



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr Josiah Ocran

v Coca Cola European Partners Great Britain Limited

Heard at: Watford

On: 3 to 6 July 2017
20 July 2017 (In chambers)

Before: Employment Judge Bedeau
Members: Mr D Palmer
Mrs C Baggs

Appearances

For the Claimant: Ms E Godwins- Employment Consultant
For the Respondent: Ms A Carse - Counsel

RESERVED JUDGMENT

1. The claimant's direct race discrimination claim is not well-founded and is dismissed.
2. The claimant's harassment related to race claim is well-founded.
3. The case is listed for a remedy on 27 October 2017 with a time estimate of one day.

REASONS

1. By a claim form presented to the tribunal on 16 October 2016, the claimant made claims of race discrimination, breach of contract, victimisation and bullying/harassment.
2. In the response presented to the tribunal on 17 November 2016, the respondent averred that it did not discriminate against the claimant because of his Ghanaian national origins nor had it racially harassed him.
3. The case was listed for four days by Employment Judge Lewis at the preliminary hearing held on 5 January 2017 to start on 3 July 2017. It was clarified by the parties that there were only two claims to be tried, namely

harassment related to race and direct discrimination because of race as the claimant withdrew his breach of contract, indirect race discrimination and victimisation claims.

The issues

4. The issues between the parties which fall to be determined by the tribunal are as follows:-

5. Section 26: Harassment on the grounds of race

5.1 Did the respondent engage in unwanted conduct as follows:-

5.1.1 In what was said to him by Mr Probert at meetings between 10 and 24 June 2016?

5.1.2 In particular, by Mr Probert's references to the claimant's Ghanaian management experience and / or style?

5.1.3 In Mr Probert pressurising the claimant to accept one of three choices, which were resignation; demotion to Team Leader; or a performance improvement plan?

5.1.4 In Mr Probert's discussions with Mr Hyman and Mr Percy about the claimant?

5.1.5 In Mr Probert excluding the claimant from management meetings?

5.2 Was the conduct related to the claimant's protected characteristic?

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

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

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

6. Section 13: Direct discrimination on grounds of race

6.1 Has the respondent subjected the claimant to the following treatment falling within section 39 Equality Act 2010, namely:-

6.1.1 In the matters set out at 5.1 to 5.5 above?

- 6.2 Had the respondent treated the claimant as alleged less favourably than it treated or would have treated his comparators? The claimant relies on the following comparator, Mr Hebb.
- 6.3 If so, are there facts from which the tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?
- 6.4 If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

7. Remedy

- 7.1 If the claimant succeeds, in whole or part, the tribunal will be concerned with issues of remedy.
- 7.2 There may fall to be considered a declaration in respect of any proven unlawful discrimination, recommendations and/or compensation for loss of earnings, injury to feelings, and/or the award of interest.

The claimant's application to adduce additional evidence

8. Before evidence was called, Ms Godwins, on behalf of the claimant, applied to adduce further documentary evidence in the case, namely 85 pages of email correspondence. She asserted that the facts relied upon by the claimant in support of his harassment claim were the same as for the direct race discrimination as they relate to meetings held between the claimant and Mr Karl Probert, Operations Manager, in June of 2016 and to discussions Mr Probert allegedly had with Mr Paul Hymers, Human Resources Business Partner and Mr Robert Pursley, Operational Excellence Manager and were relevant to the claimant's further assertion that Mr Probert excluded him from some management meetings. Mr Probert became the claimant's line manager from 6 June 2016.
9. The learned Judge made orders for the exchange of witness statements to take place on 5 May 2017, for the claimant to serve a schedule of loss by 23 June 2017 and to notify the respondent before 3 March 2017, of the documents to be included in the joint bundle. The respondent was ordered to provide to the claimant a full, indexed and paginated bundle of documents on or before 24 March 2017.
10. We were told by the representatives that the order in respect of witness statements was varied by mutual agreement to 12 May 2017.
11. On 20 May 2017, following the exchange of witness statements on 12 May, he handed to his legal advisors a large amount of documents challenging the assertions in the respondent's witness statements about his poor performance. Those documents were not, it would appear, considered in

good time to be included in the joint bundle. Those advising the claimant thought that they should be included in a supplemental bundle. This process was not completed until 30 June 2017 when, in PDF format, the documents were sent to the respondent's legal representatives.

12. On Friday 30 June 2017, the claimant's legal representatives sent by email, documents the claimant intended to refer to in evidence comprising of email correspondence with various individuals, the purpose of which was to challenge the assertions in the respondent's witness's statements about the claimant's performance.
13. The claimant, through Ms Godwins, stated that he was suffering from work related stress and depression and had been on sick leave taking medication, from June 2016 up until the termination of his employment in February 2017. She also said that he had been working full-time from March 2017 for another employer.
14. According to Ms Godwins the additional documents were relevant as they sought to challenge the various statements in the respondent's witness statements about the claimant's performance prior to June 2017. The reason why they were served late was that the claimant was not fit and able to address disclosure in good time. As they are relevant, they should be admitted.
15. Ms Carse, counsel on behalf of the respondent, stated that having perused through the documents, some were incomplete and she could not follow the email exchange; she did not have sufficient time through them and prepare further cross-examination of the claimant; two of the individuals referred to Mr Paul Lane and Mr Asif Ali, would have to be spoken to but Mr Ali left the respondent's business; instructions would need to be taken from Mr Lane and there was no certainty that that would be possible even if the tribunal were to grant a short adjournment, and the claimant had not prepared a supplemental witness statement referring to the additional documents and was in the dark as to what he would say in evidence in relation to the relevance of the documents.
16. We took into account the concerns expressed by Ms Carse. We are required to do justice to both parties by balancing all relevant factors including the issue of proportionality and the overruling objective. We take into account the issue of proportionality and the overriding objective and came to the conclusion, unanimously, that the additional documents were relevant as, on their face, they challenged the assertions made by the respondent's witnesses in their witness statements about the claimant's performance prior to the meetings he had with Mr Probert in June last year. Ms Carse, in response to a question the tribunal put to her, stated that she would be inviting the tribunal to make findings of fact in relation to the claimant's performance prior to his first meeting with Mr Probert on 10 June 2016. The documents were produced late in the day and we were not overly impressed with the reasons given by Ms Godwins for the delay as the claimant was able to secure for himself and engage in further employment in

March of this year. The documents should have been served much earlier than on 30 June 2017. They are, however, relevant and admissible.

17. Time must be afforded to the respondent to prepare for further cross-examination of the claimant on them. We ordered that he should serve a supplemental witness statement on the respondent focussing solely on the additional documents. Further, the supplemental witness statement had to be served on the respondent by not later than 5pm on the first day of the hearing.
18. We adjourned the hearing to the following morning for the respondent to tell the tribunal whether it would be in a position to continue. The following day Ms Carse told us that she would not be applying for an adjournment and was prepared to proceed.

The evidence

19. The claimant gave evidence and did not call any witnesses.
20. On behalf of the respondent, evidence was given by Mr Robert Pursley, Senior Manager, Operational Excellence; Mr Paul Hymers, Human Resources Business Partner; and Mr Karl Probert, Operations Manager.
21. In addition to the oral evidence two bundles of documents were adduced comprising in excess of 520 pages. References will be made to the documents as numbered in the bundles.
22. The claimant is of Ghanaian origin and worked in Ghana for the Guinness Company as a manager.
23. He commenced employment with the respondent on 29 September 2016, as a Production Manager, Upstream Department, Large PET at the respondent's site in Edmonton, north London. He was one of three Production Managers there all of whom reported., at the time, to Mr Darrell Vaz, Operations Manager.
24. In the claimant's contract of employment, it states:

“You may be required to perform a different job role or other reasonable duties from time-to-time, subject to your skills and abilities, which CCE decides is necessary to meet the needs of the business. You may also be required to carry out your role for another company within the Coca Cola Enterprises Inc. Group.”

(Page 71 of the joint bundle)

25. When he joined the respondent Mr Karl Probert was the Production Manager for the Large Bottles Production Line (Large PET) and Mr Shane Hebb was the Production Manager for the Small Bottles Production Line (Small PET) who had previously been in the claimant's role as Upstream Production Manager. We find that it is common for the production managers to move

between these roles as directed by senior management to suit the needs of the business and to broaden their knowledge and skills.

26. The Upstream Production Manager has responsibility for four areas within the factory: Planning; Raw Materials; Laboratory and Process. each of which is led by a Team Leader who, in turn, reports to the Upstream Production Manager. Laboratory is engaged in the day-to-day checking and quality assurance of products. Planning receives the production plan from central planning, schedules it in the best way possible for the factory and requests right materials to meet the plan. This team is also responsible for controlling agency labour costs and paying the invoices. The Raw Materials Team receives in the materials requested by Planning, return anything that needs to go back and interface with the Planning to confirm when things have arrived. They also provide some of the materials to the production lines. The Process Team manufactures the syrups for the respondent's products. Planning call off ingredients for them to make the syrups which are then made up in line with what is required for the plan. The Production Manager, Upstream, is required to have a breadth of knowledge to understand how all these processes interconnect and ensure things are joined up. We further find that the Production Manager would need the support of the team leaders in delivering the plan for the day. In doing so, he or she would be required to use their skills, knowledge and experience around how the factory works and how to lead and manage people at different levels.
27. From early December 2015, Mr Vaz stopped working at the site and subsequently went on sick leave. His employment ended around 4 March 2016. This created a vacancy for the post of Operations Manager which was not filled until a few weeks later.
28. At the end of January 2016, Mr Robert Pursley, Senior Manager, Operational Excellence, was asked to conduct the end of year review meetings for his direct reports, including the claimant. There are three gradings: "Does not meet expectations"; "Meets expectations"; and "Exceeds expectations". The claimant was given an overall grading of "Meets expectations" as it was acknowledged by Mr Pursley that he had only been in post for nearly four months and wanted to encourage and support him.
29. In relation to the competency, "Professional: 03 Communicate with Impact", the claimant was given a rating "Meets" that is "Meets expectations". Mr Pursley's commented,

"Good communications skills are at the heart of Josiah works. There needs to be the correct balance between engaging though consultation and ensuring what needs to be done gets done in a timely manner.

Josiah's style and approach (your "bedside manner") is one that will succeed in the long run, but we will need to strike the right pace with this approach. Some good examples of this competency in the short time Josiah has been on site."
30. In relation to "Professional:05 Deliver Winning Performance", Mr Pursley's comments were:

“A good start to Josiah’s career at CCE, and he brings a wealth of knowledge and skills which will stand him in good stead as he gains more experience in the Site. A great opportunity lies ahead with Upstream in terms of SAP and also the proper organisation and control of this important area of the factory. I believe Josiah’s approach to how he works with people will set a clear example of how we want our people to behave. I wish you success in 2016.”

31. We find that the claimant’s initial 12 to 16 weeks in the role was what could be described as a “honeymoon period” when he was trying to learn more about his work and was given, overall, a favourable rating but things were to change.
32. By early March 2016 Mr Pursley was becoming more concerned about the claimant’s performance as it was not where it needed to be. He discussed it with Mr Steve Thorpe, Acting Site Director, who also shared his concerns. In order to assist the claimant in getting up to speed, Mr Pursley decided to implement weekly one-to-one meetings with him. This was to get him back on track and to give him clarity in relation to areas of his work which did not seem to be getting better and required significant change to be made.

One-to one meetings

33. Their first one-to-one meeting was held on 24 March 2016 and notes were taken by Mr Pursley. We find that notes of each one-to-one meeting would be taken and typed up by him. They would then be sent to the claimant prior to the next one-to-one meeting. The claimant was, therefore, in a position at the follow-up meeting to agree or disagree with the content of the notes.
34. At the start of the meeting on 24 March 2016, Mr Pursley explained that while progress had been made in the Process and Laboratory areas there was still a lot of structural and people issues in the Planning and Raw Materials Teams which needed to be addressed. A number of issues required action from the claimant which was discussed during the meeting. They included a plan for the replacement of Mr John Rodgers, Team Leader in Raw Material, who was due to retire in a few weeks’ time. There was no clear plan on how the claimant was going to deal with his departure and who would cover his position. There was also the issue of the claimant’s poor relationship with Ms Hayley Criddle, Team Leader in Planning. Mr Pursley was concerned that he, the claimant, needed to find a way of managing Ms Criddle more effectively. They discussed using the Situational Leadership Model of management which required the use of a particular management style depending on the skills and capabilities of those to be managed. They also discussed creating a better relationship with Mr Paul Lane, Finance Partner and the implementation of a more formal system of one-to-ones with his team. One of the key action points from the meeting was for the claimant to develop a plan of action to move things forward in a structured way. Mr Pursley wanted him to keep track of what he was doing so that if things started to go wrong, he could very quickly see and work out what

needed to be done to correct them. He offered to support him in making progress over the next four weeks.

35. In Mr Pursley's view, the claimant did seem to make some progress as his relationship with Mr Lane had improved and he ensured that his team focussed on Cincom queries, which are financial. The claimant thanked Mr Pursley for his support in managing Mr Rodgers. (132 and 134)
36. The second one-to-one meeting was held on 5 April 2016 during which Mr Pursley recognised some progress had been made by the claimant in finance queries and yield issues. He also noted that he made a template for one-to-one meetings with his team and had meetings with two members though not with Ms Criddle. He did not, however, produce a plan of action for their meetings and was advised to prepare something to demonstrate the structure he was going to put around his role. They discussed outstanding action points, such as: meeting with Mr Lane and how they could agree a way of working together; meeting with the full team before the daily 8.30am 24 hours review meeting; and to address the issues concerning Ms Criddle.
37. The third one-to-one meeting was on 15 April 2016. The claimant had been provided with a model by Mr Hymers, for the management of Ms Criddle and had held his first meeting with her on 12 April but it did not go as planned as he was unable to tell her the issues he wanted to discuss. In relation to his action plan, he said to Mr Pursley that he would draft one which Mr Pursley would have by the following Monday morning. He said that he had met with Mr Lane and set out some KPIs.
38. The fourth meeting was held on 25 April 2016 when the claimant provided his action plan which was discussed but it was not very specific as it did not specify what he was going to do and how he was going to do it. At the end of the meeting Mr Pursley made it clear that there was still a lot of work to be done to get to a point where the claimant was in control of Upstream Production. He said that the claimant was receiving a lot of support from senior managers to achieve this and there was an expectation that in the short term, he would be able to stand on his own two feet to do the job he was employed to do. In Mr Pursley's view, seven months had passed and the claimant was not where he was meant to be. It was agreed that they would continue with the one-to-one meetings before Mr Karl Probert was due to take over his line management on 1 June 2016.
39. We find that Mr Pursley was of the view that the claimant's progress was mixed in the weeks following the fourth one-to-one meeting. On the positive side, he took steps to improve the performance of Ms Chantelle Leftwich, Labour Planner with whom there was an apparent breakdown in their relationship. With the support of Mr Probert, the claimant put in place a process for logging labour feedback in the Service Log and responded to feedback from the shop floor. He was also receiving support from Mr Nick Nixon, Site Director. (162,175,176, and 180).

40. On the less positive side, Mr Pursley was aware that Ms Leftwich responded badly to the way the claimant was trying to manage her and went on sick leave on 25 May 2016, suffering with stress. He struggled to get access to the Cincom system; Mr Lane had to contact Mr Pursley to get support in raising an invoice in Ms Criddle's and Ms Leftwich's absence; the claimant's team failed to provide their orders for labelling to the Central Planning team in time despite a clear request to do so promptly; and Mr Lane had to step in to try and secure training for Ms Leftwich and Ms Criddle on CCE Buy systems.
41. The last one-to-one meeting was held on 1 June 2016, during which Mr Pursley and the claimant discussed Ms Criddle's return from sick leave; Mr Istiaque Ahmed, Planner, had gone on sick leave with stress and did not want to return to his role in Planning. The claimant, therefore, needed to work on a plan for managing that situation. The management of Cincom queries and purchase order issues were still not where they needed to be. Ms Leftwich was on sick leave due to stress; and the claimant was still receiving support from senior managers.
42. The claimant had done additional work on his action plan but Mr Pursley was still not happy with it as there needed to be dates by which he was going to implement the actions points. They discussed four headings which could be used to structure the plan and the need to map the dates on it to see how progress was being made. Not much progress had been made on the plan and Mr Pursley was disappointed. (210 to 211).
43. Prior to Mr Probert taking over the claimant's line management, Mr Pursley had a discussion with him about whether the role of Production Manager, Small PET, might be better suited to the claimant than the Upstream role. Mr Probert had recently been promoted from position of Production Manager, Small PET, to Operations Manager and had left a stable, good performing team. The claimant had experience in working on productions lines and the position was considered as a way of helping him.
44. We find that at the point of handing the claimant over to Mr Probert, Mr Pursley felt that there were still significant problems with the claimant's performance. He was concerned that after eight months in the post, he had the sense that the claimant was struggling to create a structure and organisation about his daily work and in dealing with difficult conversations and management issues. Mr Probert was considering putting the claimant on a Performance Improvement Plan which Mr Pursley saw as a constructive tool to help someone improve their performance.

Mr John Rodgers' disciplinary

45. On 18 April 2016, Mr Probert was promoted to Operations Manager. Earlier on in the claimant's employment, that is, in or around November/December 2015, an incident occurred concerning the use of a forklift truck by Mr John Rodgers, Team Leader, Raw Materials. Staff members reported fumes coming from the vehicle but it was not taken out of operation. The claimant

investigated the incident as it raised serious health and safety issues and Mr Rodgers was subsequently invited to a disciplinary hearing. We find that the invitation was not sent by the claimant but centrally by someone in Human Resources.

46. Mr Probert was the disciplinary manager who questioned Mr Rodgers whereupon Mr Rodgers said that he was not told by the claimant that he was the subject of an investigation and had no inkling that his meeting with him would potentially lead to a disciplinary hearing.
47. From the evidence, we find that it was unclear what the claimant's role was. In his view, he believed he was conducting a fact-finding investigation and not a disciplinary investigation. Whatever was his role, we are satisfied that his investigation came early on in his employment with the respondent and there was no evidence that he had received relevant training on how to conduct of a fact-finding investigation and/or a disciplinary investigation leading to a possible disciplinary hearing. Any criticisms of his conduct have to be seen in that context.
48. As already stated, Mr Probert took over the claimant's line management on 6 June 2016. On 24 May, he met with the claimant to discuss how he proposed to carry out his one-to-one meetings once he became his line manager. He sent the claimant a document called Employee Review Tracker, to fill in each month to be discussed at their meetings as a way of monitoring his performance against set objectives. It had sections on whether the objectives were on track or off track; for comments; as well as what had been done well and what could have been done better. We find that this approach in monitoring the claimant's performance began with Mr Pursley during the one-to-one meetings with the claimant and was to be followed by Mr Probert who used a slightly different method. (194-195)
49. On 1 June 2016, Ms Criddle resigned from her employment in an email sent to Mr Hymers. She stated that part of the reason was the claimant, including the way in which he had managed her and behaved towards her. She cited his lack of experience and asserted that he was "out of his depth". She also referred to the respondent recruiting Upstream Production Managers with very little relevant experience. (206-207)
50. Ms Criddle's resignation was accepted by the respondent.
51. The respondent's senior management team with the approval of Mr Hymers, decided that on Mr Probert's line management of the claimant, the claimant should move to the Production Manager, Small PET post as they had concerns about whether he was performing effectively as Production Manager Upstream. We further find that the claimant said to Mr Probert, on more than one occasion that his experience was on production lines and manufacturing and asked Mr Probert to consider him for the Production Manager, Small PET role upon his promotion to Operations Manager.
52. Senior management's concerns about the claimant's suitability for the Production Manager Upstream, was borne out in the evidence given by Mr

Pursley who came over across to us as a credible witness, a competent and experienced manager, who was anxious to help the claimant improve his performance but still had genuine ongoing concerns about his performance even at the time when Mr Probert took over as line manager.

53. Although senior management were concerned about the claimant's apparent inability to deliver results in the Upstream side of the business, they still wanted him to be given the opportunity of performing in a Production Manager role based on his personality and on the effort he put into his work but should be put on a Performance Improvement Plan in the Small PET role to help him focus on the areas of his work which were in need of improvement.

Mr Probert's meetings with the claimant

54. Mr Probert's first one-to-one meeting with the claimant was held on 10 June 2016. He made notes in his personal diary which were later typed up. The claimant did not take notes during the meeting. He, however, challenged the accuracy of the typed notes and asserted that Mr Probert was not making notes. Having read the typed up notes in the bundle and having heard the evidence given by both the claimant and Mr Probert, we do find that the notes in the joint bundle were produced shortly after the meeting which summarised the matters discussed. From the notes the claimant's one-to-one meetings with Mr Pursley and his Action Plan were discussed. The claimant said that Mr Pursley had told him that he needed to put completion dates in the plan. When asked whether he had done it, he replied, no. They discussed the fact that the claimant forgot to provide Mr Probert with the Upstream Service Level Performance figures and that he should do so,. His performance as Upstream Manager was discussed as well as the fact that three of his staff had talked about handing in their resignations, namely Ms Hayley Criddle, Mr Wilcox and Mr Ali. Ms Leftwich and Mr Ahmed were off on sick leave suffering from stress. Mr Probert referred to occasions when the claimant spoke aggressively to his team members and on one occasion when he, Mr Probert, had to intervene. His apparently blunt email style was also discussed. The claimant raised the issue of lack of support in Upstream. They also discussed the move to Production Manager, Small PET, a matter Mr Probert said was raised by the claimant prior to the meeting on 10 June. Mr Probert informed him that he had decided to move him to that position and that he would put him on a Performance Improvement Plan to enable him to have a clear plan and real focus on areas he needed to improve, such as, his management style, speed of execution, follow up and management of daily/weekly routines. The weekly performance review meetings would take place every Friday. The PIP would be implemented the following Monday 13 June 2016.
55. We find that the claimant agreed to take on the position of Production Manager, Small PET as he had discussed it with Mr Pursley and in his witness statement, he stated that in respect of the meeting held on 10 June 2016 with Mr Probert, that he asked Mr Probert to allow him to present his

plan for the role of Production Manager, Small PET but Mr Probert responded by saying that he did not want to see the presentation.

56. The claimant also alleged that Mr Probert said that he was not going to “beat around the bush” and that he, that is the claimant, was not fit to be a manager. This statement does not appear in the notes nor had the claimant produced contemporaneous notes in support of it. We do not accept that it was said at the meeting. (215-216)
57. The claimant told the tribunal that the meeting did not go as planned as he was upset, particularly about the decision to put him on a PIP.
58. On Monday 13 June 2016, he began work as Production Manager, Small PET. At that time the PIP had not been drafted by Mr Probert.
59. A daily performance review meeting was held on 15 June 2016 when Mr Probert went through the Lineview manual which is the respondent’s online monitoring system for the operation of its production lines. It is one of the tools a Production Manager would need to use to understand the manufacturing processes in order to make the right decisions and engage in meaningful conversations with their team. The claimant discussed his concerns around taking over the position of Production Manager, Small PET as he did not feel confident that he would be successful in the role. He said that he had seen Mr Darren Heslin, Small PET, Production Team Leader, talking and laughing with Ms Criddle and believed it was about him. He questioned whether he would be able to manage Mr Heslin. Mr Probert discussed the PIP and the areas in which the claimant’s performance would require improvement. such as: organising his workload; follow up; performance; management style, and routine management. (216)
60. A further meeting, not a performance review, was held on 17 June and not as the claimant alleged, on 16 June. The purpose of which was for Mr Probert to provide the claimant with the support he would need in his new role. The meeting was secretly recorded by the claimant and later transcribed. From the transcription, the claimant said that he visited the shop floor, was taken around the line and told how the machines worked, the routines and processes. Mr Probert referred to a member of staff having observed the claimant “moping around”. The claimant did not understand what the term meant. Mr Probert explained it by reference to being in possession of a winning lottery ticket but with the numbers washed out.
61. The claimant asked Mr Probert what his options were and referred to the meeting held on 10 June when they discussed stepping in to a Team Leader role. Mr Probert replied that he did not believe that the claimant was at the level of a Production Manager and that if he had a Team Leader role he would consider suggesting to him that he take it on to learn more about the business and to develop his skills before moving back to production management. He did not offer the claimant a Team Leader role or

suggested a specific move as there was no role available at Edmonton in production at the time. (219-246).

62. Of significance, the claimant said in evidence that there was no reference to his race at the meetings on 10 and 16 (or 17) June 2016.
63. He alleged against the respondent that Mr Probert excluded him from management meetings but in his evidence he clarified that he was referring to one meeting which took place either on 15 or 17 June 2016. He said that Mr Probert on that day instructed him to go on Line 5 knowing that a managers' meeting was due to take place on the same day. It was an attempt on the part of Mr Probert, according to the claimant, to prevent him from attending the meeting. This was denied by Mr Probert who said that the claimant had elected to go on to Line 5 to learn more about his new duties and about the manufacturing process in small bottles.
64. The monthly management meetings are attended by the Site Director as well as senior and middle managers including Production Managers. There was a clear conflict in their evidence. To resolve it we considered the transcript, in particular, what Mr Probert said to the claimant was, "You missed the monthly meeting today anyway, so I sent your apologies because you being on the line..." The claimant did not challenge this statement during the meeting and appeared to have accepted it. He did not say in response that Mr Probert had instructed him to work on Line 5 to avoid his attendance at the meeting. We, therefore, find that he elected to work on Line 5 and as a result, Mr Probert apologised to those present at the managers' meeting for his absence.
65. At the meeting they discussed a range of issues including managing his teams absence and a possible Team Leader position which the claimant had raised on an earlier occasion as a potential opportunity for him but Mr Probert's response was that it had already been filled. It is clear from reading the transcript that Mr Probert was not against using profanities in getting his points across to the claimant.
66. The claimant met with Mr Pursley on 22 June 2016 and secretly recorded their meeting. Although he said that Mr Probert had told him that he was going to be moved to a Team Leader role this was something Mr Pursley did not believe was the case as no such role was available. The claimant told Mr Pursley that he had asked Mr Probert to look at other options for him. Mr Pursley advised that he needed to be clear about what he wanted and at what level. He had to focus on his PIP as he was not performing at the required level. He had to engage in the process and decide on the best way forward. We find that he was saying to the claimant that he, the claimant, was the only person to judge what was best for him having regard to his abilities. He appeared to be encouraging the claimant, who was looking at opportunities elsewhere, to stay the course, "You can't back away." At the end of the meeting the claimant thanked him for his advice. (257-262)

67. Although the claimant said that he had a meeting with Mr Probert on Wednesday 22 June, we find that it was in fact held on Friday 24 June 2016 as they had agreed the weekly performance reviews should be held every Friday. This meeting was also secretly recorded by the claimant and later transcribed. The following is an extract relevant to the claimant's case. References to K is to Mr Probert and J is the claimant:

"K - Yeah, I think so there's two things for me Josiah is that obviously I spoke to Paul and had that conversation with him. He said he would go and have a look in and around the business to see what there was. I spoke to him this morning and he said to be fair although there's a few roles advertised here and there to be fair I don't want you going as an Operator/Technician somewhere.

J - No, I don't want to, I wouldn't go, I wouldn't want. For me it's very difficult and the first place to drop my position now because that the position I've operated such a long time.

K - But it depends. You also need to remember it depends on the structure of some companies isn't the same as the structure, for instance, the guy who interviewed you came for a Production Manager. He is operating at a Production Manger's level according to him based on that's structure, but then he's then reporting to a Manufacturing Manager who's then reporting to an Operations Manager who then reports in to the sub-Director. Here at Edmonton you can all cope. You've got Team Leaders, you've got Team Leaders and then you've got Production Managers and then you've got an Operations Manager. You've got one less tier if you see what I mean.

J - When I had Guinness, I had shift managers reporting in to me and I had team leaders reporting in to shift managers and I had engineering manager reporting in to me. And I did that for three and a half years.

K - Where was that? That was at Ghana?

J - Yeah I went into Ghana but before then even I was doing six months OE within my role and the opportunity came and they gave me the opportunity. The point is what card and I don't want this to go. The point is this culture is not me honestly and I don't know. I was a bit more motivated to fight a lot of battles but to be honest with you the meeting we had should meet, that Friday when we had it I told you I had to go home straight up. It was just a very big blow to me and it was totally different to all the meetings I've had with Bob and obviously you said your not Bob and that's why I'm struggling to get out of it.

K - I had a chat with Bob about that and he said again, even in the first meeting I had with Josiah, Josiah responded to me, he said, which I've literally got four weeks at Bob. He was aware that actually he needed to improve over those weeks, right.

J - And that was pertaining to planning and that's the point. I can let you read all that.

K - ... there's a couple of choices that you've got. Its either you stay, you fight on the Performance Improvement Plan or you look to go down to the Team Leader level. We can send out announcement to say the reason for it is personal, family related issues 'cause obviously the shift pattern supports your requirements kind of thing. As a result of people actually knowing, don't get me wrong, people will put two and two together. Like I said before Josiah and come up with six but it's your decision. It's not my decision it's your decision. You've either got the Performance Improvement Plan or there is a position to step down to as a Team Leader. But you've gotta make that decision, not me. Now the conversation that I had with Paul about it is, as far as I'm concerned, I know you might have had the team and don't take this the wrong way, the culture between Ghana managing and the culture between here is totally different. How you can get people to do things, how you can speak to people, how you communicate. Like here to fair and a lot of people who are lazy bastards don't wanna fucking do what they're employed to do.

And part of being a manager's job is your always fighting against trying to do the right things to get them to do the job that they're employed to do and they're picking up the cash at the end of the week or the end of the month. Where Ghana is probably a little bit different. If you tell somebody do something they'll go on and do it rather than giving you shitloads of hassle back about well you can't do it or why they wont do it. But you need to have a think about that Josiah if that's what you want to do. Like I said we can send out a note and obviously support so it doesn't look like the reason you're doing it is because you're stepping down. You do know it's an opportunity for you as far as I'm concerned so I've thought about this quite a lot Josiah when Mike handed in his notice to be fair, 'cause as soon as he handed in his notice I thought of you. And the reason I thought of you was 1, what you said to me and what you asked me to look for. And two thinking about what would be the best plan for you if that's what you wanted to do..."

(264 – 282, 265)

68. Having listened to the first 15 minutes of the recording, we find that Mr Probert explained to the claimant on more than one occasion that he had the option of continuing in his post as Production Manager, Small PET, on a PIP or to accept a Team Leader post that had become available and work his way up. He would not be required to relocate as the Team Leader position had become available at Edmonton.
69. We further find that the statement by Mr Probert "Where was that? That was at Ghana?", came from discussions he had with the claimant in the past about his work experience and knew that the claimant visited his family in Ghana. The other references to Ghanaian management culture affected the claimant as he felt that his management experience in Ghana counted for very little in Mr Probert's view but Mr Probert had no first-hand knowledge of that management culture and made unsupported assumptions. The claimant in fact worked for Britvic and Amazon as a manager in the United Kingdom.

70. Mr Probert sought to explain his actions by referring to the fact he came from the Midlands and moved to London 10 years ago. He said that in the Midlands people are less money conscious and would get on with their work whereas in London people are generally better paid but would challenge every decision taken in the workplace.
71. The claimant again met with Mr Probert not on 24 June, as he claimed, but on 1 July 2016. At the beginning of their discussion Mr Probert asked him whether he had had time to think about his options. In response, he said;
- “Yeah, I did, I did. I put a lot of thought into everything you said, and I’d like to stick to the position and just try to work hard to make it work”.
72. Mr Probert informed him that following his decision the PIP would now have to be implemented and that he proposed that they should meet every week to review his progress. The claimant expressed concerns about the PIP stating that he had never “faced this situation” and that he did not really know what to expect. (286-312)

The claimant’s grievance

73. He went on sick leave on 4 July 2016 and did not return to work. He submitted a grievance on 28 July 2016, alleging discrimination by Mr Probert, victimisation, bullying and harassment at work. (338-350)
74. A grievance meeting was held on 17 August 2016 conducted by Paramjeet Phadi, the outcome of which was unsuccessful to the claimant who appealed. After meeting on 20 October and 7 December 2016, he was informed on 20 December and later by letter dated 17 January 2017, that his appeal had been dismissed. (372-498)

Mr Shane Hebb

75. The claimant compares his treatment with Mr Shane Hebb, who was not placed on a PIP. Mr Hebb was for a time Production Manager, Upstream. Although there were issues with his performance, according to Mr Probert, he managed them and managed his team and improve his performance. He was moved to be line managed by Mr Probert. Both Mr Probert and Mr Lane were satisfied that Mr Hebb had taken steps to resolve management issues. (457).
76. From Mr Probert’s Employee Review Trackers used with Mr Hebb on a monthly basis, Mr Probert did not have any major concerns about his performance. (253)

The ethnic make-up of the work force

77. From the statistical information provided, as at December 2015, the Edmonton site had a racially diverse workforce: 2 Bangladeshi; 5 black

African; 9 black Caribbean; 17 black other; 1 Chinese; 8 Indian; 15 other and 145 white. (507A)

78. There was 1 Ghanaian Team Leader, Mr Richard Abonie. (507A)
79. Although the claimant alleged that Mr Probert, Mr Hymers and Mr Pursley had discussion about his race, he did not provide any evidence nor was evidence adduced in support of that contention. All three men denied it.
80. The above are the tribunal's material findings of fact.

Submissions

81. The tribunal heard submissions from Ms Godwins, on behalf of the claimant and from Ms Carse, Counsel on behalf of the respondent. We do not propose to repeat their submissions herein having regard to Rule 62(5) Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, as amended. We have also taken into account the relevant authorities they made reference to.

The law

82. We considered harassment related to race under section 26, Equality Act 2010 "EqA".

"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 and intimidating, hostile, degrading, humiliating or offensive environment for B"

82. Guidance has been given by Mr Justice Underhill P, as he then was, in the case of Richmond Pharmacological Ltd v Dhaliwal [2009] IRLR 336. His Lordship set out the approach to adopt when considering a harassment claim, although it was with reference to section 3A(1) Race relations Act 1976. The EAT held that the claimant had to show that:

- (1) the respondent had engaged in unwanted conduct;
- (2) the conduct had the purpose or effect of violating the claimant's dignity or of creating an adverse environment;
- (3) the conduct was on one of the prohibited grounds;
- (4) a respondent might be liable on the basis that the effect of his conduct had produced the proscribed consequences even if that was

not his purpose, however, the respondent should not be held liable merely because his conduct had the effect of producing a proscribed consequence, unless it was also reasonable, adopting an objective test, for that consequence to have occurred; and

(5) it was for the tribunal to make a factual assessment, having regard to all the relevant circumstances including the context of the conduct in question, as to whether it was reasonable for the claimant to have felt that his or her dignity had been violated, or an adverse environment created.

83. Under section 13, EqA 2010, direct discrimination is defined:

“(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.”

84. Section 23, EqA provides for a comparison by reference to circumstances in relation to a direct discrimination complaint:

“There must be no material difference between the circumstances relating to each case.”

85. Section 136 EqA is the burden of proof provision. It provides:

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

(2) If there are facts from which the court could decide, in the of any other explanation, that a person (A) contravened the provisions 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.”

86. Guidance in applying the statutory burden of proof was given under the old law in the cases of Barton v Investec Henderson Crossthwaite Securities Ltd [2003] IRLR 332, EAT approved by the Court of Appeal in the case of Igen Ltd v Wong [2005] IRLR 258.

89. In the House of Lords case of Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11, it was held that employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as he or she was and postponing the less favourable treatment issue until they have decided why the treatment was afforded. Was it on the proscribed ground or was it for some other reason? If the former, there will usually be no difficulty in deciding whether the treatment afforded to the claimant on the proscribed ground was less favourable.

90. In Madarassy v Nomura International plc [2007] IRLR 246, the claimant alleged sex discrimination, victimisation and unfair dismissal. She was employed as a senior banker. Two months after passing her probationary period she informed the respondent that she was pregnant. During the

redundancy exercise in the following year, she did not score highly in the selection process and was dismissed. She made 33 separate allegations. The employment tribunal dismissed all except one on the failure to carry out a pregnancy risk assessment. The EAT allowed her appeal but only in relation to two grounds. The issue before the Court of Appeal was the burden of proof applied by the employment tribunal.

91. The Court held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status, for example, sex and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not without more, sufficient material from which a tribunal “could conclude” that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.
92. The Court then went on to give this helpful guide, “Could conclude” [now “could decide”] must mean that any reasonable tribunal could properly conclude from all the evidence before it. This will include evidence adduced by the claimant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent in testing the complaint subject only to the statutory absence of an adequate explanation at this stage. The tribunal would need to consider all the evidence relevant to the discrimination complaint, such as evidence as to whether the acts complained of occurred at all; evidence as to the actual comparators relied on by the claimant to prove less favourable treatment; evidence as to whether the comparisons being made by the claimant is like with like, and available evidence of the reasons for the differential treatment.
93. The Court went on to hold that although the burden of proof involved a two-stage analysis of the evidence, it does not expressly or impliedly prevent the tribunal at the first stage from the hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the claimant's evidence of discrimination. The respondent may adduce in evidence at the first stage to show that the acts which are alleged to be discriminatory never happened; or that, if they did, they were not less favourable treatment of the claimant; or that the comparators chosen by the claimant or the situations with which comparisons are made are not truly like the claimant or the situation of the claimant; or that, even if there has been less favourable treatment of the claimant, it was not because of a protected characteristic, such as, age, race, disability, sex, religion or belief, sexual orientation or pregnancy. Such evidence from the respondent could, if accepted by the tribunal, be relevant as showing that, contrary to the claimant allegations of discrimination, there is nothing in the evidence from which the tribunal could properly infer a prima facie case of discrimination.
94. Once the claimant establishes a prima facie case of discrimination, the burden shifts to the respondent to show, on the balance of probabilities, that its treatment of the claimant was not because of the protected characteristic,

for example, race, sex, religion or belief, sexual orientation, pregnancy and gender reassignment.

95. In the case of EB-v-BA [2006] IRLR 471, a judgment of the Court of Appeal, the employment tribunal applied the wrong test to the respondent's case. EB was employed by BA, a worldwide management consultancy firm. She alleged that following her male to female gender reassignment, BA selected her for redundancy, ostensibly on the ground of her low number of billable hours. EB claimed that BA had reduced the amount of billable project work allocated to her and thus her ability to reach billing targets, as a result of her gender reassignment. Her claim was dismissed by the employment tribunal and the Employment Appeal Tribunal. She appealed to the Court of Appeal which accepted her argument that the tribunal had erred in its approach to the burden of proof under what was then section 63A Sex Discrimination Act 1975, now section 136 Equality Act 2010. Although the tribunal had correctly found that EB had raised a prima facie case of discrimination and that the burden of proof had shifted to the employer, it had mistakenly gone on to find that the employer had discharged that burden, since all its explanations were inherently plausible and had not been discredited by EB. In doing so, the tribunal had not in fact placed the burden of proof on the employer because it had wrongly looked at EB to disprove what were the respondent's explanations. It was not for EB to identify projects to which she should have been assigned. Instead, the employer should have produced documents or schedules setting out all the projects taking place over the relevant period along with reasons why EB was not allocated to any of them. Although the tribunal had commented on the lack of documents or schedules from BA, it failed to appreciate that the consequences of their absence could only be adverse to BA. The Court of Appeal held that the tribunal's approach amounted to requiring EB to prove her case when the burden of proof had shifted to the respondent.
96. The employer's reason for the treatment of the claimant does not need to be laudable or reasonable in order to be non-discriminatory. In the case of, B-v-A [2007] IRLR 576, the EAT held that a solicitor who dismissed his assistant with whom he was having a relationship upon discovering her apparent infidelity, did not discriminate on the ground of sex. The tribunal's finding that the reason for dismissal was his jealous reaction to the claimant's apparent infidelity could not lead to the legal conclusion that the dismissal occurred because she was a woman.
98. Applying section 136, the statutory burden of proof has been reviewed by the Employment Appeal Tribunal in the case of Efobi v Royal Mail Group UKEAT/2017/0203. Mrs Justice Laing distinguished the earlier cases on the burden as they were not concerned with section 136. Her Ladyship referred to Mummery LJ, "Could" must mean "a reasonable tribunal could properly conclude" Madarassy v Nomura International plc, paragraph 57.

"Section 136(2) does not put any burden on the claimant. It requires the ET, instead, to consider all the evidence, from all sources, at the end of the hearing, so as to decide whether or not "there are facts etc" (cf paragraph 65 Madarassy). Its effect is that if

there are such facts, and no explanation from A, the ET must find the contravention proved. If, on the other hand, there are such facts, but A shows he did not contravene the provision, the ET cannot find the contravention proved.”, paragraph 78, Efobi.

Conclusions

Harassment related to race

99. Having regard to the list of issues, under harassment on grounds of race, we have not made findings in support of the claimant's claims in respect of paragraphs 5.1.1, 5.1.3, 5.1.4 and 5.1.5. With regard to 5.1.1, the claimant told us that there was nothing racist said or done during the meetings on the 10 and 16 June 2016.
100. In relation to paragraph 5.1.3, we have not made any findings that the respondent had pressurised the claimant either to resign, accept demotion to Team Leader or be placed on a PIP. Mr Probert explained to the claimant that he would be placed on a PIP in the post of Production Manager, Small PET. Resignation was an option open to the claimant but neither Mr Probert nor Mr Pursley encouraged him to resign. It was the claimant who wanted to consider a Team Leader post and no pressure was placed on him to do so or to accept the position which subsequently became vacated. We have already found that even before the claimant moved to Mr Probert's line management, Mr Pursley had concerns about his performance and arranged regular meetings with him.
101. As regards paragraph 5.1.4, the claimant was unable to demonstrate nor was there evidence in support of his assertion that Mr Probert, Mr Hymers and Mr Pursley discussed his race during any meetings. Both Mr Hymers and Mr Pursley denied meeting with Mr Probert and discussing the claimant's race or issues in respect of it. Although Mr Probert made reference to meeting with Mr Paul Hymers he did not say that the claimant's race was referred to. (265)
102. The allegation that the claimant was excluded from the management meeting, paragraph 5.1.5, we have found that he was not and that Mr Probert gave an apology for his absence. It was the claimant's choice to learn more about his new Production Manager, Small PET role on the day in question and it that regard he decided not to attend the scheduled monthly management meeting.
103. In relation to 5.1.2, references to his race were made on 24 June 2016, in particular, his Ghanaian management style and experience, paragraph 5.1.2. We have found that Mr Probert did make the statement attributed to him but had sought to argue that it was not with reference to Ghanaian management style. We take a different view. The statements, “Where was that. That was at Ghana”, “..and don't take this the wrong way, the culture between Ghana managing and the culture between here is totally different is totally different. How you can get people to do things, how you can speak to people, how you communicate. Like here a lot of people are lazy bastards don't wanna fucking do what they're employed to do” and “Where Ghana's probably a little bit different. If you tell somebody to do something they'll

go on and do it rather than giving you shitloads of hassle back about well you can't do it. But you need to have think about that Josiah if that's what you want to do", were references to Ghana and the Ghanaian management culture. Mr Probert knew that the claimant spent three and a half years as a manager working for Guinness in Ghana and had visited Ghana to see his relatives. To make repeated references to the Ghanaian management culture not knowing what that was or is, was used to belittle the claimant's management experience gained while working that country and viewed his management style as soft. They were comments about the claimant's Ghanaian management experience, therefore, they were related to race and were unwanted as they were not relevant to how the claimant was performing in his role as Mr Probert had no knowledge of the management culture and adopted a stereotypical view of it being inadequate for this country. He, effectively, negated the claimant's Ghanaian management experience and failed to have regard to the fact that the claimant had worked as a manager for Britvic and Amazon in this country.

104. Although the above statements did not have the purpose of violating the claimant's dignity, objectively viewed and having regard to the claimant's own susceptibilities at a time when he was questioning his abilities as a Production manager, their effect was to create a degrading, humiliating and offensive environment for him.
105. We have come to the conclusion that the harassment related to race claim in respect of this particular allegation, is well-founded.

Direct race discrimination

106. As the claimant put the direct race discrimination as an alternative, it is academic whether the conduct described in paragraphs 5.1.1 to 5.1.5 of the list of issues, amounted to direct race discrimination. From our findings, we do not conclude that the claimant was discriminated against because of race in relation to paragraphs 5.1.1, 5.1.3 to 5.1.5. Mr Hebb, who is not Ghanaian, was relied on by the claimant but only with reference to not being placed on a PIP. The evidence on that, as we have found, showed that there were material differences between them. Mr Hebb's performance had improved whereas the concerns about the claimant's performance were continuing. Mr Hebb, therefore, was not an appropriate comparator. Even if it was a non-Ghanaian manager who had performance issues, we are satisfied that the respondent would have exercised their contractual authority and changed that person's job role as well as putting them on a PIP.
107. In relation to paragraph 5.1.2, had it been a non-Ghanaian Production Manager, Small Bottles, it is unlikely that Mr Probert would have made the same or similar comments. We reject his explanation for these statements that they were not referable to race but to his views about the UK workforce. Had it not been the case that we have found in favour of the claimant in respect of his harassment claim, we would, in the alternative, have found for the claimant on this aspect of his direct race discrimination claim.

108. The case is listed for a remedy hearing on 27 October 2017 with a time estimate of 1 day.

109. The claimant is required to serve a schedule of loss.

Employment Judge Bedeau

Date: ...26 September 2017.....

Sent to the parties on:

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For the Tribunal Office