



THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH

BEFORE: EMPLOYMENT JUDGE BALOGUN

MEMBERS: Mr P Adkins
Ms F Whiting

BETWEEN:

Anthony Stennett

Claimant

And

London Borough of Southwark

Respondent

ON: 25 – 29 April 2022
19-20 May 2022 & 8 July 2022 (In Chambers)

Appearances:

For the Claimant: Mr R Beaton, Counsel

For the Respondent: Mr P Linstead, Counsel

RESERVED JUDGMENT AND REASONS

The direct discrimination and harassment claims fail and are dismissed.

REASONS

1. By 3 separate claim forms, 2 presented on 28 August 2019 and the third on 6 January 2021, the claimant brought complaints of direct race discrimination and harassment. All claims were resisted by the respondent.
2. We heard evidence from the claimant and, on his behalf, from Margaret James (MJ) former Line Manager. He also produced a statement from Hardeep Matharu (HM) ex-colleague, the contents of which were not in dispute. The respondent gave evidence through Georgina Brown (GB) Business Systems Manager; Andy Taplin (AT) Operations Manager (Income); Dominic Cain (DC) Director of Exchequer; and Louise Turff (LT) Head of Home Ownership Services.
3. We were provided with a joint bundle of documents and a respondent's supplementary bundle. References in square brackets in the judgment are to pdf pages in the joint bundle unless prefixed with an "s" in which case they refer to pages in the supplementary bundle.

The Issues

4. The issues in the case are set out in the agreed List of Issues document [206-217]. These are more specifically referred to in our findings and conclusions below.

The Law

Direct Discrimination

5. Section 13 of the Equality Act 2010 (EqA) provides that a person (A) discriminates against another (B) if because of a protected characteristic (in our case, race) A treats B less favourably than A treats or would treat others.
6. Section 23 EqA provides that on a comparison of cases for the purposes section 13, there must be no material difference between the circumstances relating to each case.
7. The relevant circumstances for the purposes of the statutory comparisons are those which the respondent took into account when deciding to treat the claimant as it did. If the relevant circumstances are to be "the same or not materially different" all the characteristics of the claimant which are relevant to the way his case was dealt with must be found also in the comparator. They do not have to be precisely the same but they must not be materially different. MacDonald v Advocate General for Scotland and TSB Governing Body of Mayfield Secondary School [2003] IRLR 512 House of Lords.

Harassment

8. Section 26 EqA provides that a person (A) harasses another (B) if – A engages in unwanted conduct related to a relevant protected characteristic, or engages in conduct of a sexual nature, and 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.

9. In deciding whether the conduct has the effect referred to above, account must be taken of: a) the perception of B; b) the other circumstances of the case; c) whether it was reasonable for the conduct to have that effect.

Burden of Proof

10. Section 136 EqA provides that if there are facts from which the court could decide, in the absence of any other explanations that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
11. The leading authority on the burden of proof in discrimination cases is Igen v Wong 2005 IRLR 258 That case makes clear that at the first stage the Tribunal is to assume that there is no explanation for the facts proved by the Claimant. Where such facts are proved the burden passes to the Respondent to prove that it did not discriminate.
12. In Laing v Manchester City Council [2006] IRLR 748 the Employment Appeal Tribunal (EAT) made clear that it would not be an error of law for a Tribunal not to follow the two-stage approach and that there might be cases where it would be sensible for a tribunal to go straight to the second stage and consider the subjective reasons which caused the employer to act as it did. Assuming that the burden may have shifted causes no prejudice to the employee. The EAT here followed the dictum of Lord Nicholls in Shamoon v Chief Constable of the RUC [2003] IRLR 285, where he held that sometimes the less favourable treatment issue cannot be resolved without at the same time deciding the reason-why issue. He suggested that Tribunals might avoid arid and confusing disputes about identification of the appropriate comparator by concentrating on why the claimant was treated as he was, and postponing the less favourable treatment question until after they have decided why the treatment was afforded.
13. In the case of Madarassy v Nomura International PLC [2007] IRLR 246 it was held that the burden does not shift to the Respondent simply on the Claimant establishing a difference in status or a difference in treatment. Such acts only indicate the possibility of discrimination. The phrase “could conclude” means that “a reasonable Tribunal could properly conclude from all the evidence before it that there may have been discrimination.”

Findings and Conclusions

14. The tribunal decided all of the findings below on the balance of probabilities, having considered all of the evidence given by witnesses during the hearing, together with documents referred to by them. Any failure to mention any specific part of the evidence should not be taken as an indication that the tribunal failed to consider it. The tribunal only made those findings of fact necessary for it to determine claims brought by the claimant. It was not necessary to determine every fact in dispute where it was not relevant to the issues between the parties
15. On 20 March 2018, the claimant commenced work with the respondent as a Building Insurance & Gas Servicing Officer within Home Ownership Services. The claimant worked via an Agency, Comensura, and it is common ground that he was a contract worker rather than an employee.

16. The claimant is black. His allegations of race discrimination and harassment are largely directed at 4 individuals who, he contends, colluded with each other to treat him badly because of his race. Our findings and conclusions on his specific allegations are set out below, using the paragraph numbering from the Agreed List of Issues.

DIRECT DISCRIMINATION

Issue 4.1

17. The claimant claims that on 29 June 2018, he attended a meeting set up by the respondent's external stakeholder, Peter Clarke, Senior Building Surveyor. Also present at the meeting was MJ, the claimant's line manager, who is also black. GB was MJ's line manager. GB is white. GB was also present at the meeting as she had been invited by Peter Clarke. The purpose of the meeting was to discuss the outsourcing of the management of all the council's subsidence work to a firm, Cunningham Lindsay.
18. The claimant claims that GB excluded him and MJ from any meaningful participation in the meeting and used unnecessary jargon that GB knew they would not be familiar with. He claimed that GB did not pause to give them a chance to interject with questions and comments. However, the claimant accepted in evidence that he did make a comment and GB did not interrupt him while he was doing so, even though she considered his interjection to be irrelevant to the meeting. The claimant also claims that GB acted in a dismissive and condescending manner towards him and MJ. In making this allegation, the claimant does not rely on anything said by GB at the meeting. His complaint is that, when he made a physical gesture, as if to raise his finger to make a point, GB realised this and looked away.
19. The claimant also complains about an email chain following the meeting. In one of the emails to Sharon Lindsay, GB writes: "*Anthony told me you were no longer dealing with street properties - is this wrong?*". [1082]. The claimant contended that this was a loaded question in order to create a false narrative to cause obfuscation. That was not put to GB in cross examination. Instead she was asked why she did not ask "*Is that right*" rather than "*Is this wrong*". A distinction without a difference, in our view.

Conclusion

20. This allegation is very vague, it is not based on anything that was said or done by GB. Rather, it is wholly based on the claimant's perception. In our view, there is nothing in what the claimant has said that points to less favourable treatment, let alone less favourable treatment on grounds of race.

Issue 4.2

21. The claimant claims that after the above meeting, he asked GB a question about something that was discussed in the meeting and rather than respond, she looked him in the face, giggled and jumped in the lift. GB denies such an encounter and says she did not hear the claimant ask her a question.

Conclusion

22. The claimant's descriptions are interesting. We consider it unlikely that GB would have responded to a question with a giggle unless the question was humorous. The claimant does not suggest that it was. Indeed, he does not say what question he asked. In his oral evidence, the claimant said: "*GB turned away and in about 3 strides she hopped and skipped into the lift before the door closed*". Again, hopping and skipping in this context is an unusual turn of phrase. More likely, GB made a dash for the lift in order to catch it before the doors closed. This exaggerated use of language suggests that the less favourable treatment is perceived rather than factual. The more likely scenario, in our view, is that in her hurry to catch the lift, GB did not realise that she was being asked a question. There is no less favourable treatment and even if there was, we find that it was not related to the claimant's race.

Issue 4.3

23. The claimant contends that on 4-5 occasions, GB inferred to MJ and other team colleagues that appointments he attended for face to face meetings with leaseholders may be fraudulent. In the claimant's witness statement this allegation has been expanded to include GB inferring this to him as well.
24. By way of background, the respondent was trying to reduce face to face contact with customers and increase and promote online transactions. The claimant accepted in evidence that he was aware of the respondent's policy and said that he always sought to encourage it.
25. On 18 January 2019, GB sent an email to MJ querying why the claimant had had 2½ days of face to face appointments that month so far when there had never been a business need to meet home owners face to face, apart from occasionally. GB then asked MJ to keep a record of the home owners that require face to face appointments and the reasons why so that this could be reviewed. On the 14 February 2019, GB emailed MJ again asking for the business reasons for 2 face to face appointments arranged by the claimant. At the same time, she asked for the claimant's **ATRACs** records [809]. The claimant relies on these documents in support of this allegation.
26. GB had a general concern about the claimant's attendance and MJ not managing it. In an email sent to MJ on 17 December 2018, GB queries the claimant's logging in and out times, stating: "*it may be is (sic) falsifying his ATRACs record and you are authorising it*". [741]
27. Those concerns about the claimant's attendance were raised with him by GB in an email on 22 February 22, in which she set out the respondent's expectations for attendance moving forward. She further stated that she would be monitoring this given the concerns she had had previously about his attendance [1177]
28. We were taken to examples of the claimant's irregular attendance. In an email dated 15 February 2019, GB points out to MJ that the claimant arrived at work at 10.20am. The respondent's core working hours are 10-12 and 2-4. [811] There is also an email from LT(GB's line manager) to GB on 6 March 2019 at 10.17 pointing out that the claimant had turned up ¾ of an hour late for training that started at 9.30am and nearly 20 minutes outside core time [862]. Also, on 6 August 2018, after querying the claimant's

absence and being told by MJ that he had called in to say he had damaged his foot and had to go to hospital, GB instructed MJ to keep a record of unplanned absences. [1111]

Conclusion

29. The first thing we say is that we are satisfied from the evidence that the respondent had a genuine concern about the claimant's attendance. In light of those concerns, it was appropriate for the respondent to raise this with his line manager and to seek to monitor that attendance.
30. I asked how GB inferred fraud to the claimant, he said she raised issues with me about what the interviews were for. The inference I took was that I might be making them up. Another explanation is that they were not in line with policy and therefore she wanted to understand why they were necessary. Her reason for asking is evident from the emails to MJ. MJ's failure to respond did not assuage GB's concerns.
31. GB did not at any time say to the claimant that he had been fraudulent. She raised the possibility with MJ and it was appropriate for her to do so as the claimant's line manager. It is unclear when the claimant became aware of it but it was either through disclosure in the litigation or that MJ told him at the time.
32. Although MJ was the claimant's line manager, they had known each other before he started with the respondent on this occasion. MJ and the claimant had become friends from his previous work with the respondent and met socially, even attending a wedding together in India of a former colleague. It is therefore entirely plausible, given their relationship, that MJ would have disclosed this information to him.
33. The claimant has not met the initial burden of showing less favourable treatment. He has not shown that the circumstances of his named comparators are the same or similar to his. Further, the respondent has provided an explanation for its actions which are unrelated to the claimant's race. This allegation is not made out.

Issue 4.4.

34. Part of the claimant's role was to assist leaseholders across the borough with difficult insurance claims and to bridge the gap with insurers. Mrs K was a leaseholder with a subsidence claim who was refusing to pay the excess due on the insurance policy. Mrs K was known to be a difficult person to deal with. The essence of the claimant's allegation is that GB failed to provide him with support in dealing with the Mrs K matter in that GB suggested solutions that were unprecedented and would not have worked.
35. The claimant's evidence on this was contradictory and GB did not have a clear recollection of events. We were therefore assisted by the contemporaneous documents.
36. At pages 1061-1063 of the bundle is an exchange of emails between GB and Russell Adair, Loss Adjuster, about the excess problem. The problem appears to involve a lot of people in various departments, adding to its complexity. It seems to us that this was not an issue that GB could have resolved for the claimant on her own. The fact that the issue had still not been resolved by the time the claimant left the respondent is a measure of how difficult it was.

37. Although the claimant contends that GB was unwilling to provide assistance, not only did she come up with a possible solution, she also got involved by contacting Asset Management about the issue instead of the claimant. Nevertheless, the claimant remained reluctant in cross examination to concede that GB had been trying to help by moving things forward. Instead, he characterised her efforts as being part of the obfuscation. He claimed that GB purposely gave him wrong directions but when asked to give examples, he was unable to do so. He conceded that it appeared from the emails that GB was trying to help him but said that we were only seeing one side. The insinuation was that the emails were masking what was really going on. This was a recurring theme of the claimant's evidence which he never really expanded upon.

Conclusions

38. The allegation is in very general terms, the claimant has not provided details of the support he wanted from GB that was not given. On the other hand, the email evidence suggests that there was a significant measure of support. The claimant contended that some of the solutions being proposed were unprecedented and would not have worked. Whether or not that is true, it is not evidence of GB being unsupportive, neither is it evidence of race discrimination. This complaint is not made out.

Allegation 4.5

39. This is an allegation that GB had set the claimant up to fail when dealing with the Zurich Homes claim.
40. As the Insurance officer, the claimant dealt with the day to day administration of leaseholder claims, communal issues and Landlords claims with Zurich. The claimant was having difficult dealing with Zurich in that there were problems getting information and responses from them. Zurich had reorganised its claims team shortly after the claimant started, with the operations team moving from Cheltenham to Glasgow.
41. The claimant contended that GB deliberately withheld contact details for Zurich and refused to assist him. GB told the claimant at the time that she no longer had contact details for the claims team at Zurich as the people she had previously dealt with had moved on. We have no reason to believe that that statement was untrue.
42. GB was dealing with Scott Marriot and David Wang, senior officials at Zurich, on the procurement of the Zurich contract and they had nothing to do with the day to day administrative issues that the claimant was involved in. GB did not therefore consider it appropriate to give their numbers to the claimant.
43. On 12 April 2018, GB asked MJ and the claimant to provide her with details of any claims handling or operational issues they were having so that she could raise these at her meeting with Zurich the following week. Nothing was forthcoming. Further, on 30 July 2018, GB asked MJ to speak to the claimant about the difficulties he was having with Zurich and to raise them with Pamela Brown. That was not done either. [258-259] Instead, that same day, the claimant sent an email addressed to internal and external stakeholders, including Scott Marriot, complaining about his queries not being responded to. The email contained phrases in block capitals, considered to be the electronic form of shouting. GB considered the correspondence to be highly unprofessional and having read it, we can understand why [1104]

Conclusion

44. This is another allegation that is not borne out by the facts. There is no evidence whatsoever that GB was setting the claimant up to fail. On the contrary, the email evidence suggests that she was endeavouring to use her influence to escalate his concerns. This complaint is not made out.

Issue 4.6

45. The allegation as set out in the List of Issues does not entirely make sense. The claimant provides a more concise explanation at paragraph 59 of his witness statement.

46. The claimant says that on 13 December 2018, he received a call from someone in Corporate Risk and Insurance, asking whether the claimant had another contact she could reach out to as she was finding Ross Ready (RR), Conveyancing Manager, to be unresponsive. The claimant responded that RR could be difficult to reach and provided an alternative contact. The claimant alleges that while he was still on the phone, he overheard GB on the phone to RR telling him that the claimant was upset and quite angry with him. In the rider to the ET1, the claimant says that he could see in his peripheral vision that GB was smirking, and that when she grabbed the phone, he immediately got the sense that she was about to do something inflammatory. The claimant contends that RR emailed him immediately after his call with GB to apologise, which put the claimant in an awkward position. That email has never been produced. GB denies the allegation.

47. We prefer the account of GB. The claimant has never produced the email that he refers to, even though it would have provided strong evidence in support of his case. Further the claimant undermined his case by admitting in cross examination that he could not tell whether GB was smirking and that it was possible that he did not know who she was on the phone with and may not have heard the exact conversation.

Conclusion

48. This allegation is not made out on the facts.

Allegation 4.7

49. The claimant alleges that on 13 December 2018, GB rubbed glitter from a Christmas card she had received onto his right shoulder. GB says that it fell onto his forearm accidentally when she opened the card.

50. Neither party refers to anybody else being present at the time but the claimant says at paragraph 56 of his statement that he mentioned it to MJ later that day and she was stunned by what had happened to him.

51. MJ gave evidence for the claimant in these proceedings. Her witness statement makes no reference to this conversation at all. At the time MJ gave evidence, she was part-heard in her own Tribunal claim against the respondent. Our understanding is that GB is one of the alleged protagonists in that claim. In her witness statement before us, MJ made clear her negative views of GB and expresses her opinion on many of the issues raised by the claimant in this case. However MJ said nothing in her evidence about this

particular matter. If this was something that MJ was aware of we would have expected to see it in her witness statement especially given her alleged reaction to it. In our view, MJ was not aware of it and if it had happened in the way the claimant alleges, MJ would have been.

52. Further, we find the allegation implausible. The claimant refers to GB rubbing the glitter into his right shoulder with both hands in an exaggerated movement 3 or 4 times. This is a senior manager who at this point is raising serious questions about the claimant's attendance. Set against that, she is said to have engaged in "horseplay" that one would only do with someone you are friendly with or alternatively, as an act of sexual harassment. Neither of those circumstances are likely in this scenario. The more plausible explanation is that provided by GB, i.e. that when the card was opened, the glitter went everywhere and some of it landed accidentally on the claimant's forearm. We accept that account.

Conclusion

53. The allegation is not made out.

Issue 4.8

54. The respondent has a pool of vehicles available for staff to use on council business. In addition, staff are able to hire these vehicles at a subsidised rate for personal use. The only requirement is that they complete a driving assessment beforehand. The fee for that assessment is £30. Payment of the fee is made via an authorised budget and then reclaimed directly from staff salary. The claimant approached LT about hiring a car for personal use and she directed him towards the Finance department.
55. Although the benefit was open to all staff, including agency staff, the council did not have a mechanism for payment of the £30 assessment fee, other than from an authorised budget. This presented a difficulty for the claimant as he was paid via Commensura so the fee could not be reimbursed automatically from his pay and for reasons that are not entirely clear, there was no mechanism for him to pay the money to the respondent directly.
56. At page 736 of the bundle is the start of an email chain between GB, MJ and LT. GB asks why the claimant wants to hire a car. The trigger for this is an enquiry from the Finance Manager about a payment of £30 for a driving assessment to be paid out of department budget for the claimant. In response to her email query, MJ told GB that the payment had been sanctioned by LT, however LT denied that this was the case [736]. GB therefore contacted Andy Williams, Building Manager, for clarification on the process [1152]
57. The claimant alleges that by her email exchange, GB was contending that he was not entitled to hire a car because he was an agency worker. The first point to make is that this complaint appears to be about a difference in treatment because of employment status rather than race. That is not a claim before this tribunal. In any event, the complaint is not made out on the facts. GB does not any point in her emails assert or suggest that the claimant is not entitled to hire a car and it would be an unreasonable inference to draw from what she does say. We accept GB's evidence that the reason for her query was because she had never come across this situation before and therefore needed to check that it had been agreed and that there was a process for recovering the

money. The respondent is funded by the taxpayer and so has to account to the electorate and wider public for its expenditure. In our view, the enquiries GB made were entirely reasonable and in keeping with the respondent's duty to ensure that tax payers' money was being used appropriately. It had nothing to do with the claimant's race.

Conclusion

58. The claim is not made out.

Issue 4.9

59. The respondent's ATRACS system automatically registers clocking in and out activity. Sometimes manual adjustments need to be made where working time has not been registered by ATRACS because, for example, a worker has not clocked in. Line managers are responsible for reviewing and authorising timesheets. They also sign off on manual adjustments. The person responsible for doing this in the claimant's case was MJ.

60. On 18 February 2019, GB wrote to all staff in her department asking them to send screenshots of their ATRACS for the previous week so that she could authorise their timesheets in MJ's absence. [1161]

61. On 19 February 2019, at 9.41, GB sent an email to the claimant chasing his outstanding ATRACS screenshot [824]. When he failed to respond, she sent a further email at 12.20 on the same day warning the claimant that she would not be authorising his timesheet unless he sent the information requested [823-824]

62. In the absence of a response from the claimant, GB reviewed his manual adjustments and was able to authorise those relating to his sick days but decided to leave the others until MJ's return the following day. She informed the claimant of this [823] The claimant sent an email to GB a couple of hours later saying "*That's alright you don't have too (sic) authorise it*" [1162]. GB understood this to mean that he would get MJ to authorise it on her return.

63. The claimant contends that GB's refusal to authorise his manual adjustments without verifying them with MJ was an act of race discrimination. The claimant relies on 2 actual comparators, Adam Fransella and Sharon McGonigle.

Conclusion

64. The claimant's assertion is not supported by any evidence. The request to provide ATRACS screenshots was sent to a number of staff, including the comparators. The comparators had no manual adjustment to their ATRACS so their circumstances were not the same as the claimant's. We accept GB's explanation for not authorising the claimant's timesheet and are satisfied that it has nothing to do with his race. This complaint is not made out.

Issue 4.10

65. It is unclear from the way the issue is drafted what discriminatory conduct is being alleged. When asked in cross examination to clarify, the claimant referred to GB being rude and aggressive in a phone call. That is not an allegation that appears in the list of

issues, neither does it appear in the claimant's witness statement. The claimant did not say when this phone call took place, what was said or done by GB that constituted rude and aggressive behaviour or why he contends that it was because of race.

Conclusion

66. This allegation is lacking in particularity and fails on that basis

Issue 10A

67. The claimant complains about being invited to a meeting without notice to discuss his performance.

68. On 22 February 2019, GB had one to one meetings with the members of her team to inform them that MJ's secondment had ended and that she (GB) would be taking over their direct line management pending the appointment of a replacement. At the claimant's meeting, GB used the opportunity to discuss his timekeeping and attendance. GB told us that MJ had not managed the claimant's attendance. The contents of that meeting are confirmed in an email from GB later that day and set out the respondent's expectations of the claimant with regards to attendance. [1177]

69. The claimant complains that GB did not follow the correct procedure in raising these matters with him; he was not notified in advance; the meeting was not minuted and; the email sent afterwards did not record any of his responses. He contended that he was ambushed and that the meeting should have taken place via the agency. GB denied this, stating that whilst anything formal would be dealt with via the agency, day to day issues were dealt with by the respondent.

Conclusion

70. The claimant's complaint seems to be that GB dealt with an issue of poor attendance informally rather than formally. That is not in our view a detriment. Many employers have a staged process for dealing with disciplinary and performance issues, each stage becoming progressively more serious. The informal stage is considered the least serious. We have already found that there were concerns about the claimant's timekeeping and performance and it is the role of any line manager to raise them with the individual at the earliest opportunity so that they can be addressed. It appears that MJ did not do so and is why GB, as the claimant's new line manager, was addressing this. We are satisfied that she would have acted in the same way for somebody who was not black. This complaint fails.

Issue 4.11

71. The claimant complains that on 23 February 2019, he discovered that his wages had not been paid because GB had not approved his timesheet. He alleges that this was discriminatory.

72. This relates to the matters at issue 4.9. The reason that the timesheet was not approved is because the claimant did not send GB the screenshot of his ATRACS and secondly, because he told her not to approve his timesheet. At [1243] GB sent an email to Sharon, one of the claimant's comparators refusing to authorise her timesheet. Sharon is white.

Conclusion

73. This had nothing to do with the race. The complaint is not made out.

Issue 4.12

74. The claimant contends that on 25 February 2019, he approached GB to request a conversation in private but instead of taking him into a private meeting room, she walked over to the main floor of the office and started the conversation within earshot of other staff. When he asked her about his missing wages and told her about the financial difficulties this had caused, GB just shrugged her shoulders and when he told her that he would escalate matters, she said “*You can do what you like*”.

75. GB denies this account. GB says that the claimant approached her at her desk in an agitated and angry manner stating that he had not been paid and demanding to know what she was going to do about it. GB suggested they went to a meeting room and she got up to find if one was free. The claimant followed her and continued to challenge her in the open office space. GB told him that she had understood that he did not want her to authorise his timesheet and that he wanted to wait until MJ returned. In the end she felt that there was no point continuing the conversation in the state that the claimant was in. She did not want to go into a room with him as she felt threatened and was scared. She therefore walked away.

76. The claimant admitted in cross examination that he had started the conversation in the open office space. He said he did so because he could not hold it in any longer, that he was trying to stay controlled and not let his emotions get the better of him in his emotive state. That explanation fits GB’s description of the claimant being agitated and angry at the time. We recall that when GB was giving evidence about feeling threatened and scared by the claimant’s demeanour, she became rather emotional. Up until that point she had given her evidence in a dispassionate “matter of fact” way. That suggested to us that she had been quite affected by her encounter with the claimant and that she had felt genuinely threatened and scared at the time.

77. Having weighed the competing accounts, we prefer GB’s version of events.

Conclusion

78. The allegation is not made out on the facts.

Issue 4.13

79. This is a complaint about how Dominic Cain (DC) Director of Exchequer, dealt with the claimant’s complaint about not being paid.

80. On 25 February 2019, the claimant approached DC and told him that GB had failed to authorise his timesheet so he had not been paid. He also said that he believed GB had done this deliberately. DC spoke to GB who explained the issue around the manual adjustments and non-production of the ATRACS screenshot. In order to prevent a further escalation of matters, DC instructed GB to authorise the timesheet and deal with any issues relating to it afterwards. By the following day, the claimant had been paid.

81. In his email to the claimant of 27 February 2019, DC says that having discussed the matter with GB, he did not believe that GB's actions were intended to cause him difficulties and that the matter could have been avoided if he had provided the information she had requested [844]. The claimant relies on this email as evidence of race discrimination as he contends that DC treated GB more favourably by blaming him for the situation without investigating the wider issues.

Conclusion

82. DC dealt with the complaint in a pragmatic and reasonable way and his comments about the cause of the problem were factually correct. It was never put to him in cross examination that he was acting in collusion with GB or anybody else and we find that he was not. There is no evidence that DC's actions were because of race. This complaint fails.

Issue 4.14

83. In June 2018, GB had asked MJ to advertise permanently for the claimant's role. She was asked again in November 2018. [1137-1138] MJ failed to do so on both occasions. GB therefore took on this task after MJ's secondment ended.

84. On 8 March 2019, GB informed the claimant that his temporary contract would not be renewed and that his final day would be 5 April 2019. This was because of an organisation-wide decision to reduce the number of agency staff.

85. On 15 March 2019, GB emailed the claimant informing him that the advert for the permanent role was on the council website if he wanted to apply. The claimant was going to be on holiday in Ghana when the interviews were scheduled to take place and alleges that GB deliberately arranged them for them to take place when he was away to prevent him from attending and did so because of his race.

86. The claimant had provided GB with his leave dates and they were in her calendar. However, we accept GB's evidence that she did not check these when she organised the interview dates. When the claimant reminded GB that he would be away, she told him to contact the recruitment team and that they would arrange his interview (assuming he was shortlisted) for when he returned. That belies any suggestion that GB was trying to exclude him from the interview process.

Conclusion

87. This complaint is not made out.

Issues 4.15, 4.16

88. The claimant alleges GB had purposely not shortlisted him for interview and that they had failed to provide him with feedback, on the basis that there were a high number of applications when this was not the case.

89. The claimant submitted an application for the permanent role on 27 March 2019. shortlisting for the role was done by assessing candidates against 5 essential criteria and applying a score of between 0 - 2 [1237-1238] The guidance notes to the selection

criteria provide that a score of zero indicated that a candidate had failed to meet the criterion. It further provides that if a candidate scores zero for any essential criteria, they cannot be shortlisted and put through to interview [S44]. The claimant scored a total of 3 out of a possible 10 marks. In 2 of the essential criteria he scored 0. Hence under the rules of the scheme, he could not be shortlisted.

90. On 2 April 2019, the claimant received an email from the respondent's HR team saying that he had not been shortlisted for interview and that due to the high number of applications, individual feedback could not be given. [1233] In fact, the claimant was the only eligible applicant for the role. 4 external candidates mistakenly applied but the advert was meant for internal candidates only. They were therefore not progressed.
91. The email received by the claimant was an automated one, based on a template uploaded by HR, which was sent automatically by the Lumesse computer system when an instruction to reject a candidate was received. We accept GB's evidence that she did not see the email before it went out and so was not in a position to change it. We also accept GB's evidence that she was unaware that the claimant wanted feedback.

Conclusion

92. There is no evidence that GB purposely did not shortlist the claimant because of his race. We are also satisfied that the decision not to provide feedback had nothing to do with race. These complaints fail.

Issue 4.17

93. The claimant's last day in the office was 22 March 19. The claimant contends that on his last day, after shaking his hand and wishing him the best for the future, GB asked him if he was forgetting something and poked him in the chest indicating that he hand over his ID and locker key that were hanging from a lanyard around his neck. He contended that GB was not entitled to request these as the usual procedure was that the lanyard would be handed to HR or the Security Team.
94. GB denies the claimant's account. She said that she pointed to the lanyard indicating that he should hand over his ID badge. We prefer GB's account as we consider it more plausible. As to the claimant's assertion that the wrong procedure was followed, even if that was the case, we are struggling to identify what the detriment was to the claimant. The claimant relies on Adam Fransella as a comparator. GB adopted the same procedure in relation to him on his last day. There was therefore no less favourable treatment in this regard.

Conclusion

95. The complaint is not made out

Issue 4.17A

96. On his last day, the claimant was presented with a leaving card. The claimant contends that this indicated that GB had prejudged the recruitment process. He claims he was

discriminated against by being treated as a leaver when he could have got the permanent job.

97. GB's explanation was that on the claimant's last day, she was not in a position know whether he would definitely apply for the role or if he did, whether the application would be successful. In addition, the team were aware that the job was being advertised on a permanent basis and other members of staff were eligible to apply for it. In those circumstances, to treat the claimant as if he were definitely returning would suggest that his application would be successful. We accept that evidence. The claimant submitted his application form on 27 March (5 days after his last day) GB therefore had no concrete evidence that he would be applying for the role and she knew that his agency contract was not being renewed. Treating the claimant as a leaver was therefore appropriate.

Conclusion

98. We are satisfied that GB's actions had nothing to do with the claimant's race.

Issue 4.18

99. The claimant alleged that between April 2018 and March 2019, LT often did not respond when he said "Good Morning" to him but greeted white colleagues. He also claimed that when he said good morning to her she would act as if she had not heard him but would then proceed with a friendly greeting to white members of staff arriving in the office. LT's evidence was that she generally did not say Good Morning to individual staff but would say a general good morning, but if someone said it to her she would respond. We prefer LT's account. It is a more realistic and plausible explanation which reflects the reality of working in an open plan workplace with a big team. Also, the claimant's contention that LT only said good morning to white people did not accord with LT's evidence (which we accept) that the person she said Good Morning to the most was Laura Bui, a BAME member of staff who she frequently sat next to.

Conclusion

100. This complaint is not made out on the facts.

Issue 4.19

101. The claimant contends that LT discriminated against him by praising many white staff when external stakeholder gave positive feedback but did not do so in his case. However, there are a number of examples in the bundle of the claimant being singled out for praise by LT.
102. The respondent has a platform called Staffino where feedback from home owners is captured and reported back to staff. On 27 February 2019, the administrators of Staffino sent LT some positive feedback posted about the claimant. LT copied it to the claimant with the comment: "*Well done Anthony – your first compliment on Staffino*" [1190]. If she had not done that, the claimant would have been none the wiser as he had no direct access to Staffino.
103. In March 2019, LT collated the Staffino feedback for February on all staff in ranking order and this showed that the claimant came second. This was sent to all staff. [1195]

The same exercise was carried out in March 2019. This time the claimant came joint first and this was highlighted in the covering email. [1239] This evidence undermines the claimant's allegations.

104. The claimant sought to resile from these allegations by contending that he was in fact referring to a specific incident that occurred at a Home Owners Conference in March 2019. The Home Owners Conference was set up for and operated by Southwark leaseholders as a Leasehold Advice Surgery. The allegation is not entirely clear but what the claimant appears to be saying is that LT did not acknowledge the fact that a customer was saying nice things about him. LT does not recollect the incident. Even if the claimant is right about that, it is a big stretch to say, without more, that this was because of his race, particularly in light of the evidence of the occasions that LT went out of her way to praise him publicly.

Conclusion

105. There is no evidence of race discrimination. The complaint is not made out.

Issues 4.20

106. This complaint seems to be that the claimant was not given written notice of termination of his contract. Although the way the issue is worded suggests that this was a breach of Southwark staff guidelines, GB said that she was unaware of such guidelines and the claimant did not produce any documents in support. In the response to the claimant's grievance about the matter, the respondent made no reference to guidelines being breached. There was simply a recommendation that in future, written notice should be given [1251]. We accept GB's evidence that she did not think she needed to give written notice to an agency worker whose assignment was coming to an end. We find that her failure to do so had nothing to do with the claimant's race and that she would have treated non-black agency workers in the same way in similar circumstances.

Conclusion

107. The complaint is not made out.

Issue 4.21

108. The claimant contends that the respondent discriminated against him by insisting that his contract end date was 22 March 2019.
109. In his claim form the claimant has cited 22 March 2019 as his employment end date. The respondent has done the same in its ET3. We find, as a matter of fact that his contract did end on that date.
110. At paragraph 98 of his witness statement, the claimant says: "*In previous stages of these proceedings, the Respondent has sought to allege that GB was under the impression that my contract terminated on 22 March 2019, on my last working day. It is clear that GB was informed that my assignment terminated on 5 April 2019*". The claimant cannot use a dispute that arose in the course of the litigation as a basis for his discrimination complaint. There is no evidence that the position taken by the respondent had anything to do with the claimant's race.

Conclusion

111. This claim is not made out.

Issue 4.22

112. On 14 April 2019, following his termination, the claimant raised a complaint of discrimination and harassment. This was dealt with by AT, Operations Manager and following an investigation, an outcome report was produced on 14 August 2019 [1247-1251] The report was sent to the claimant on the 28 August 2019. The claimant presented his first Tribunal claim that same day. The claimant contends that the sending of the report to him was deliberately delayed in order to frustrate him lodging his ET claim.

113. The minutes of the claimant's investigation meeting with AT on 23 May 2019 record the claimant saying that he would be lodging a tribunal claim by 12th June. [927] The claimant contends that the minutes are inaccurate and that he did not give a date. We consider it unlikely that the respondent would have included the date in the minutes unless it had been provided by the claimant. Even if the minutes are incorrect, it is likely that this was AT's understanding and that of any other person that would have had access to the minutes subsequently, including Boni Marsh, the HR manager who sent the report to the claimant. In those circumstances, the idea that the minutes were delayed to frustrate the ET claim does not make sense as the respondent would have been under the impression that the claim had already been lodged.

Issue 4.22A

114. The outcome of the internal recruitment process was that nobody was appointed to the role. In the interim, it was covered by Pascal Turner (PT) who had stepped in temporarily to cover following the claimant's departure. PT had previously been covering a different role but that came to an end when the person she was covering for returned to work.

115. The claimant alleges that he was treated less favourably in that when the post was re-advertised, the respondent used a less rigorous recruitment process to ensure that PT would be appointed.

116. The respondent used its temp to perm process in the recruitment of PT. This process is used where a job has been advertised unsuccessfully in the last 6 months. It is a different route but not necessarily less rigorous. Candidates have to demonstrate through a CV and personal statement that they meet the criteria on the person specification. [1254] It seems to us that the claimant is speculating about the lack of rigour in the process because he does not understand why he did not get through but PT, who he considered to be less experienced, did. He suggested that GB had manipulated the process but there is no evidence to support that.

Conclusion

117. The allegation is not made out.

Issue 4.23

118. This complaint, in essence, is that the respondent discriminated against the claimant by not properly investigating his complaint against GB.
119. The full version of the complaint is at page 914 of the bundle. The procedure when dealing with a complaint from an agency worker is to pass it onto the agency, who then send a summary version of it to the respondent to deal with. AT met with the claimant on 23 May 2019 to discuss his complaint. AT had read the full version of the complaint but used the Hayes summary version as the basis for the meeting.
120. In his full written complaint, the claimant names 2 colleagues that he claims witnessed the alleged “poking” of the lanyard incident, although in the complaint he simply refers to GB tapping it. AT told us that he did not interview the claimant’s witnesses because he did not think they would add anything. We find it difficult to understand how he could have reached that conclusion without speaking to them first.
121. In rejecting the claimant’s complaint of race discrimination, AT stated in his outcome letter that no other members of staff had made complaints of a similar nature. The claimant contends that that is incorrect because MJ had made complaints of discrimination. The claimant contends that he told this to AT at the meeting. Whilst the minutes record the claimant saying that MJ had a number of run ins/altercations with GB and had been demoted, there is no reference to MJ raising a complaint of race discrimination against GB [923]. The claimant contends that the minutes are inaccurate. However, we consider that the contemporaneous notes are more likely to be accurate than the claimant’s self-serving recollections many years later. Had the claimant mentioned a complaint of race discrimination by MJ, it would have been recorded in the minutes. We find that he did not.
122. In relation to the Zurich matter (see issue 4.5) the claimant contends that AT accepted GB’s statement that “*she would not withhold information which would help a colleague in a work situation*” without supporting evidence. AT’s actual response was that there was no evidence to support the allegation. That was a permissible finding to make. The claimant also alleges that he was not allowed to present email evidence in support of his case but GB was. The claimant provided no details of the emails. We had no information about the dates, the authors, the recipients or the content. More importantly, he did not disclose copies of them in evidence. For all of these reasons, we prefer the respondent’s evidence that no such email was proffered by the claimant at the time.

Conclusion

123. The first point to make is that an unreasonable investigation does not equate to discrimination. In this particular case, whilst there are some aspects of the investigation that could have been dealt with better, overall, it was reasonable. The fact that the claimant did not agree with the outcome does not make it discriminatory. We are satisfied that the manner of the investigation and the outcome had nothing whatsoever to do with race.

Issue 4.24

124. One of the recommendations in AT's outcome letter was that the claimant should receive constructive feedback on his unsuccessful application. This did not happen and the claimant contends that it was because of race. GB was not asked about the recommendation in cross examination but LT was. LT was unaware of the recommendation as she was not sent a copy of AT's outcome letter. LT said that it was not usual to give feedback to somebody who was not in the organisation (the claimant had left by then) and she was not sent a copy of AT's report so was unaware of the recommendation. LT also said that had she been aware, she would have asked GB to provide written feedback. We accept that evidence.

Conclusion

125. We are satisfied that the failure to give feedback had nothing to do with race.

Issue 4.25

126. This is an extension of issue 4.22A and our conclusions are the same.

HARASSMENT

127. Allegations 4.3, 4.8, 4.9, 4.12 and 4.13 are also said to amount to unwanted conduct related to race. To the extent that we have found that the conduct occurred, we are satisfied that it was not related to race. The harassment claims therefore fail.

General

128. Our observation of the claimant was that many of the alleged wrongs were based on his perception rather than facts. Many of the incidents have alternative and plausible explanations but the claimant was steadfast in not considering the possibility that these might explain the respondent's actions, instead, preferring to conclude that they could only relate to race. Where there was clear evidence to the contrary, such as an email, the claimant would assert that what appeared reasonable on its face was deceptive because things were happening under the surface. He maintained that there was collusion and a culture of discrimination, without providing any evidence. The impression we had was of someone who, for whatever reason, was hyper sensitive. These observations have informed many of our findings in this case.

Judgment

129. The unanimous judgment of the tribunal is that the direct race discrimination and harassment claim fails and is dismissed.

Employment Judge Balogun
Date: 11 August 2022