavating (ECC) Limited v Sharp [1978] IRLR 27**. The statutory language incorporates the law of contract, which means that the employee is entitled to treat himself as constructively dismissed only if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract.

45. The term of the contract upon which the claimant relied in this case was the implied term of trust and confidence. In **Malik and Mahmud v Bank of Credit and Commerce International SA [1997] ICR 606** the House of Lords considered the scope of that implied term and the Court approved a formulation which imposed an obligation that the employer shall not:

> **"…without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."**

46. It is also apparent from the decision of the House of Lords that the test is an objective one in which the subjective perception of the employee can be relevant but is not determinative. Lord Nicholls put the matter this way:

> **"The conduct must, of course, impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer. That requires one to look at all the circumstances."**

47. The objective test also means that the intention or motive of the employer is not determinative. An employer with good intentions can still commit a repudiatory breach of contract.

48. Not every action by an employer which can properly give rise to complaint by an employee amounts to a breach of trust and confidence. The formulation approved in **Malik** recognises that the conduct must be likely to destroy or seriously damage the relationship of confidence and trust. In **Frenkel Topping Limited v King UKEAT/0106/15** the EAT put the matter this way (in paragraphs 12-15):

> **"12. We would emphasise that this is a demanding test. It has been held (see, for instance, the case of BG plc v O'Brien [2001] IRLR 496 at paragraph 27) that simply acting in an unreasonable manner is not sufficient. The word qualifying "damage" is "seriously". This is a word of significant emphasis. The purpose of such a term was identified by Lord Steyn in Malik v BCCI [1997] UKHL 23 as being:**
>
> > **"… apt to cover the great diversity of situations in which a balance has to be struck between an employer's interest in managing his business as he sees fit and the employee's interest in not being unfairly and improperly exploited."**
>
> **13. Those last four words are again strong words. Too often we see in this Tribunal a failure to recognise the stringency of the test. The finding of such a breach is inevitably a finding of a breach which is repudiatory: see the analysis of the Appeal Tribunal, presided over by Cox J in Morrow v Safeway Stores [2002] IRLR 9.**
>
> **14. The test of what is repudiatory in contract has been expressed in different words at different times. They are, however, to the same effect. In Woods v W M Car Services (Peterborough) Ltd [1981] IRLR 347 it was "conduct with which an employee could not be expected to put up". In the more modern formulation, adopted in Tullett Prebon plc v BGC Brokers LP & Ors [2011] IRLR 420, is that the employer (in that case, but the same applies to an employee) must demonstrate objectively by its behaviour that it is abandoning and altogether refusing to perform the contract. These again are words which indicate the strength of the term."**

49. In some cases, the breach of trust and confidence may be established by a succession of events culminating in the "last straw" which triggers the resignation. In such cases the decision of the Court of Appeal in **London Borough of Waltham Forest v Omilaju [2005] IRLR 35** demonstrates that the last straw itself need not be a repudiatory breach as long as it adds

something to what has gone before, so that when viewed cumulatively a repudiatory breach of contract is established. However, the last straw cannot be an entirely innocuous act or be something which is utterly trivial.

Discrimination

50. The claim relies on section 13 of the equality act 2010 which 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."**

51. Section 39(2) of the Equality Act 2010 provides that an employer must not discriminate against an employee. It sets out various ways in which discrimination can occur and these include dismissal. The characteristics protected by these provisions include national origin.

52. In this case the respondent will have subjected the claimant to direct discrimination if, because of his Polish national origin, it treated him less favourably than it treated or would have treated others. Under Section 23(1) of the Equality Act 2010, when a comparison is made, there must be no material difference between the circumstances relating to each case.

53. Section 136 of the Equality Act 2010 sets out the manner in which the burden of proof operates in a discrimination case and provides as follows:

> **"(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 sub-section (2) does not apply if A shows that A did not contravene the provision".**

54. In short, a two-stage approach is envisaged:

    a. at the first stage, the tribunal must consider whether the claimant has proved facts on a balance of probabilities from which the tribunal could conclude, in the absence of an adequate explanation from the respondent, that the respondent committed an act of unlawful discrimination. This can be described as the prima facie case. However it is not enough for the claimant to show merely that he has been treated less favourably than his comparator(s) and that there is a difference of national origin between them; there must be some more.

    b. The second stage is reached where a claimant has succeeded in making out a prima facie case. In that event, there is a reversal of the burden of proof: it shifts to the respondent. Section 123(2) of the Equality Act 2010 provides that the Tribunal must uphold the claim unless the respondent proves that it did not commit (or is not to be treated as having committed) the alleged discriminatory act. The standard of proof is again the balance of probabilities. However, to

discharge the burden of proof, there must be cogent evidence that the treatment was in no sense whatsoever because of the protected characteristic.

55. In **Shamoon v Chief Constable of the RUC 2003 IRLR 285** the House of Lords said the following:

> **"employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as [he] was, and after postponing the less favourable treatment issue until after they have decided why the treatment was afforded. Was it on the proscribed ground or was it for some other reason?"**

And that there may be cases where:

> **"the act complained of is not in itself discriminatory but is rendered so by a discriminatory motivation, ie by the "mental processes" (whether conscious or unconscious) which led the putative discriminator to do the act. Establishing what those processes were is not always an easy enquiry, but tribunals are trusted to be able to draw appropriate inferences from the conduct of the putative discriminator and the surrounding circumstances (with the assistance where necessary of the burden of proof provisions). Even in such a case, however, it is important to bear in mind that the subject of the enquiry is the ground of, or the reason for, the putative discriminator's action, not his motive: just as much as in the kind of case considered in James v Eastleigh, a benign motive is irrelevant…the ultimate question is – necessarily what was the ground of the treatment complained of (or - if you prefer - the reason why it occurred)."**

56. In **Johal v Commission for Equality and Human Rights UKEAT/0541/09** the EAT summarise the question as follows:

> **"Thus, the critical question we think in the present case is the reason why posed by Lord Nicholls: "Why was the claimant treated in the manner complained of?""**

57. In **Hewage v Grampian Health Board [2012] ICR 1054** the Supreme Court approved guidance given by the Court of Appeal in **Igen Limited v Wong [2005] ICR 931**, as refined in **Madarassy v Nomura International PLC [2007] ICR 867**. In order for the burden of proof to shift in a case of direct race discrimination it is not enough for a claimant to show that there is a difference in race and a difference in treatment. In general terms "something more" than that would be required before the respondent is required to provide a non-discriminatory explanation.

58. Further, unfair or unreasonable treatment by an employer does not of itself establish discriminatory treatment: **Zafar v Glasgow City Council [1998] IRLR 36.** It cannot be inferred from the fact that one employee has been

treated unreasonably that an employee of a different race would have been treated reasonably. However, whether the burden of proof has shifted is in general terms to be assessed once all the evidence from both parties has been considered and evaluated. In some cases, however, the Tribunal may be able to make a positive finding about the reason why a particular action is taken which enables the Tribunal to dispense with formally considering the two stages.

59. In his submissions the claimant's representative also relied upon **Madden v Preferred Technology Group CHA Ltd [2005] IRLR 46** (in addition to the authorities referred to above)

Victimisation

60. Section 27 of the Equality Act 2010 says:

> **"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."**

61. As it is accepted that the claimant has done the protected act, for victimisation the question for the Tribunal is whether the respondent subjected the claimant to a detriment because of that protected act, in the sense that the protected act had any material influence on subsequent detrimental treatment. That requires consideration of the mental processes of the decision maker in each instance.

62. However, that exercise has to be approached in accordance with the burden of proof. If the claimant proves facts from which the Tribunal could reasonably conclude that his protected act had a material influence on subsequent detrimental treatment, his case would succeed unless the respondent could establish a non-discriminatory reason for that treatment.

63. If the Tribunal concludes that the protected act played no part in the treatment of the claimant, the victimisation complaint fails even if that treatment was otherwise unreasonable, harsh or inappropriate. Unreasonable behaviour itself does not necessarily give rise to any inference that there has been discriminatory treatment. Where errors affect only the claimant the Tribunal must be particularly careful in its scrutiny of the decision-making process to see whether the respondent's explanation withstands that scrutiny, or whether the error in truth masks a discriminatory decision-making process.

Harassment

64. Section 26 of the Equality Act 2010 says:

> **"A person (A) harasses another (B) if – (a) A engages in unwanted conduct related to a relevant protected characteristic, and (b) the conduct has the purpose or effect of – (i) violating B's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B."**

> **"In deciding whether conduct has the purpose or 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."**

65. The EAT in **Richmond Pharmacology v Dhaliwal [2009] IRLR 336**, stated that harassment is defined in a way that focuses on three elements: (a) unwanted conduct; (b) having the purpose or effect of either: (i) violating the claimant's dignity; or (ii) creating an adverse environment for him; (c) on the prohibited grounds (here of nationality). Although many cases will involve considerable overlap between the three elements, the EAT held that it would normally be a 'healthy discipline' for Tribunals to address each factor separately and ensure that factual findings are made on each of them.

66. The alternative bases in element (b) of purpose or effect must be respected so that, for example, a respondent can be liable for effects, even if they were not its purpose (and vice versa).

67. In each case even if the conduct has had the proscribed effect, it must also be reasonable that it did so. The test in this regard has both subjective and objective elements to it. The assessment requires the Tribunal to consider the effect of the conduct from the claimant's point of view; the subjective element. It must also ask, however, whether it was reasonable of the claimant to consider that conduct had that requisite effect; the objective element.

68. In **Nazir and Aslam v Asim and Nottinghamshire Black Partnership [2010] ICR 1225**, the EAT gave particular emphasis to the last element of the question, i.e. whether the conduct related to one of the prohibited grounds. When considering whether facts have been proved from which a Tribunal could conclude that harassment was on a prohibited ground, the EAT said it was always relevant, at the first stage, to take into account the context of the conduct which is alleged to have been perpetrated on that ground. That context may in fact point strongly towards or against a conclusion that it was related to any protected characteristic.

Time limits/jurisdiction

69. Section 123 of the Equality Act 2010 provides that proceedings must be brought within the period of three months starting with the date of the act to which the complaint relates (and subject to the extension for ACAS Early Conciliation), or such other period as the Tribunal thinks just and equitable. Conduct extending over a period is to be treated as done at the end of the period. A failure to do something is to be treated as occurring when the person in question decided on it.

70. The key date is when the act of discrimination occurred. The Tribunal also needs to determine whether the discrimination alleged is a continuing act, and, if so, when the continuing act ceased. The question is whether a respondent's decision can be categorised as a one-off act of discrimination or a continuing scheme. The Court of Appeal in **Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96** makes it clear that the focus of

inquiry must be not on whether there is something which can be characterised as a policy, rule, scheme, regime or practice, but rather on whether there was an ongoing situation or continuing state of affairs for which the respondent was responsible in which the claimant was treated less favourably.

71. If out of time, the Tribunal needs to decide whether it is just and equitable to extend time. Factors relevant to a just and equitable extension include: the presence or absence of any prejudice to the respondent if the claim is allowed to proceed (other than the prejudice involved in having to defend proceedings); the presence or absence of any other remedy for the claimant if the claim is not allowed to proceed; the conduct of the respondent subsequent to the act of which complaint is made, up to the date of the application; the conduct of the claimant over the same period; the length of time by which the application is out of time; the medical condition of the claimant, taking into account, in particular, any reason why this should have prevented or inhibited the making of a claim; and the extent to which professional advice on making a claim was sought and, if it was sought, the content of any advice given.

72. The claimant's representative in his submissions also made reference to **Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434** which confirms that the exercise of a discretion should be the exception rather than the rule and that time limits should be exercised strictly in employment cases.

73. In considering its decision the Tribunal took into account the submissions made by each of the parties and all matters referred to within them.

Conclusions – applying the law to the facts

Direct discrimination

74. In terms of the direct discrimination claims, the Tribunal has carefully considered the application of the burden of proof. The claimant was paid less than one of his comparators throughout his employment. The claimant was paid less than his other comparator in terms of weekly pay throughout his employment, and less on an hourly basis from November 2016 until May 2018 (although more than him thereafter). Those comparators do not share the claimant's nationality. However, as identified above, there must be something more before the burden of proof is reversed.

75. The claimant submits that the respondent's sham process and the false reasons that he alleges the respondent gave for the difference in pay reverse the burden of proof. Had the Tribunal found that a sham or false reason or explanation had been given, that would have reversed the burden of proof. However, for the reasons outlined above the Tribunal does not find that the reasons given were a sham (see in particular paragraphs 16, 22-24, 25-28, 31, 34 and 38 – with the view of the skillset being consistent with the historic redundancy assessment referred to at paragraphs 17-18). They were genuine reasons. In the light of those findings, the something else required to reverse the burden of proof has not been found. Accordingly, the claimant has not satisfied the Tribunal that the reason for his pay/less favourable treatment was on the grounds of nationality and his claim does not succeed.

76. Even had the claimant reversed the burden of proof, the Tribunal is satisfied that the difference in pay is for the reasons outlined in the findings of fact above and evidenced by Ms Cuthbert, it was not because of the claimant's nationality. It is certainly the case that the respondent could have been more transparent about the reasons it had for paying its employees at their relevant rate and the process followed, and it certainly could have had better documentation recording those reasons. However, the Tribunal accepts the respondent's evidence of the reasons given and therefore does not find that the reason was the claimant's nationality.

Jurisdiction/time limits (in relation to the victimisation and harassment claims)

77. The harassment and victimisation claims were not entered at the Tribunal within the period required by section 123 of the Equality Act 2010. The alleged monitoring ceased on 24 August 2018 when the relevant feedback was provided. ACAS Early Conciliation commenced on 13 April 2019 and the claim was entered at the Tribunal on 17 May 2019. The claimant's claim was not entered at the Tribunal within the primary time limit required.

78. However, it is just and equitable for the Tribunal to extend time for those claims to be considered. There was no prejudice to the respondent, who was able to respond to the claims and fully evidence its defence. The claimant would have been precluded from pursuing a claim and would have had no remedy if time was not extended. Whilst there was a delay and the claimant had the same opportunity to access advice and information as others, there was no evidence of the claimant having been advised about the time limit. The balance of prejudice means that it is just and equitable to extend time for the claims to be determined.

Victimisation

79. In relation to victimisation, the protected act relied upon is the claimant's grievance dated 2 October 2018. That is the first time that the claimant alleged that any difference in pay was due to his nationality. It is accepted by the respondent that that was a protected act.

80. The Tribunal does not find that the claimant had his work monitored as if to demonstrate that his performance as compared to his colleagues was the reason for any difference in pay. As confirmed above, the Tribunal finds that the projects were given to the claimant for the reasons explained by Ms Cuthbert, that is as a way to assess and evaluate his skills and not as inappropriate monitoring. The Tribunal does not find that reasons were put in place simply to demonstrate a difference in pay.

81. In relation to the claimant's allegation that he was for working too slowly so as to justify the difference in pay – the Tribunal does not find that this occurred. The claimant's speed was not criticised, but he was told in broad terms that he was not as efficient as the respondent wished him to be. The Tribunal does not find that the claimant was told that so as to justify the difference in pay in the way alleged. The Tribunal accepts the respondent's reasons for the difference in pay. The respondent could have been more transparent and had

better documentation about the reasons, however the Tribunal accepts the reasons given.

82. In any event, the review of the projects and the comments made to the claimant about the speed of his work took place in the Summer of 2018. The meeting providing the feedback was held on 24 August 2018. The feedback provided led to the grievance. Accordingly, the claimant's claim for victimisation also fails because the events about which he complains as being a detriment occurred prior to the protected act and therefore were not materially influenced by it (as it had not yet occurred).

83. In his submissions, the claimant's representative argued two things which he said addressed this potential issue with the timing of the events relied upon and the protected act. He alleged that the claimant was treated in the way alleged because the respondent believed that the claimant might do a protected act (which is provided for within section 27 of the Equality Act 2010). However, there was no evidence whatsoever to support this contention and this was not put to the respondent's witness. He also contended that because the race discrimination allegation related to issues around pay, this protected act ran from the first date upon which issues in relation to pay were raised, rather than when discrimination was first alleged. The claimant's representative could provide no authority for such a submission. The Tribunal does not accept that a protected act occurs when an issue is first raised, it occurs when an allegation is made that there has been discrimination. In this case this first occurred in practice on 2 October 2018, it did not occur when the pay issues were raised (without an allegation of discrimination) earlier in 2018.

Harassment

84. In terms of harassment, for the reasons outlined above the Tribunal does not find that the detriments occurred at all. The claimant was not monitored for the reasons alleged, and he was not criticised in order to justify the difference in pay.

85. The assessment and evaluation undertaken on the projects was something to which the claimant broadly agreed and therefore was not unwanted conduct. The assessment neither had the purpose nor the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. There was no genuine evidence that it did so. The purpose was to assess whether the claimant was paid at the right amount. The Tribunal does not find that it would have been reasonable for it to have the requisite effect, even if it had such an effect on the claimant – the assessment of the projects was a reasonable and appropriate approach to the issues the claimant had raised and to assessing his skillset in the context of his request for higher pay.

86. It is found by the Tribunal that comments made to the claimant about his efficiency were comments that were not wanted. In that respect the first element of the test for harassment is satisfied in relation to that allegation. However, the Tribunal does not find that comments about his efficiency had the purpose or effect of violating his dignity or creating an intimidating, hostile,

degrading, humiliating or offensive environment. That was not the purpose of the comment. If they did have that effect, the Tribunal does not find that it was reasonable for them to do so. In particular, the Tribunal has considered this in the context of the findings above about what was said to the claimant in the feedback provided about the project review.

87. In any event the harassment complaints do not succeed because the Tribunal finds that both the monitoring and the feedback regarding efficiency were not made on the grounds of race.

Constructive dismissal

88. In terms of the constructive dismissal claim, the primary way in which this was put was that the fundamental breach of contract was the alleged acts of discrimination. For the reasons outlined above in relation to the discrimination claims, the Tribunal does not find that the respondent fundamentally breached the claimant's contract in this way as alleged.

89. The claimant was paid less than one of his non-Polish comparators throughout his employment, and less than his other non-Polish comparator in terms of weekly pay throughout his employment, and less on an hourly basis from November 2016 until May 2018 (although more than him thereafter). Based upon the findings above, the Tribunal does not find that the difference in pay: was due to nationality; was for the reasons the claimant alleged; and/or in any event constituted conduct which was likely to destroy or seriously damage the relationship. An employer is able to pay employees different rates of pay without it alone constituting a fundamental breach of contract, and in this case the respondent had genuine reasons for the differences in pay. From May 2018 the difference in pay between the claimant and Mr Currie was entirely as a result of the different hours of work, and in August 2018 the claimant was offered additional hours, which he declined.

90. The constructive dismissal claim was in the alternative put forward on the basis that the claimant contended that the respondent breached the implied term of trust and confidence by putting forward spurious reasons for the difference in pay and not being able to produce evidence to substantiate them. The Tribunal does not find that there were any spurious reasons put forward. Some explanation was provided to the claimant and the explanations provided do not undermine the duty of trust and confidence. The claimant was not penalised for raising the issues.

91. As there was no fundamental breach of contract, the claimant was not dismissed. It is found that the claimant resigned because of the issues of pay and the way that they were addressed. In terms of the argument regarding waiver, the Tribunal does not need to reach a conclusion on that issue. The claimant's constructive dismissal claim fails because there was no fundamental breach of contract and the claimant did not terminate his contract in circumstances in which he was entitled to do so by reason of the employer's conduct (as provided for in section 95(1)(c) of the Employment Rights Act 1996).

92. If the Tribunal had needed to go on and consider whether the claimant had unreasonably failed to follow the ACAS code of practice, the Tribunal would not have found that not appealing was an unreasonable failure and would not have adjusted any award as a result.

Conclusions

93. As outlined above and for the reasons given, the claimant does not succeed in any of his claims brought against the respondent.

94. At the end of the Employment Tribunal hearing, when judgment was reserved, it was listed for a remedy hearing for one day on 17 July 2020. As a result of the fact that the claimant has not succeeded in his claims, that date will be vacated (and will not take place) as a Remedy Hearing is no longer required.

Employment Judge Phil Allen

18 February 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON

21 February 2020

FOR THE TRIBUNAL OFFICE