



EMPLOYMENT TRIBUNALS

Claimant: Mr A Kadema

Respondent: Tees, Esk and Wear Valley Foundation NHS Trust

HELD at Teesside Justice Hearing Centre **ON: 22 to 25 November 2022**
5 and 9 December 2022

BEFORE: Employment Judge Johnson
Members: Mr D Dorman-Smith
Mr S Moules

REPRESENTATION:

Claimant: In person
Respondent: Miss C Millns of Counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is as follows;

1. The claimant's complaints of direct race discrimination contrary to section 13 of the Equality Act 2010 are not well-founded and are dismissed.
2. The claimant's complaints of harassment related to his race, contrary to section 26 of the Equality Act 2010, are not well-founded and are dismissed.
3. The claimant's complaint of victimisation contrary to 27 of the Equality Act 2010 is not well-founded and is dismissed.

REASONS

1. The claimant conducted these proceedings himself; gave evidence himself and cross-examined the respondent's witnesses. He did not call any other witnesses on his behalf. The respondent was represented by Miss Millns of counsel who called to give evidence the following witnesses:-
 - (1) Miss Nicola Dalton (healthcare assistant).
 - (2) Miss Lynne Murphy (control room operative).
 - (3) Miss Claire Parker (healthcare assistant).
 - (4) Miss Laura Campbell (healthcare assistant).
 - (5) Ms Rebecca Norton (temporary staffing and agency team).

The respondent submitted a witness statement from Mr. Lancashire (service manager). That statement was accepted by the claimant which meant that Mr Lancashire was not called to give evidence or be cross-examined.

2. There was an agreed bundle of documents comprising an A4 ring binder containing a total of 439 pages of documents. The bundle was marked R1.
3. By a claim form presented on 31 December 2021 the claimant brought complaints of unlawful race discrimination. The allegations included direct race discrimination contrary to section 13 of the Equality Act 2010, harassment contrary to section 26 of the Equality Act 2010 and victimisation contrary to section 27 of the Equality Act 2010. Those allegations may conveniently be split into three specific incidents as follows:-

Incident 1 – On the Ivy Clover Ward on 10 March 2021 when the claimant alleges comments were made to him by Nicola Dalton.

Incident 2 – Two incidents at the security airlock in April 2021 in respect of comments allegedly made to the claimant by Lynne Murphy.

Incident 3 – On the Linnet Ward on or about 1 September 2021 when comments were allegedly made about the claimant by either Claire Parker or Laura Campbell and the respondent's subsequent delay in providing the claimant with a written outcome into his grievance about that particular incident.

4. The claimant entered into Acas early conciliation about these matters on 1 November 2021 and obtained his Acas early conciliation certificate on 8 December 2021. The claim form was presented on 31 December 2021. The respondent conceded that the allegations relating to the Linnet Ward on 1 September 2021 and the respondent's subsequent investigation were within the Employment Tribunal's time limit for the presentation of such complaints. The respondent submitted that the allegations relating to the Ivy Clover Ward in March 2021 and the security airlock in April 2021 fell outside that three month time limit, were wholly unconnected to the later incidents in September 2021 and that it would not be just and equitable for time to be extended in respect of the earlier incident.

5. The allegations relating to the Ivy Clover Ward in March 2021 and the security airlock in April 2021 were well understood by the respondent. Those relating to the Linnet Ward in September 2021 were not. At a private preliminary hearing on 4 March 2022, Employment Judge Pitt ordered the claimant to provide further information about his allegations of harassment, direct discrimination and victimisation. In respect of the allegations of harassment, the claimant was ordered to provide the date the incident occurred, the name of the person involved and any witnesses and what is alleged to have happened. In respect of the allegations of direct discrimination the claimant was ordered to provide details of the unfavourable treatment to include the date the incident occurred, the name of the person involved and any witnesses and what is alleged to have happened. In respect of the Linnet Ward incident in September 2021, the original claim form states as follows:-

“A full time member of staff targeted me by reporting malicious allegations against me – unacceptable behaviour of punishing me, shifts immediately cancelled because of these malicious allegations (targeting blacks) evidence is available. This malicious allegation has got nothing to do with whistle blowing other than targeting blacks, this proved by the findings/investigation carried out together with the written outcome confirming that the allegation has got no substance. The malicious allegation reads; “there has been an incident reported regarding Amos Kadema being asleep on shift. We have had to place him in restriction until the concern can be resolved. The concern alleges that on 1 September Amos was asleep whilst on 2/1 observations with the high risk patient. He has also been observed to leave staff members alone with patients when on 2/1 observations to make a drink or go to the toilet. This has left the staff in a dangerous position and had Amos needed to make a drink or take a toilet break he should be asking for cover to relieve himself from duty.”

6. The claimant provided further information in a document dated 18 March 2022. In respect of the Linnet Ward incident in September, the claimant states as follows:-

“Claire Parker made false malicious allegations against me. The allegations were not in good faith other than to pleasure herself and friends, hate, harassment, bullying, undermining my professionalism and racial targeting. The allegations have got nothing to do with work at all, as it is proved by the outcome of the investigations, nothing was found to be true. Tees, Esk and Valley Foundation NHS Trust have a policy and channels on reporting all incidents and allegations. If Trust management were genuine, serious in safeguarding patients and staff surely they could have questioned Claire Parker the reasons why she took so long to report a serious safeguarding incident, before taking action against me. (They tolerate discrimination, harassment, bullying and undermine my professionalism). All because Claire Parker is white British and I am black NHS Trust did not want to disappoint the staff of their colour. The culture of racial discrimination, tolerating harassment, bullying, undermines my professionalism has made the Trust management to suspend me. They did not want to suspend Claire Parker because they share same colour. The staff made false allegation against me has a long history of targeting blacks and foreign nationals – this is supported by Rachel Waddle’s written outcome. Claire Parker should have been suspended or dismissed from work because of her actions, deliberately using NHS mental hospital to fulfil her racial hate, harassment, bullying and undermining blacks.”

7. Based upon that further information from the claimant, the respondent prepared its case on the basis that the principle allegation of harassment and direct discrimination was against Claire Parker, she being the named perpetrator in that further information. At the main hearing and following the claimant's evidence and cross-evidence by Miss Millns, the claimant applied to amend his claim, so that the principal perpetrator of the alleged discrimination would be Laura Campbell instead of Claire Parker. That application was made following the postponement of the hearing after the first 4 days 25 November and its resumption on 5 December. The application was refused for the reasons which are set out below.
8. The claimant had submitted a formal application on 12 August 2022 for specific disclosure of CCTV footage and other documents, which the claimant insisted must exist and which would have assisted him in his claims. The CCTV footage related to 10 March 2021 and 28 April 2021 in respect of the incidents of the Ivy Clover Ward and at the security airlock and from 1 September 2021 in respect of the incident on the Linnet Ward. The claimant's application was that the CCTV footage must exist and would show that his version of exactly what had happened on each of those occasions was more likely to be correct. The application was considered on 28 September and refused on the basis that it was not necessary for the fair disposal of these proceedings to make an Order for disclosure. The Tribunal accepted the respondent's submissions that the CCTV footage did not cover the areas where the claimant was working on 1 September 2021 and would be unlikely to assist in respect of the earlier incident. The CCTV footings could not show exactly what was being said. They would certainly not assist the Employment Tribunal in deciding whether anything which had been said or done was in some way influenced by or related to or because of the claimant's race. Despite that earlier decision, the claimant persisted with his application for disclosure of the CCTV records at various times during the main hearing. Those applications were again refused.
9. The claimant also on several occasions made unfounded and unsupported allegations to the effect that the respondent had altered or even forged some of the documents in the bundle. Those allegations were made despite the respondent's meaningful explanations in respect of those documents. On a number of occasions the Tribunal attempted to direct Mr Kadema towards the claims which he was actually pursuing and try to get him to focus upon the issues which had been identified and agreed as those which the Employment Tribunal would have to decide. The Tribunal acknowledged that English is not Mr Kadema's first language and that this, at times, made it frustrating for him to present his case or to challenge that which was being presented by the respondent. Breaks were given whenever the claimant requested one or appeared to be in need of one. What had originally appeared to be a generous allocation of 4 days for these relatively narrow issues, ended up taking 6 days to be heard.

Findings of Fact

10. The claimant is and was at all materials employed by Service Care Solution as a mental health care assistant. Service Care Solution has a contract with the respondent to provide nursing staff of various categories from time to time. Almost all of the claimant's work for Service Care Solution was at premises owned and operated by the respondent. The respondent has accepted throughout these proceedings that it would be vicariously liable for the acts of any of its own employees, if those acts amounted to breach of the discrimination legislation in the Equality Act 2010.

11. On 10 March 2021 the claimant was working on the Ivy Clover Ward at the Rosebery Park Hospital in Middlesbrough. The claimant was assisting in the care of patient A, who was subject to a specific care plan, which had been formulated by those senior nurses responsible for her care. The claimant accepted that he was aware of the care plan and further accepted that he had played no part in its formulation. The care plan itself included provision for “snacks” or “treats” to be given to patient A at various times or in certain circumstances. Nicola Dalton’s unchallenged evidence was that those snacks or treats are closely monitored and regulated but that there could be 2 days’ worth of snacks or treats on patient A’s trolley at any one time. On the evening of 10 March 2021, patient A tried to replenish her trolley, stating that she had not received her snacks for that day. Nicola Dalton, the senior healthcare assistant in charge, was aware that patient A had in fact received her snacks regularly throughout the day and refused patient A’s request. Patient A then became somewhat agitated. The claimant intervened, arguing that patient A should be given additional snacks. It is accepted that there was an exchange of words between Miss Dalton and the claimant. The claimant’s version was that he was told by Nicola Dalton, “You keep quiet – you do not work here – you do nothing.” The claimant insisted that Miss Dalton had raised her voice to him when saying this. Miss Dalton’s version was that she had not raised her voice to the claimant, nor had she questioned why he worked there. Miss Dalton did not consider that the claimant’s concerns were relevant in regards to the best interest of patient A. In answers to cross-examination, Miss Dalton accepted that she had not liked the way the claimant had spoken to her, particularly when what he was saying was contradictory to the care plan for patient A. In answer to questions from the Tribunal, Miss Dalton accepted that she may have said that the claimant should not tell her how to do her job, but that was all.
12. This was one of those incidents where the Tribunal was faced with deciding which version of a somewhat heated discussion was more likely to be correct. The Tribunal found it likely that Miss Dalton may well have displayed her frustration at the way her authority was being challenged by the claimant, that she may well have raised her voice to the claimant and may well have made reference to the claimant not having been involved in the preparation of the care plan, or even knowing exactly what the care plan said. The Tribunal found it unlikely that Miss Dalton would have said “You keep quiet you do not even work here.”
13. On the claimant’s best case, the words used by Miss Dalton were, “You keep quiet you do not work here.” If that had been said, the Tribunal understood how the claimant may have felt offended by such a remark. However, the claimant has failed to provide any evidence whatsoever that any such comment may have been because of, or related to, his race. The claimant has not identified any white British comparator who was treated differently. If the claimant were to rely upon a hypothetical comparator, it would be a white British employee who challenged a senior nurse in the same way. The claimant has not shown that such a hypothetical comparator would have been spoken to in a different way.
14. The next incident is alleged to have taken place on or about 7 April 2021 at the control room in Rosebery Park Hospital Middlesbrough. Because some of the patients within the hospital are considered to be “high risk” (both to themselves, to members of staff and to other patients) there are specific procedures which have to be followed with regard to security. The respondent operates an airlock system, through which members of staff must pass to gain access to the ward where high risk patients are cared for. Staff members pass through the airlock security and

are given a key fob/alarm with which to gain access to the ward and to raise the alarm in case of incidents of danger.

15. The claimant alleges that on 7 April 2021 as he went through the airlock he was given a defective fob/alarm by Lynne Murphy. The claimant maintains that Lynne Murphy knew that this key fob/alarm was defective before it was given to him. The claimant says that he went through the airlock and then realised that the key fob/alarm was defective and returned to Miss Murphy to have it changed. The claimant insisted that Miss Murphy pretended to change the key fob/alarm, but deliberately returned to him the same defective key fob/alarm. The claimant's evidence to the Tribunal was that Miss Murphy did this on two occasions. The claimant's evidence to the Tribunal was that Miss Murphy did this deliberately to expose him to harm from high risk patients when he gained access to the ward and that this was done because of his race and would not have been done to a white British member of staff.
16. Miss Murphy denied deliberately giving the claimant a defective key fob/alarm, denied pretending to change it and denied returning the same defective key fob/alarm to him. Miss Murphy's evidence was that the key fob/alarms are stored on a rack and that each is numbered. The key fob/alarms are charged up overnight so that their batteries are properly charged when staff members are given them to gain access to the ward. Miss Murphy's unchallenged evidence was that if the key fob/alarm is defective, then the member of staff cannot gain access to the ward and thus could never be exposed to any danger from a high risk patient. Miss Murphy recalled the incident, stating that she had given the claimant what she believed an operational key fob/alarm and that when he returned saying it was not working, she changed it for a different one.
17. The Tribunal preferred Miss Murphy's evidence about this incident. The Tribunal found it highly unlikely that Miss Murphy would have deliberately given the claimant a defective key fob/alarm in any circumstances. The Tribunal accepted Miss Murphy's evidence that no member of staff could gain access to the ward without an operational key fob/alarm. Again, the claimant had failed to establish any connection between Miss Murphy's treatment of him and his race. The claimant had not identified any specific comparator or even a hypothetical comparator (whom would have to be a white British member of staff who would not have deliberately been given a defective key fob/alarm). The Tribunal found that the claimant had failed to make any connection between his treatment by Miss Murphy, and his race.
18. The next incident again occurred at the security airlock, this time on 28 April 2021. The claimant's evidence was that he had entered the airlock, where he began washing his hands and changing his personal protective equipment. The claimant's evidence to the Tribunal was that, whilst he was washing his hands, Miss Murphy was saying "Come on, come on, come on". The claimant described Miss Murphy as saying this "continuously".
19. Miss Murphy's version of the incident was that the claimant was leaving the airlock, but she had not been satisfied that he had securely attached his keys and alarm to his belt, as he is required to do. Miss Murphy therefore asked Mr Kadema to check that he had attached his alarm and keys as is required, before letting him leave the airlock. Miss Murphy accepted that she would not have allowed the claimant to leave the airlock until she was satisfied that he had properly attached his keys and alarm. Miss Murphy's evidence was that the claimant became angry and aggressive, demanding to know why she had stopped him from leaving the airlock.

Because Mr Kadema raised his voice to her, Miss Murphy called the control manager to come out to speak to him.

20. Again, this was an incident where the Tribunal was asked to decide which version was to be preferred, that of Mr Kadema or that of Miss Murphy. The Tribunal found it likely that Miss Murphy have displayed an element of impatience and frustration, either because of the length of time being taken by the claimant to wash his hands or because he had failed to properly attach his keys and alarm to his belt. On the claimant's best case, Miss Murphy said to him, "Come on, come on, come on". The Tribunal found that to be an entirely trivial remark and one which was wholly unconnected to the claimant's race. The claimant has not identified a comparator who was white, British and was treated differently. The claimant has not shown that a hypothetical comparator who was white British would also have been treated any differently.
21. The claimant raised no formal complaint about any of these matters until he presented his claim to the Employment Tribunal at the end of December 2021. The Tribunal found it likely that the claimant had added these earlier allegations as a make-weight to bolster his allegations relating to the September 2021 incident.
22. It is the incident of 1 September 2021 which is the source of the claimant's primary complaint in these proceedings. The claimant was working a nightshift on the Linnet Ward, which is a secure ward within the Rosebery Park Hospital. That particular ward provides care for patients whose behaviour can be particularly challenging and some of whom are required to be kept under constant observation by not less than two members of nursing staff at all times. Also working that particular nightshift were Claire Parker (healthcare assistant) and Laura Campbell (healthcare assistant). Claire Parker is a permanent employee of the respondent, whilst Laura Campbell is a temporary healthcare assistant, which meant that Claire Parker was the senior nurse on duty that particular night.
23. Whilst carrying out 2/1 observations on a particular patient, Miss Campbell thought that Mr Kadema was "falling asleep" in the communal area of the ward. Miss Campbell in her evidence stated that, "In an attempt to keep Mr Kadema awake, I raised my voice when speaking to the patient in the hope that Mr Kadema would stay alert. I did not shout or raise my voice inappropriately and was purely trying to keep Mr Kadema awake for the safety of myself and other individuals on the ward that night." Miss Campbell went on to say that earlier that week whilst undertaking 2/1 observations on the same patient with a different member of staff, that other member of staff had actually fallen asleep in the communal area. Miss Campbell informed Claire Parker of her concerns that Mr Kadema appeared to be falling asleep. Miss Parker mentioned to Miss Campbell that a couple of weeks previously she had been undertaking her round on a nightshift and had noticed that one of the vulnerable patients who was subject to 2/1 observations, appeared to have only one member of staff observing him, as the other had either gone to make a cup of tea or to use the lavatory. Because of their concerns, Miss Parker and Miss Campbell agreed that thereafter, where possible, they would work together to undertake 2/1 observations, rather than with those other members of staff who appeared to be struggling to stay awake or who were occasionally left their post. Miss Parker and Miss Campbell said that this was done for their own safety because they felt uncomfortable and exposed to risk by the actions of the other members of staff.
24. It was accepted that, during their conversation, Miss Parker suggested to Miss Campbell that she may care to formally report her concerns to a more senior

member of staff. Miss Campbell did that by email dated 8 September 2021, a copy of which appears at page 324 in the bundle. The email is dated 8 September 2021, timed at 04:05am and is addressed to Stephen Marshall, Matthew Gayle and Fiona Robinson of the respondent Trust. The letter states as follows:-

“Hi, I would like to make you all aware of some concerns I have had when working on Linnet Ward. On Tuesday 31 August I was on nightshift on 2-1 observations when the other member of staff fell asleep in the communal area whilst we were sitting with the patient, the staff member (Samson) was audibly snoring whilst sat next to the patient. I shouted at said member of staff and told him to attract attention of other staff members so that he could go on his break and someone could relieve him of the position. I felt this could have possibly left me in a vulnerable situation with a patient who had just recently that day come out of seclusion. The patient actually commented to Samson about him sleeping asking, “are you tired there Samson?” A similar situation occurred on Wednesday 1 September when a different member of staff Amos was also falling asleep in the communal area while we were sat with the same patient only this time I was raising my voice talking to the patient, intentionally getting louder to keep him awake. On this occasion the staff member wasn’t snoring. Team member Claire Parker intentionally put herself and myself on seclusions observations rotationally all night so that we weren’t left vulnerable with these staff members on Wednesday night, as she had also observed them leaving staff alone with the patient while going to make drinks or visiting the bathroom with getting someone to cover them. Both Claire and myself thought that this should be brought to the attention of yourselves as we both feel it leaves others in potentially dangerous situations.”

25. The letter was brought to the attention of Miss Rebecca Norton (temporary staffing and agency team lead) and to Donna Marcey (assistant temporary staffing manager). In accordance with the respondent’s standard procedures, Miss Marcey informed Service Care Solution that Mr Kadema was being placed “on restrictions”, the effect of which was that he would not be permitted to undertake any work for the respondent pending an investigation into these matters. The claimant was in turn notified by Service Care Solution and he took great exception to being told that he was placed on restrictions.
26. An investigation was commenced by the respondent on 10 September and completed by 17 September. At the end of the investigation, it was found that the evidence from those members of staff who were interviewed was inconclusive, so that Mr Kadema was immediately allowed to return to work without any further action being taken. The claimant estimates that he lost wages whilst he was placed on restriction, in the sum of £567.98.
27. As part of its investigation, the respondent obtained statements from several members of staff. Miss Donna Marcey viewed such CCTV footage as was available, but found that to be inconclusive. Miss Norton’s evidence to the Tribunal was that it had never been alleged that Mr Kadema had actually fallen asleep, but that he “appeared to be falling asleep” and that voices were raised to prevent him from doing so. Miss Norton also found that the allegation relating to a member of staff leaving his post whilst undertaking 2/1 observations was unclear because no one could state who had remained in post and who had actually left the post. It was found that Mr Kadema had been one of the two persons on duty that particular night, but no finding was made that he was the one who had left his post.

28. The claimant took great exception being placed on restriction and to being accused of both falling asleep and leaving his post. The claimant insisted throughout that he had never left his post and had never fallen asleep whilst on duty. The claimant insisted that these allegations were effectively concocted by Claire Parker and/or Laura Campbell, either individually or collectively and that their reason for doing so was a malicious attempt to target him because of his race. The claimant alleged that these acts were of direct race discrimination contrary to section 13 of the Equality Act 2010 and harassment contrary to section 26 of the Equality Act 2010. The claimant has not identified a specific white, British comparator in respect of his section 13 claim. A hypothetical comparator would be a white British healthcare assistant working a nightshift and who would not have been falsely accused of falling asleep or leaving his post.
29. It was put to the claimant in cross-examination that the respondent's investigation into these matters was speedy, thorough and reasonable in all the circumstances, at the end of which no action of any kind was taken against the claimant. Despite those findings, the claimant insisted that Claire Parker specifically had personally made a false allegation against him which led to him being placed on restriction. In his pleaded case in his claim form ET1 at page 39 in the bundle, the claimant states, "*Claire Parker made false malicious allegations against me. The allegations were not in good faith other than to pleasure herself and friends, hate, harassment, bullying, undermining my professional and racial targeting. The allegations have got nothing to do with work at all as it is proved by the outcome of the investigations, nothing was found to be true. All because Claire Parker is white British and I am black. NHS Trust did not want to disappoint a staff of their colour.*"
30. The respondent prepared and conducted its defence to that allegation on the basis that Claire Parker had never made any allegation against the claimant whatsoever. Claire Parker had received information from Laura Campbell, which information Laura Campbell subsequently put into her email dated 8 September 2021. When these were matters were put to him in cross-examination, the claimant persisted with his allegation that it was Claire Parker who was responsible for the act or acts of discrimination. Once it became apparent that the formal report of the incident had been undertaken by Laura Campbell, the claimant attempted to change his position somewhat by insisting that Claire Parker and Laura Campbell had conspired together to fabricate these false allegations and had both done so because of his race. After Laura Campbell gave her evidence and following a break of several days in the proceedings, the claimant then applied to amend his claim so that Laura Campbell would be named as the perpetrator of the acts of discrimination alongside Claire Parker. That application was made after the claimant's evidence had been given and after he had been cross-examined. It was made after Laura Campbell's evidence had been given and she had been cross-examined. Having heard submissions on both sides, the Tribunal was satisfied that the claimant had been given a more than adequate opportunity throughout the proceedings to properly identify the person against whom his allegations were being brought. The claimant had been in possession of all the documents in this case for many weeks prior to the start of the hearing. There had been a hearing at the claimant's request to consider his application for specific disclosure, which had taken place on 28 September 2022, only 2 months prior to the start of this hearing. It should have been apparent to the claimant by then as to the involvement of Miss Campbell. The Tribunal was satisfied that the balance of prejudice in this case was such that the application to amend should be refused.

31. In his cross-examination of Miss Campbell and Miss Parker, the claimant insisted that he had not been on 2/1 observations with either of them on the night in question. The claimant maintained his insistence that the CCTV footage would have showed that he was not on duty with either of them. The claimant also referred to the respondent's rota system and computerised record of notes made during each shift relating to patients (the "Paris" system) which he insisted would show that he was never on 2/1 observations with either Miss Parker or Miss Campbell. The respondent's position was that the CCTV footage did not cover the particular area where the observations had taken place and in any event would be unable to show whether the member of staff in question was actually asleep or just "falling asleep". The Tribunal found from the explanations given by the respondent's witnesses, that there were undoubted discrepancies in the operation of the Paris system. Entries on that system could be made in the name of nursing staff who were not physically making those entries, but who had given permission for entries to be made in their name. Whilst two members of staff may have been specifically placed on a rota, changes were often permitted during the course of the rota should one of those members of staff be called away for any particular reasons.
32. The Tribunal accepted Mr Kadema's evidence that he had never actually fallen asleep, nor had he left his post in circumstances where he was not authorised to do so. However, the Tribunal also accepted Miss Campbell's evidence that she genuinely believed Mr Kadema to be "falling asleep" such that she had to raise her voice whilst talking to the patient to ensure that Mr Kadema stayed awake. The Tribunal accepted Miss Parker's evidence that she had noticed a vulnerable patient being observed by one healthcare assistant when there should have been two, but that she had never seen or specifically named Mr Kadema as the one who had left his post. The Tribunal found that it was entirely reasonable for the respondent to undertake a proper investigation into the matters raised by Miss Campbell in her email dated 8 September. The Tribunal found that the concerns raised by Miss Campbell in that email were genuine and in no sense whatsoever influenced by the race of either Mr Kadema or anyone else.
33. Having been informed by Service Care Solutions that he was permitted to return to work for the respondent, the claimant demanded a written outcome of the investigation which had been undertaken into the allegations raised by Laura Campbell. The respondent initially offered to meet with Mr Kadema to go through the outcome of the investigation with him. That was done because the claimant was not of course an employee of the respondent and had not raised any formal grievance with the respondent. Because the investigation had found the evidence to be inconclusive, no formal report had been prepared. On 7 September the claimant in writing formally requested "a full report of the findings in writing from the Trust." It was following that letter, that the respondent offered to meet with the claimant to discuss the matter. The claimant declined that offer on 14 October. A formal report was prepared in writing, dated 21 October and sent to the claimant by email on that date.
34. The claimant alleges that the respondent's failure to provide him with a written report was an act of victimisation, contrary to section 27 of the Equality Act 2010. When it was put to the claimant that he had in fact received a written report, he adjusted his position somewhat, to allege that the delay in preparing the report and the respondent's attempt to persuade him to discuss the matter at a face to face meeting, was the retaliatory action for him indicating in an earlier email (the

protected act) that he was bringing a complaint under the provisions of the Equality Act 2010 relating to race discrimination.

35. There is no doubt that the claimant received a written report. Accordingly there can have been no detriment to him by not receiving a written report. The Tribunal found that the written report was prepared promptly and certainly within a reasonable period of time following the claimant's request. The Tribunal could not see how the claimant was placed at any disadvantage by having to wait no more than 10 working days for that report, following his written request. Any delay was not related to his race.

The law

36. The claims brought by the claimant engaged the provisions of the Equality Act 2010.

4 The protected characteristics

The following characteristics are protected characteristics—

- *age;*
- *disability;*
- *gender reassignment;*
- *marriage and civil partnership;*
- *pregnancy and maternity;*
- *race;*
- *religion or belief;*
- *sex;*
- *sexual orientation.*

9 Race

(1) Race includes—

(a) colour;

(b) nationality;

(c) ethnic or national origins.

(2) In relation to the protected characteristic of race—

(a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular racial group;

(b) a reference to persons who share a protected characteristic is a reference to persons of the same racial group.

(3) *A racial group is a group of persons defined by reference to race; and a reference to a person's racial group is a reference to a racial group into which the person falls.*

(4) *The fact that a racial group comprises two or more distinct racial groups does not prevent it from constituting a particular racial group.*

(5) *A Minister of the Crown ...—*

(a) *must by order amend this section so as to provide for caste to be an aspect of race;*

(b) *may by order amend this Act so as to provide for an exception to a provision of this Act to apply, or not to apply, to caste or to apply, or not to apply, to caste in specified circumstances.*

(6) *The power under section 207(4)(b), in its application to subsection (5), includes power to amend this Act.*

13 Direct discrimination

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

(2) *If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.*

(3) *If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.*

(4) *If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.*

(5) *If the protected characteristic is race, less favourable treatment includes segregating B from others.*

(6) *If the protected characteristic is sex—*

(a) *less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;*

(b) *in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth.*

(7) *Subsection (6)(a) does not apply for the purposes of Part 5 (work).*

(8) *This section is subject to sections 17(6) and 18(7).*

26 Harassment

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) A also harasses B if—

(a) A engages in unwanted conduct of a sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection (1)(b).

(3) A also harasses B if—

(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,

(b) the conduct has the purpose or effect referred to in subsection (1)(b), and

(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

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

(a) the perception of B;

(b) the other circumstances of the case;

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

(5) The relevant protected characteristics are—

- age;*
- disability;*
- gender reassignment;*
- race;*

- *religion or belief;*
- *sex;*
- *sexual orientation.*

27 Victimisation

(1) 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.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

123 Time limits

(1) Proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

(2) Proceedings may not be brought in reliance on section 121(1) after the end of—

(a) the period of 6 months starting with the date of the act to which the proceedings relate, or

(b) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

136 Burden of proof

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

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

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

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

(5) This section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to—

(a) an employment tribunal;

(b) the Asylum and Immigration Tribunal;

(c) the Special Immigration Appeals Commission;

(d) the First-tier Tribunal;

(e) the Special Educational Needs Tribunal for Wales;

(f) an Additional Support Needs Tribunal for Scotland.

37. The claimant is black African and brings complaints of unlawful direct discrimination to section 13, harassment contrary to section 26 and victimisation contrary to section 27. He does not name any specific comparators, but invites the Tribunal to consider a hypothetical comparator who is white British and whose circumstances are otherwise the same as the claimant's.

Allegation 1

38. The claimant alleges that his treatment by Nicola Dalton on the Ivy Clover Ward on 10 March 2021 was both direct discrimination contrary to section 13 and harassment contrary to section 26. The Tribunal found that there was likely to have been an exchange between the Miss Dalton and the claimant relating to whether or not the patient should be allowed snacks or treats at that particular time. The Tribunal found that reference may well have been made to the fact that the claimant was not a permanent member of staff on that ward and that he had not been involved in the preparation of the care plan for that particular patient. The Tribunal found that a white British healthcare assistant in the same circumstances as the claimant would probably have been spoken to in a similar manner. The Tribunal found that the reason why the claimant had been spoken to in that manner was in no sense whatsoever connected to his race.

Allegation 2

39. The claimant alleges that he was deliberately given a faulty alarm more than twice by Lynne Murphy and that this was done deliberately to cause him harm when he gained access to the ward and that the reason why this was done was because of his race. The Tribunal found as a fact that Miss Murphy had not deliberately given the claimant faulty alarms in the manner described by the claimant. Whilst the claimant may well have been given a faulty alarm, that was likely to have been accidental. It could never have been Miss Murphy's intention to cause the claimant harm in the way described by the claimant, because he could not have gained access to the ward without a fully operating alarm. The reason why the claimant was given a faulty alarm was in no sense whatsoever connected to his race. Whilst it may have been unwanted conduct in the eyes of the claimant, the Tribunal was not satisfied that it was reasonable for that conduct to be regarded as having the effect described by the claimant.

Allegation 3

40. The claimant alleges that Lynne Murphy said to him, "Come on, come on, come on" whilst he was washing his hands in the security airlock. The claimant's submission was that this was less favourable treatment than would have been administered to a white British employee in the same circumstances and also amounted to unwanted conduct contrary to section 26. The Tribunal found it likely that words similar to those described by the claimant were used, but that they were no more than a trivial indication of impatience or frustration by Miss Murphy. They were certainly not related in any way whatsoever to the claimant's race.

41. Allegation number 1 is alleged to have been committed by Nicola Dalton on 10 March 2021. Allegations 2 and 3 are said to have been committed by Lynne Murphy on 7 April and 28 April. Pursuant to section 123 of the Equality Act 2010, the claimant's complaint to the Employment Tribunal about those incidents ought to have been presented within 3 months of the dates of those incidents. Allegation 1 ought to have been presented by 10 June 2021, allegations 2 and 3 (if connected)

by 28 July 2021. The Tribunal found that those three allegations were wholly unconnected to the later allegation in respect of Linnet Ward, which occurred in September 2021. No explanation was given by the claimant as to why he had not entered into Acas early conciliation and/or presented his claim to the Employment Tribunal in respect of the first 3 allegations, within the three month time limit. The claimant has failed to produce any evidence as to why the claims were not presented in time or as to why it was be just and equitable for time to be extended. Those claims are out of time and are dismissed.

42. Allegation 4 relates to those concerns expressed by Claire Parker and Laura Campbell about what is alleged to have happened on the nightshift on 1 September 2021 on Linnet Ward. Laura Campbell's evidence was that she was working on a 2/1 observations with Mr Kadema, during which she noted that Mr Kadema was "falling asleep". Miss Campbell never alleged that the claimant had actually fallen asleep. Miss Campbell informed Claire Parker of her concerns. Claire Parker confirmed that she had noticed a different healthcare assistant asleep and snoring the previous week and had also noticed on one occasion that only one healthcare assistant had been present observing a patient who was categorised as requiring two healthcare assistants observing at all times. The only time Mr Kadema was actually mentioned in any of this was relating to Laura Campbell's observation that he appeared to be falling asleep. It is accepted that Claire Parker informed Laura Campbell that she may care to report her concerns formally to the respondent. Laura Campbell did that in her email of 8 September. Miss Campbell's words about the claimant were:-

"A similar situation occurred on Wednesday 1 September when a different member of staff Amos was also falling asleep in the communal area while we were sat with the same patient only this time I was raising my voice talking to the patient, intentionally getting louder to keep him awake. On this occasion the staff member wasn't snoring".

43. As a result of that report, the respondent conducted an investigation. Mr Kadema accepted in cross-examination that the respondent was obliged to conduct an investigation in those circumstances. Mr Kadema however took great exception to being put on restriction when he was identified as appearing to be falling asleep. Mr Kadema insisted that he had never been observations that night with Laura Campbell and that the records kept by the respondent showed that to be the case. The claimant insisted that this was direct discrimination contrary to section 13 and harassment contrary to section 26. For the reasons set out above, the Tribunal accepted the respondent's explanation about this incident and accepted Laura Campbell's version as more likely to be correct. The Tribunal was satisfied that Mr Kadema appeared to Laura Campbell to be falling asleep. The Tribunal found it perfectly reasonable for Miss Campbell to inform Claire Parker, who was the senior nurse on duty that night. The Tribunal found it entirely reasonable for Miss Campbell to have formally reported the matter in her email on 8 September. The Tribunal found that the reason why Laura Campbell did this was because of her genuine concern about Mr Kadema appearing to falling asleep. The Tribunal found that Miss Campbell informing Claire Parker and formally reporting the matter had nothing whatsoever to do with the claimant's race. The Tribunal found that Miss Parker suggesting to Miss Campbell that she may care to report the matter formally was again in accordance with the respondent's policies and had nothing to do with the claimant's race. The Tribunal found the claimant's allegation that Miss Campbell and Miss Parker had deliberately conspired to get him into trouble

because of his race, to be completely fanciful. Whilst being formally reported and placed on restrictions was certainly unwanted conduct which the claimant found to be humiliating, the Tribunal found that that had nothing to do with the claimant's race. In fact, the claimant did not complain about being placed on restriction. His allegations relate to Claire Parker and/or Laura Campbell making false allegations against him because of his race. The Tribunal accepted the respondent's explanation as to why those steps had been taken and found that there was no racial element in them whatsoever. The Tribunal found it likely that a white British healthcare assistant who was appearing to be falling asleep would also have been reported by Miss Campbell and/or Miss Parker.

Allegation 5

44. The final allegation relates to the claimant's assertion that there was an unreasonable delay in the respondent providing him with a written report into its investigation into the allegations against him. The Tribunal found that there was no unreasonable delay. There was no obligation upon the respondent to provide a written report in circumstances where the claimant had not raised a formal grievance and where this investigation had shown that no further action would be taken. The Tribunal found that the 10 days taken to provide the claimant with a written report was entirely reasonable in all the circumstances. The Tribunal found that the claimant was not subjected to any detriment by having to wait 10 days for that report. Whilst the claimant may have undertaken a protected act when indicating in his request for a report that he was considering a complaint of race discrimination, the time taken to prepare the report was in no sense whatsoever related to the claimant's race.
45. For those reasons the claimant's complaints of direct race discrimination, harassment and victimisation are not well-founded and are dismissed.

Employment Judge Johnson

Date: 7 February 2023

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