



EMPLOYMENT TRIBUNALS

Claimants

Mr G Ellington

AND

Respondents

London Borough of Hammersmith
and Fulham

Heard at: London Central **On:** 29 September to 5 October 2020 and
9 October 2020

Before: Employment Judge Nicolle

Members: Ms D Keyms
Ms E A Flanagan

Representation:

For the Claimant: In person

For the Respondent: Ms King, of Counsel

JUDGMENT

The claims for direct race discrimination under s13 and s39 of the Equality Act 2010 (EQA) and for harassment under s26 of the EAQ fail and are dismissed. The claim for constructive unfair dismissal succeeds.

REASONS

The Claim

1. Following a period of ACAS early conciliation between 17 November 2019 and 17 December 2019 the Claimant issued a claim on 17 January 2020.

The Hearing

2. Unfortunately, there was confusion and delay on the first day of the hearing as a result of the parties' expectation that the case would be heard based solely on electronic bundles but also as a result of a dispute between the parties as to whether the bundles included all relevant documents. This represented an ongoing issue throughout the hearing with a significant number of additional

documents being added to the bundle during the hearing. The most significant tranche of additional documents concerned employer liability information received by the Respondent from Amey Services Limited (Amey) in connection with a service provision change on 1 May 2019 under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE).

3. The Claimant asserted throughout the hearing and in his closing submissions that he had been prejudiced by what he considered to be the deliberate failure of the Respondent to disclose all relevant documents. Whilst it was acknowledged by all parties that the disclosure and bundle finalisation processes were unsatisfactory we found no evidence that the Respondent had deliberately failed to comply with its disclosure obligations. Further, we reject the Claimant's assertion that the notes of a meeting dated 8 May 2019 had been created by the Respondent retrospectively for the purposes of the hearing.

4. The bundle comprised three separate folders. This was partly as a result of the Claimant and the Respondent producing separate bundles but also as a result of many of the documents in the main bundle being redacted to disguise the identity of two individuals named in the hearing namely Louise Felix (Ms Felix) and David Gordon (Mr Gordon).

5. An application was made by the Respondent at the start of the hearing for an Order under Rule 50 of the Employment Tribunals (Constitution Rules of Procedure) Regulations 2013 (the Rules) for an Order pursuant to which the identities of Ms Felix and Mr Gordon would remain confidential. The Tribunal carefully considered the matter and gave a ruling with oral reasons that it would not be appropriate for an Order to be made under Rule 50.

The Witnesses

6. There was a further issue regarding the witness statements with both parties being late in exchanging statements. The Tribunal ruled that the Claimant should be permitted to rely on his witness statement notwithstanding it being served very close to the hearing and further that the updated witness statement of Renford Dixon (Mr Dixon) should be admitted. Mr Dixon was employed as a mobile cleaner by Amey and then the Respondent. Michael Cunningham, Mobilisation and then Aesthetic Manager for Amey from January 2018 to December 2018 (Mr Cunningham) also gave evidence on the Claimant's behalf. Raymond Rahman, Head of Soft FM Services – Shared Facilities Management (Mr Rahman), Reg Davies, self-employed consultant (Mr Davies) and Mary Lamont, Head of People and Talent (Ms Lamont) gave evidence on behalf of the Respondent.

7. Given the issues relating to the bundle the Tribunal did not hear evidence on day one and read relevant documents from the bundles together with the witness statements once they had been provided. The evidence was completed on day five and an additional day was listed on 9 October when the Tribunal heard submissions and met in Chambers to reach its findings and decision.

The Issues

8. There was an agreed final list of issues. As this document runs to six pages it is appended to this decision, but the grounds of complaint are set out within our conclusions.

Findings of fact

The Claimant

9. The Claimant was employed by Amey as a Team Leader from 10 August 2017. His employment transferred to the Respondent under TUPE on 1 May 2019. He was employed as a cleaning supervisor by the Respondent until he resigned on 2 September 2019 with his last day of employment being 30 September 2019.

10. The Claimant is black and of African descent.

Amey

11. The Respondent, together with two adjacent London Boroughs, outsourced the provision of cleaning services to Amey. However, because of dissatisfaction with the standard of service and value of money provided by Amey the Respondent decided to terminate Amey's contract early and to take the cleaning services back in house.

12. As a result of the service provision change under TUPE the Respondent says that it cannot be liable for those acts relied on by the Claimant which predate 1 May 2019 given that they were not matters comprising liabilities of Amey which would have been capable of transferring to the Respondent under TUPE. We return to this issue in our conclusions.

Amey Job Titles

13. The Tribunal heard considerable evidence regarding the respective hierarchal job structures within cleaning at Amey and then the Respondent after the TUPE transfer. At Amey the structure in ascending order comprised cleaning operatives, team leaders (albeit the Claimant says that these were regarded as cleaning supervisors); facilities managers, contracts manager and account director.

14. At Amey the Claimant managed a team of approximately 27 cleaners. His duties were undertaken exclusively under the contract between Amey and the Respondent. The bundle contained Amey job descriptions for Working Team Leader Band A and FMEM Team Leader Band B. The Claimant was Band B.

15. The Band B job description says that its main purpose is "to assist in the delivery of a range of facility services to buildings in line with contractual commitments". It refers to managing a team of 33 cleaners across 56 sites.

16. The job description contains a list of key responsibilities which include:

- Help to main standards as set out in the Service Level Agreement;
- Ensure all customer requirements are met;
- Attend weekly meetings with the customer to discuss any day to day cleaning requirements; and
- Attend monthly review meetings with the customer.

17. There was a dispute between the parties as to who constituted the “customer” with the Claimant and Mr Cunningham saying that it comprised individual establishments within the Borough such as libraries and police stations whilst the Respondent says that it was the customer. We find that the Respondent was the customer given that the cleaning services contract was between it and Amey.

18. The Claimant reported to the Senior Facilities Manager who in early 2019 was Morris Oni (Mr Oni). There was a dispute between the parties as to whether the Band B job description provided for the possibility that the Team Leader would undertake some cleaning duties as and when required. The Claimant was adamant that it did not whilst Mr Rahman was of the view that it would, on occasion, be appropriate to expect the Team Leader to undertake some cleaning. This distinction was clearly of considerable significance to the Claimant who was adamant that his role should not include any cleaning. Mr Rahman said that that he and other managers/supervisors would occasionally undertake some cleaning when required. However, as the Claimant acknowledges that he undertook no cleaning during his time with Amey and the Respondent we do not consider that this distinction is material to our decision.

Mr Gordon’s suspension

19. Mr Gordon was suspended on full pay from July 2018 to December 2018. This was as a result of his having threatened aggressive action against a manager as result of a delay in making payment to him for undertaking additional cleaning services.

20. Whilst the circumstances of Mr Gordon’s suspension, and its duration, are not directly relevant the Claimant says that as a result of his role in Mr Gordon’s suspension that Mr Gordon had antagonism towards him which contributed to his letter of complaint regarding the Claimant dated 3 June 2019.

21. Apart from his suspension no disciplinary action was taken against Mr Gordon by Amey.

Louise Felix

22. Ms Felix attended a return to work meeting on 30 October 2018 following a period of long-term sickness leave. Ms Felix says that she had actually returned to work on 10 August 2018 and could not therefore understand why this meeting

was taking place so long after. The Claimant was one of those in attendance at the meeting.

23. During the meeting Jordan Tuthill, Cleaning Supervisor, (Ms Tuthill) said that she smelt alcohol on the Claimant's breath. Whilst Ms Felix was reluctant to undertake a breathalyser test, she ultimately did so, and the result came back as clear. She was then asked to undertake a drugs test but refused.

24. The bundle contained a copy of Amey's alcohol and drugs policy. This includes the right to require employees to undergo a "for cause" test in situations where their fitness for work is believed to be compromised by use of alcohol or drugs. Employees shall be suspended from work on full pay until the results are known.

25. The Tribunal heard significant and conflicting evidence regarding what happened during and after this meeting. We find that the Claimant went from the meeting room to find Ms Felix who was in a meeting with Patsy Ishmael, Branch Secretary, Hammersmith and Fulham UNISON, (Ms Ishmael) and that he interrupted the meeting.

26. Ms Felix was suspended as a result of her refusal to undertake the drugs test. The Claimant says that he was responsible for suspending Ms Felix. The Respondent disputed whether the Claimant's job responsibilities with Amey included responsibility for suspensions, grievances and invoking disciplinary procedures. The Claimant's evidence was that they did but he did not have the power of dismissal. Whilst the Claimant's job description is silent on the extent of his responsibilities in this respect, we find that as a matter of fact he had, at least, implied authorisation to undertake such roles. Further, we find that he was responsible for Ms Felix's suspension.

27. During evidence Mr Cunningham described at some length an incident whereby Ms Felix had taken his Ray-Ban sunglasses from the meeting room on 30 October 2018 and that he had to retrieve them from her after she left the room. We make no findings in this respect given that this matter is not material to our decision.

28. In a letter from Ms Felix to Ms Ishmael dated 8 November 2018 she set out her complaints regarding the events on 30 October 2018 and in particular the conduct of the Claimant. She concluded by stating:

"I can only describe Gavin's behaviour towards me on this day as passive aggressive"

29. There was a dispute in the evidence as to what, if any disciplinary action was taken against Ms Felix as result of the 30 October 2018 incident. Mr Cunningham says that he had considered and dismissed the grievance before he left Amey. However, we find his evidence on this point to be vague and in the absence of any contemporaneous documentation or notes of such a grievance meeting having taken place we find that it did not. We also reach this finding as result of the subsequent chain of correspondence regarding Ms Felix's outstanding grievance.

30. In a letter from the Claimant dated 9 January 2019 she was invited to attend a disciplinary investigatory meeting on 15 January 2019. The letter stated that the meeting was to discuss the following allegations:

- rude and abusive to a senior manager
- AWOL could not find her for one and a half hours
- Shouting and being aggressive to staff
- Failing to complete the drugs test
- Threatening behaviour

31. Mr Oni sent a letter to Ms Felix dated 16 January 2019 inviting her to a disciplinary hearing which contained a truncated version of the allegations which had been set out in Mr Ellington's letter of 9 January 2019.

32. Mr Ellington sent a further letter to Ms Felix dated 14 February 2019 inviting her to an investigatory meeting on 19 February 2019. He repeated the allegations as set out in his previous letter of 9 January 2019. It would therefore appear that there was a lack of coordination between Mr Oni and the Claimant in the conduct of this matter.

33. The Tribunal was referred to a substantial volume of correspondence disclosed during the hearing pertaining to the outstanding disciplinary and grievance issues with Ms Felix. It is not necessary for us to set out in detail this correspondence suffice to say that it is apparent that matters were not actively progressed whether by the Claimant, Mr Oni, Harry Dhanjwani (Mr Dhanjwani) or otherwise in the period from 8 November 2018 until the TUPE transfer on 1 May 2019. On 23 April 2019 Mr Dhanjwani stated that he had been removed from the Tri Borough account and the case would not be heard by Amey and would TUPE over. We therefore find that Ms Felix's grievance remained extant as at the date of the transfer.

34. We also find that Ms Felix's suspension continued throughout the period from 30 October 2018 until 1 May 2019. We find no evidence to support the Claimant's contention that she returned to active employment during this period and then went on a further period of sick leave. The Tribunal was provided with a spreadsheet which confirmed her last sickness absence and annual leave had been in October 2018.

The Morris Oni incident

35. One of the establishments Amey was responsible for cleaning was the Stephen Wiltshire Centre, a specialist educational needs school (the Centre). The Centre was new but complaints had been raised to the Respondent regarding the standard of cleaning services. Because of such complaints Mr Rahman requested that the Claimant and Mr Oni attend a meeting and inspection at the Centre.

36. We find that the Claimant was reluctant to attend this meeting. However, we find that it was in accordance with his job description that he could be required to attend meetings with Mr Rahman and the managers of establishments cleaned pursuant to the cleaning contract.

37. The Claimant considered that Mr Rahman humiliated him during the meeting and inspection. He complains specifically about being reprimanded by Mr Rahman for failing to have a pen and paper to make notes of an inspection. The Claimant says that he and Mr Oni recorded the results of their inspection on electronic devices.

38. Whilst we find that Mr Rahman's conduct of the inspection, and the comments made to the Claimant and Mr Oni, could have been such that the Claimant felt undermined, we do not find them to have been significant and further that the Claimant had an unjustified sense of grievance regarding the circumstances of this meeting.

39. The Claimant says that at a meeting later that day with him Mr Rahman complained that he could not understand Mr Oni's African accent so how could a client be expected to.

Telephoning the Claimant late at night and forcing him to visit a site after midnight

40. At a date unspecified in early 2019, but prior to the TUPE transfer, Mr Rahman received calls from residents regarding a fire alarm going off late at night at the Centre. Whilst Amey had a help desk to deal with such situations Mr Rahman considered the quickest way of resolving the situation was to call the Claimant who he believed may have access to the code for the burglar alarm. We find that whilst the Claimant did not personally have the alarm code he was quickly able to obtain it from a cleaning operative and the alarm was turned off.

41. The Claimant regarded Mr Rahman's call to him as intrusive, unnecessary and an act of harassment. We find no basis to support the Claimant's view. We find that Mr Rahman's sole objective was to find the quickest solution for a problem which was causing considerable irritation to residents. As a matter of fact it was Mr Rahman and not the Claimant who attended the Centre and the only inconvenience to the Claimant was receiving a late night call and having to then call the relevant cleaning operative to obtain the alarm code.

TUPE transfer

42. A considerable part of the Claimant's evidence related to his complaints regarding what he perceived to be a reduction in his status subsequent to the transfer. However, as these matters are only potentially relevant in the context of a claim for constructive unfair dismissal it is not necessary for us to provide detailed findings of fact.

43. There was a process of collective consultation with employee representatives prior to the transfer.

44. The Claimant attended a meeting on 8 May 2019 with Mr Rahman and Jennifer Comeston, HR Consultant (TUPE, (Ms Comeston)). We were provided with a note of this meeting during the hearing which we find in consequential. The Claimant disputes that this note represents a complete reflection of what was stated during this meeting. We find no evidence to support any inference that the note did not record complaints raised by the Claimant regarding his job role in the assimilated organisation at the Respondent subsequent to the TUPE transfer.

45. The Claimant's Amey job title of FMEM Team Leader became Cleaning Supervisor with the Respondent. The Respondent says that this role was broadly comparable to that of Team Leader. The Claimant was dissatisfied that Working Team Leaders to include Ms Felix and Patricia Ivors (Mrs Ivors) had in his view been upgraded from Working Team Leaders to Cleaning Supervisors. He also expressed dissatisfaction that there had been a general pay increase of circa 40% for cleaning operatives who had formally been on the minimum wage.

46. Mr Rahman says that after the TUPE transfer the structure within Facilities Services in ascending order comprised Facilities Operatives, Cleaning Supervisors (working and cleaning), three Soft Services Supervisors, Head of Service and Assistant Director of Facilities Services.

47. We find that the Claimant's role and responsibilities within the Respondent's structure, whilst not identical, was broadly equivalent to that he had at Amey. Whilst the Claimant raised various complaints during his evidence about the removal of his responsibilities for disciplinary and grievance matters and lack of access to a laptop and a mobile phone we do not consider these matters material to the claims pleaded. We do however, find that the Claimant's status, and perception of that status relative to his colleagues, was extremely important to him and that he had a sense of dissatisfaction that others had been advanced whilst he remained at the same grade and same rate of pay.

Mr Gordon's complaint dated 3 June 2019

48. Mr Gordon had worked as a cleaner at Shepherds Bush library for 16 years. He submitted a hand written (written on his behalf given that he could not write) letter dated 3 June 2019. In this letter he made a series of complaints regarding the Claimant to include:

- since Gavin became my site manager, he has caused me nothing but problems and stress;
- he lied about what the job was and never paid straight away as promised;
- he has threatened to suspend me without pay; and
- he is trying to make it look like I cannot cope with my job.

49. Mr Rahman says that because of complaints regarding the standard of cleaning at the library that the Claimant had been asked to attend and address any

deficiencies observed. The Claimant says that it was as result of doing his job and highlighting areas of concern that contributed to Mr Gordon having a sense of grievance towards him. He also considers that his earlier role in Mr Gordon's suspension contributed towards this.

The Respondent's investigation

50. On 13 June 2019 Jen Comeston, consultant engaged by the Respondent to support it with the TUPE transfer, (Ms Comeston) instructed Akvile Daniels, Executive Support (Ms Daniels) and Linda Flood (Ms Flood) to investigate the grievances raised by Ms Felix and Mr Gordon.

51. On 2 July 2019 Ms Felix attended a meeting with Ms Daniels and Linda Flemming, HR Consultant (Ms Flemming). Ms Felix stated that her manager (the Claimant) was "awful". She went on to say: "He's just got it in for me and I don't know why".

52. On 12 July 2019 Ms Daniels and Ms Flemming met with Ayoni Williams (Ms Williams). Ms Williams confirmed that the Claimant had told Ms Felix that she would be suspended if she did not return to work on 30 October 2018.

53. Also, on 12 July 2019 Ms Daniels and Ms Flemming met with Ms Ishmael. She referred to the Claimant having burst into her office on 30 October 2018 and accusing Ms Felix of having ignored his calls. She said that whilst the Claimant had not lost his temper that she considered him to be aggressive. She described Ms Felix as being intimidated. She was asked whether she thought it was more bullying from the Claimant or higher management overall to which she replied, "it's a little bit of both".

54. The Respondent refers to mounting evidence in the period up to 12 July 2019 to the effect that the Claimant was inciting staff reporting to him to raise complaints against Mr Rahman. However, we find little, if any, contemporaneous record of any such complaints being raised prior to the Claimant's suspension. Whilst Mr Rahman in his interview on 6 August 2019 and Ms Felix in her interview on 12 August 2019 referred variously to Cedric and the Claimant "gunning for him" we find no clear evidence that such concerns had been documented as at the date of the Claimant's suspension.

Claimant's suspension

55. Keith Fraser, Assistant Director of Facilities Management (Mr Fraser), Hitesh Jolapatar, Strategic Director, Finance and Governance (Mr Jolapatar) and Ms Lamont met on 12 July 2019 to discuss what they considered to be issues with the Claimant.

56. Mr Rahman called the Claimant on his personal mobile phone at approximately 6:50pm on 12 July 2019. The Claimant said that this was outside his contracted working hours of 9-5. The working hours are not documented in any documents in the bundle

57. Mr Rahman made a further call to the Claimant at approximately 8:20pm that day and informed him that he should attend a meeting at 9am on Monday 15 July 2019. The Claimant says that the meeting was scheduled to be at Shepherds Bush library and Mr Rahman says it was to be at Hammersmith Town Hall, but we do not consider the precise location to be material.

58. The Claimant responded by saying that he should be provided with written notification of the meeting and the right of accompaniment. The Claimant says that Mr Rahman said, "for fucks sake Gavin I'm giving a clear management instruction". Mr Rahman denies using this swear word.

59. We find that Mr Rahman's perception of the urgency of the situation was the trigger for his calling the Claimant on his mobile phone outside normal working hours. Further, we find that Mr Rahman is likely to have become irritated by a perception that the Claimant was seeking to evade the proposed meeting and is likely to have used some form of expletive.

60. We further find that in the context of the call that the Claimant almost certainly perceived that the purpose of the meeting may be to commence some form of disciplinary process to include the possibility of invoking his suspension. We reach this finding based on the Claimant seeking input from his union, requesting written notification of the meeting and the right of accompaniment. We also consider that the proposed meeting was so obviously outside the scope of the normal interaction between the Claimant and Mr Rahman that the Claimant's suspicions as to its purpose were likely to have been aroused.

Power of suspension

61. The Respondent's Disciplinary Procedure dated January 2015 contains a power of suspension at paragraph 13. Relevant provisions provide as follows:

- suspension should never be automatic and only be imposed after careful consideration.

Should only be necessary where:

- gross misconduct is alleged; or
- the investigation could be hindered by the employee's continued presence at work, and/or because of the nature of the allegation/s, the employee's presence in the workplace poses a risk and/or relationships in the workplace have broken down

15 July 2019

62. The Claimant did not attend the meeting on 15 July 2019 but rather commenced a period of sick leave on account of work place stress. He did not return from sick leave until his resignation on 2 September 2019.

Letter of Suspension

63. It was intended that the letter of suspension dated 15 July 2019 would be handed to the Claimant at a meeting that day. As a result of his non-attendance it was posted to him but not received by him until 18 July 2019 by which time he had issued a grievance at 00:42 on 18 July.

64. An issue arose as to who was responsible for drafting the suspension letter. Ms Lamont says that she believed that she had drafted the letter. The letter was sent in the name of Mr Jolapara. However, when questioned by the Tribunal as to who was responsible for the letter Mr Rahman was equivocal and said that whilst he had amended the address on the letter as a result of it originally being incorrectly addressed that he was not sure whether he had been involved in its drafting. We find that it is likely that Mr Rahman had involvement in the drafting of the letter albeit that this did not necessarily extend to producing the full document.

65. The letter set out the allegations given rise to the Claimant's suspension as being:

- As you have subjected a member of your team to bullying and harassment in contravention of the Council's dignity at work policy;
- That you have breached the Council's code of conduct in respect of working with your management team

The Claimant's Grievance

66. Under cover of an email sent at 00:42 on 18 July 2019 the Claimant raised a grievance against Mr Rahman. The Claimant says that the email and the accompanying document were written by his wife on the basis of input he had provided. In his covering email the Claimant summarised his grievance against Mr Rahman as follows:

- he has called me out of my working hours;
- he has bullied me by the way he speaks to me; and
- he has sworn at me numerous times

67. In a three page accompanying document the Claimant broke his grievance down between those matters before the TUPE transfer on 1 May 2019 and those subsequent to it.

68. It is not necessary to set out in detail the contents of the grievance. However, it is relevant to record that it did not contain any direct reference to Mr Rahman having used racist language to include any reference to his allegedly complaining about Mr Oni's accent after the inspection at the Stephen Wiltshire Centre. A

Cleaning toilets

69. One of the matters referred to in the Claimant's grievance was that on a date unspecified between 1 May 2019 and 12 July 2019 he had been asked by Mr Rahman to clean toilets in Hammersmith. The Claimant says that the toilets in

question were on the floor in the office occupied by Mr Rahman. This is disputed and the Respondent says that the requirement for the Claimant together with Mariuez Dziadziak, cleaning operative (Mr Dziadziak) to attend was as a result of approximately 10 complaints being made by members of the public regarding the state of the toilets.

70. It is apparent that the Claimant strongly objected to the request for him to attend. He says that the toilets were not in an area for which he had responsibility. The Respondent says that the Claimant was covering this area because of Michael Stobiezki's, Facilities Operative (Mr Stobiezki) absence on holiday. Further, the Claimant says that there were plenty of other Team Leaders who could have been asked to attend.

71. We find that it was not unreasonable for Mr Rahman to ask the Claimant to attend. We consider that his attendance at premises where there were issues raised regarding the state of the cleaning fell within a reasonable part of his job description. We reach this finding regardless of whether the toilets fell within the Claimant's specific area of normal geographical responsibility.

72. In any event, the Claimant acknowledges that he did not undertake any cleaning but rather brought required cleaning products and equipment to the premises and observed as Mr Dziadziak undertook the required cleaning.

18 July 2019

73. The letter of suspension was resent to the Claimant's correct address.

Referral to Occupation Health

74. On 16 July 2019 Mr Rahman advised Occupation Health to make contact with the Claimant to arrange an appointment. On 19 July 2019 the Claimant submitted a fit note confirming he was absent from work on account of stress. Further correspondence ensued regarding arrangements for an Occupational Health appointment. It is sufficient to state that the Claimant did not attend Occupational Health during the remainder of his employment.

Subsequent emails

75. The Claimant's wife sent emails on his behalf to Patrick Draper, HR Consultant (Mr Draper) on 23 and 28 July 2019. She raised various complaints regarding his treatment and questioned whether it was possible to suspend someone whilst they were off sick.

Appointment of Mr Davies

76. Mr Davies had been employed by the Council for 38 years but is now engaged as a self-employed consultant. He was contacted by Ms Lamont to investigate allegations made against the Claimant under the Respondent's disciplinary policy and the grievance that the Claimant had raised against Mr Rahman.

77. The Claimant says that given that Mr Davies had worked for the Respondent for 38 years up to March 2016 and was now engaged on an ad hoc basis to undertake consulting work, that he was neither external nor independent. We find that the Claimant has grounds to make such an inference but we do not find that Mr Davies not being external is a material factor given that it would have been perfectly normal and proper for such an investigation to have been undertaken by a manager employed by the Respondent.

78. Mr Davies sent the Claimant and his wife an email on 31 July 2019 in which he introduced himself as the external HR Consultant and that he would be supported by Mr Draper.

Mr Rahman's review of the Claimant's grievance

79. Under cover of an email dated 5 August 2019 Mr Rahman attached a mark-up showing his comments on the Claimant's grievance. This was sent to Mr Davies and Mr Draper and copied to Mr Fraser. It is not necessary for us to set out these comments suffice to say that Mr Rahman denied all of the allegations made against him.

Meeting with Mr Rahman

80. On 6 August 2019 Mr Davies and Mr Draper met with Mr Rahman.

Meeting with Ms Daniels

81. Also, on 6 August 2019 Mr Davies and Mr Draper met with Ms Daniels. In relation to the suspension letters for Ms Felix and Mr Gordon, she said that she felt that Amey had just left it all for the Council to deal with.

82. Ms Daniels is recorded as stating as follows in response to Mr Davies' question as to whether she thought there was a case for the Claimant to answer a disciplinary hearing:

“Although I have never met him it is clear that he does not have the management skills, he used his authority in the wrong way but I can't see any evidence as to why he should be suspended, training perhaps”.

Meeting with Mr Dziadziak

83. On 19 July Ms Daniels and Ms Fleming met with Mr Dziadziak. He was Ms Felix's manager as at the time of the 30 October 2018 meeting.

Meeting with Ms Felix

84. Mr Davies and Ms Draper met with Ms Felix on 12 August 2019. She confirmed that she had no confrontations with the Claimant prior to 30 October 2018. She was asked whether she had any contact with the Claimant since July 2019 and responded by saying that he had been intimidating but she just ignored him.

85. Ms Felix said that she had overheard cleaners and security staff talking about how Cedric Engele, Cleaning Supervisor (Mr Engele) and the Claimant had got it in for Mr Rahman and were going around recruiting people saying “have you any issues about Ray?” There is no evidence that Ms Felix actually heard such comments being made as she does not refer to specifics of what was said, by whom and when and when Ms Davies asked whether that was hearsay she responded by saying “I heard that, I know what they are like”.

Meeting with Ms Tuthill

86. Ms Tuthill is white British and the replacement supervisor to Mr Oni. Mr Davies and Mr Draper met with her on 12 August 2019. She said that she had just handed in her notice. Ms Tuthill said that it had seemed strange that Ms Felix’s case had popped up again and it seemed weird and she wondered if someone had been told to resurrect it.

87. Ms Tuthill said that the Claimant had always tried to help Ms Felix given that she had a number of personal problems.

88. Ms Tuthill said that the Claimant had never caused her any problems and that he was popular with the cleaners. She perceived that Ms Felix may have a grudge against the Claimant as he had been asked to carry out the process resulting in her suspension and in her view was only doing his job.

Meeting with Mr Engele

89. Mr Davies and Ms Draper met with Mr Engele on 12 August 2019. Mr Engele said that he perceived that Mr Rahman has a negative perspective, he is confrontational and is constantly apportioning blame. He went on to say that Carl Petite and Roseanna had complained about Mr Rahman’s aggressive manner towards them.

Meeting with Hocine Mesrati

90. Mr Davies and Ms Draper met with Hocine Mesrati (Mr Mesrati), a cleaner on 13 August 2019. Mr Mesrati said that he respected the Claimant but at the end he lost that respect as a result of what he perceived to be the Claimant giving preferential treatment to certain staff.

91. Mr Mesrati also complained about the manner in which Mr Rahman spoke to him to include threatening to terminate his employment unless he worked certain days. He claimed that Mr Rahman adopted a preferential approach towards others. He also referred to an occasion when Mr Rahman responded in respect of an employee being asked to drive for him, “why don’t you tell him to fuck off”. Mr Rahman denies using this language.

Meeting with Mr Stobiecki

92. On 13 August 2019 Mr Davies and Mr Draper met with Mr Stobiecki. Mr Stobiecki was very complimentary about Mr Rahman as a manager describing him

as the “perfect manager”. He complained that the Claimant had made false promises to him regarding his terms and conditions of employment.

93. Mr Davies asked Mr Stobiecki whether the Claimant had been getting staff to speak against Mr Rahman. Mr Stobiecki could not recall Mr Rahman ringing him about anything connected with the Claimant although he did say that the Claimant may have been asking people about Mr Rahman and that he had heard someone called Trish asking staff whether they knew anything not good about Mr Rahman.

Meeting with Stacey Parkins

94. On 13 August 2019 Mr Davies and Mr Draper met with Ms Parkins, Facilities Operative. Ms Parkins is white British. She described Mr Rahman as being “abrupt and rude”. She said that she had never heard him making any discriminatory comments. She referred to an incident where she described him as being “out and out rude”. This related to an occasion when she had gone into a shop in the high street to buy a pasty.

Meeting with Carl Petite

95. Mr Davies and Ms Draper met with Mr Petite, cleaner on 13 August 2019. He referred to his having brought a grievance against Mr Rahman at Amey but no details were given. He referred to Mr Rahman as having been very rude. He had not heard Mr Rahman making any racist comments. He referred to one cleaner who had been crying for about 15 minutes because of the way Mr Rahman had spoken to him.

Meeting with Devon Bent

96. Mr Davies and Mr Draper met with Mr Bent, Facilities Operative on 13 August 2019. Mr Bent complained of an occasion when Mr Rahman had shouted at him leaving him feeling ashamed and upset.

Meeting with Patricia Ivor

97. Mr Davies and Ms Draper met with Ms Ivor, Cleaning Supervisor on 13 August 2019. Ms Ivor complained about the Claimant saying that he had given her a “hard time and said that she was no good”. She referred to him having said that he would get cleaners to put in complaints about her.

98. Ms Ivor referred to having heard the Claimant saying to Ms Parkins “if I tell you what to say will you say it” in relation to Mr Rahman. She said that the Claimant does not like Mr Rahman.

99. Ms Ivor said that whilst Mr Rahman was stern with staff that he did not speak to them inappropriately.

Meeting with Mr Dziadziak

100. Mr Davies and Mr Draper met with Mr Dziadziak on 13 August 2019. Mr Dziadziak said that the Claimant does not care about people. He perceived that

the Claimant allocated more overtime to black staff. He said that he had never heard Mr Rahman being rude to staff but explained that it is very hard to get some people to work.

Email from Claimant's wife dated 15 August 2019

101. In an email to Mr Davies she referred to the Claimant's concern that he had heard from members of staff that when they went to collect their letter about having an interview regarding the investigation that Mr Rahman was waiting for them with a view to intimidating them. She also referred to the Claimant feeling that the appointment with Occupational Health was a "kind of trap" to get him to meet Mr Rahman.

Mr Davies' email to the Claimant dated 28 August 2019

102. Mr Davies updated the Claimant on the progress of the investigation. He said that he just had two members of staff to interview and proposed that he met with the Claimant on either 9 or 10 September 2019.

103. Mr Davies provided the Claimant with more detail on the disciplinary allegations against him and stated that they were as follows:

That you have subjected members of your team to bullying and harassment in contravention of the Council's dignity at work policy.

- The members of staff are Ms Felix and Mr Gordon;
- In respect of Ms Felix we are investigating your actions and behaviour which resulted in her suspension on 30 October 2018;
- In respect of Mr Gordon we are investigating your actions and behaviour which resulted in the threat of disciplinary action being taken against him; and your unfair treatment of him during the performance of his duties by criticising his work.

That you have breached the Council's code of conduct in respect of working with your management team.

That you have attempted to recruit and coordinate members of the Council's staff to present a fraud case against Mr Rahman.

104. The allegations against the Claimant in this email are significantly wider and more detailed than in his letter of suspension. The letter of suspension referred to a single member of staff who had been subject to bullying and did not make any reference to the Claimant seeking to coordinate a fraud case against Mr Rahman.

Meeting with Mr Gordon

105. Mr Davies and Ms Draper met with Mr Gordon on 2 September 2019. Mr Gordon gave detailed evidence regarding the circumstances giving rise to his suspension and the Claimant's role in that.

106. Mr Gordon complained that the Claimant and Mr Oni were the worse managers he had ever worked for. He said that the Claimant had threatened to get him sacked. He further referred to the Claimant saying that he was going to make him redundant and that he had threatened to suspend him without pay. This is denied by the Claimant.

Meeting with Mr Stobiecki

107. On 2 September 2019 Mr Davies and Mr Draper met with Mr Stobiecki. He was asked whether he could recall a conversation with Mr Rahman about people, to include the Claimant, seeking to make a case against him. He responded by saying that he had heard the Claimant asking people about Mr Rahman "if you have a problem tell me and we will open up a case against Ray".

The Claimant's Resignation

108. The Claimant resigned in an email to Mr Davies on 2 September 2019. He said as follows:

"I don't feel well enough to return as per the details in my grievance and I don't feel like I will be well enough to return to this organisation due to the way you treat staff. AS I don't think feel like I am being treated fairly"

109. The Claimant went on to reiterate his concern regarding his belief that Mr Rahman had been told details about staff collecting letters for them to attend the investigation and his intimidating staff prior to such investigation meetings.

Matters subsequent to the Claimant's resignation

110. The Claimant gave four weeks' notice and his last day of employment with the Respondent was 30 September 2019.

111. Notwithstanding the Claimant's resignation he was sent a series of questions regarding his grievance against Mr Rahman undercover of Mr Davies' email of 3 October 2019. He did not reply.

Investigation Report

112. Under cover of letters dated 13 November 2019 Mr Rahman and the Claimant were provided with Mr Davies' disciplinary/grievance investigation report relating to them both.

113. The report is 14 pages long and given that it was after the Claimant's resignation there is no need to set out the findings in detail. Relevant findings from the report in relation to the Claimant are as follows:

- (a) In respect of Mr Gordon that informal disciplinary counselling rather than formal action would have been appropriate. Mr Davies concluded that the investigation did not believe that there was a case to answer over the Claimant's bullying and harassment of Mr Gordon.

- (b) In relation to Ms Felix the investigation found that there was no direct evidence that the Claimant had acted inappropriately.
- (c) Further, the investigation found no evidence that the Claimant was attempting to recruit and coordinate colleagues to present a fraud case against Mr Rahman.
- (d) None of the Claimant's complaints against Mr Rahman as set out in his grievance dated 18 July 2019 were upheld.

Witness Evidence

114. Save as has already been set out in the findings of fact above it is appropriate to summarise key matters from the witness evidence.

Mr Cunningham

115. It was very apparent that Mr Cunningham had an extremely negative opinion of Mr Rahman. He described him as being "extremely rude, very demeaning, insulting, intimidating and narcissistic". He did not, however, give evidence of any racist language being used by Mr Rahman.

Renford Dixon

116. Mr Rahman also gave evidence regarding what he considered to be the unacceptable manner in which Mr Rahman spoke to him and other cleaners. Again, he gave no direct evidence of hearing Mr Rahman using racist language.

117. It is relevant that Mr Dixon resigned from the Respondent's employment in the summer of 2020 following a period of absence without permission and raised a grievance at the time of his resignation on 8 June 2020 regarding his ethnicity. The Respondent says that there were serious concerns regarding Mr Dixon's performance.

Morris Oni

118. Mr Oni did not attend as a witness and therefore very little weight is placed on his short witness statement. It is, however, relevant to record that in this statement he made no reference to the allegation forming part of the Claimant's claim that Mr Rahman had mimicked his accent.

The Law

Race and the burden of proof

119. Under s13(1) of the EQA read with s.9, direct discrimination takes place where a person treats the claimant less favourably because of race than that person treats or would treat others. Under s.23(1), when a comparison is made,

there must be no material difference between the circumstances relating to each case.

120. In many direct discrimination cases, it is appropriate for a tribunal to consider, first, whether the claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of race. However, in some cases, for example where there is only a hypothetical comparator, these questions cannot be answered without first considering the 'reason why' the claimant was treated as she/he was.

121. Under s136, if there are facts from which a tribunal could decide, in the absence of any other explanation, that a person has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless a respondent can show that it did not contravene the provision.

122. Guidelines on the burden of proof were set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258. The tribunal can take into account the respondent's explanation for the alleged discrimination in determining whether the claimant has established a prima facie case so as to shift the burden of proof. (Laing v Manchester City Council and others [2006] IRLR 748; Madarassy v Nomura International plc [2007] IRLR 246, CA.) The Court of Appeal in Madarassy, a case brought under the then Sex Discrimination Act 1975, held that the burden of proof does not shift to the employer simply on the Claimant establishing a difference in status (e.g. race) and a difference in treatment. LJ Mummery stated at paragraph 56:

"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."

Further, it is important to recognise the limits of the burden of proof provisions. As Lord Hope stated in Hewage v Grampian Health Board [2012] IRLR 870.

"They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other."

Time limits

123. S.123 (1) (a) and (b) and (3) (a) of the EQA provide for a time limit of three months starting with the date of the act which the complaint relates to or under s.123 (1) (b) such other period as the tribunal thinks just and equitable. S.123 (3) (a) provides that conduct extending over a period is to be taken as done at the end of that period.

124. For acts extending over a period it is relevant to consider whether a discriminatory regime, rule, practice or principle, which had a clear and adverse

effect on a complainant, existed. There is a distinction between a continuing state of affairs and a one-off act with ongoing consequences.

Constructive dismissal principles

125. In summary there must be established first that there was a fundamental breach on the part of the employer, second the employer's breach caused the employee to resign and third the employee did not affirm the contract as evidence by delaying or expressly.

126. In so called last straw dismissals there can be a situation where individual actions by the employer, which do not in themselves constitute a breach of contract, may have the cumulative effect of undermining the implied term of mutual trust and confidence. One or more of the actions may be a fundamental breach of contract, but this is not necessary. It is the course of conduct which constitutes the breach. The final incident itself is simply the last straw even if in itself it does not constitute a repudiatory breach. The last straw should at the least contribute, however slightly, to the breach of the implied term of trust and confidence.

127. The question of waiver has to be considered. A clear waiver, or simple passage of time, may demonstrate that the employee has affirmed the contract at any particular moment. However, it may be that a final incident would be sufficient to revive any previous incidents for the purpose of showing a breach of the implied term.

128. In cases where there has been a course of conduct, the tribunal may need to consider whether the last straw incident is a sufficient trigger to revive the earlier ones. In doing so, we may take account of the nature of the incident, the overall time spent, the length of time between the incidents and any factors that may have amounted to waiver of any earlier breaches. The nature of waiver is also relevant in the sense of was it a once and for all waiver or was it simply conditional upon the conduct not being repeated.

129. The repudiatory breach, or breaches, need not be the sole cause of the claimant's resignation. The question is whether the claimant resigned, at least in part, in response to that breach as per Nottinghamshire County Council v Meikle [2004] IRLR 703, CA.

130. Case law authority to include Abbeycars (West Horndon) Ltd v Ford UKEAT/0472/07 provides that the question a tribunal needs to address is whether the breach played a part in the dismissal and that it would be necessary to consider which was the principal reason for leaving.

131. The last straw does not have to be of the same character as the earlier acts, nor must it constitute unreasonable or blameworthy conduct, although in most cases it will do so. But the last straw must contribute, however slightly, to the breach of the implied term of mutual trust and confidence. An entirely innocuous act on the part of the employer cannot be a final straw. The test is objective. It is unusual to find a case where conduct is perfectly reasonable and justifiable, but yet satisfies the last straw test.

132. We must consider causation, the employee must show that he has accepted the breach, the resignation must have been caused by the breach and if there is a different reason causing the employee to resign in any event irrespective of the employer's conduct there can be no constructive dismissal.

133. Where there are mixed motives the tribunal must consider whether the employee has accepted the repudiatory breach by treating the contract of employment as at an end. Acceptance of the repudiatory breach need not be the only, or even, the principal reason for the resignation, but it must be part of it and the breach must be accepted.

Conclusions

134. In reaching our conclusions we have followed the agreed final list of issues.

Direct race discrimination – s13 EQA

Allegation

Pre-transfer, sometime in “early 2019” did Mr Rahman tell the Claimant and his line manager, Mr Oni, to attend a site, asked them what they were doing there in front of a client when they arrived, which embarrassed the Claimant, and then later shouted at them. During the latter meeting did Mr Rahman claim clients could not understand Mr Oni's due to his “African accent”?

135. Whilst we set out our findings in respect of this incident below the first question we need to address is the Respondent's contention that it could face no liability in respect of the alleged conduct of Mr Rahman towards the Claimant prior to the TUPE transfer on 1 May 2019. Whilst the Respondent accepts that all Amey's liabilities to its employees would have transferred to the Respondent by virtue of Regulation 4 (2) (a) of TUPE it argues that as Mr Rahman was not an employee of Amey this would not apply. Further, the Respondent argues that the Claimant was not a contract worker per s.41 (5) EQA.

136. We also need to consider whether, regardless of the above matters, these incidents would have formed part of a course of conduct permitting the Tribunal to consider them given the out of time contention raised by the Respondent.

137. We find that the Claimant was not a contract worker under s.41 (5) EQA. We also find that any liability, had we found that it existed, would not have transferred from Amey to the Respondent under TUPE. Further, we do not find that the pre-transfer allegations form part of a continuing course of conduct and therefore they would have been out of time. We, nevertheless, make findings in relation to these pre-transfer matters given that we do consider that they constitute background information relevant to those elements of the claim over which we have jurisdiction.

138. We find no evidence that Mr Rahman's conduct during the meeting at the Stephen Wiltshire Centre constituted race discrimination. We reach this finding for the following reasons:

- a) it formed a reasonable part of the Claimant's job description to be asked to attend premises which were cleaned by Amey as part of its contract with the Respondent;
- b) whilst we find that Mr Rahman's manner and comments to the Claimant and Mr Oni may have felt embarrassing or undermining, we do not find any evidence that this conduct was on account of their race; and
- c) we find no evidence that Mr Rahman complained about Mr Oni's "African accent" and it is particularly significant that Mr Oni did not include this matter in his witness statement. We therefore do not consider that the burden of proof shifts to the Respondent.

Allegation

Pre and post transfer, did Mr Rahman telephone the Claimant after midnight to shout at him regarding issues on site? Did Mr Rahman require the Claimant to attend a site after midnight on one occasion?

139. We find that this incident took place prior to the TUPE transfer. As set out in our findings of fact we consider that Mr Rahman's request to the Claimant was reasonable. Further, we find that the Claimant was not required to attend the site and the inconvenience to him in respect of a single incident was relatively minimal. We find no evidence that Mr Rahman's contacting the Claimant regarding the alarm at the Centre was in any way related to his race.

Allegation

Did Mr Rahman "encourage staff", to raise grievances about the Claimant sometime in mid-May 2019?

140. We find no evidence to support this contention. Ms Felix had raised a grievance by her union representative, Ms Ishmael on 8 November 2018. We find that this grievance remained extant at the time of the TUPE transfer. We find no evidence that Mr Gordon's letter dated 3 June 2019, in which he complained about the Claimant's conduct towards him, was written as result of Mr Rahman encouraging him to do so.

Allegation

Did Mr Rahman tell the Claimant to clean toilets at a site in Hammersmith in mid-June?

141. It is accepted that the Claimant together with Mr Dziadziak were asked by Mr Rahman to attend a site in Hammersmith to clean toilets. We find that this represented a reasonable request given that there had been circa 10 complaints

regarding the state of the toilets. Further, the Claimant accepts that he was not required to undertake any actual cleaning duties. We do not consider the toilets being outside the area for which the Claimant had normal responsibility negated from what we consider the reasonableness of the request. We find no evidence that Mr Rahman asked the Claimant to attend on account of his race.

Allegation

Did Mr Rahman decide to “reopen” and “reinvestigate” grievances made against the Claimant by Ms Felix and Mr Gordon in 2018?

142. First, in relation to Mr Gordon it is not correct that his grievance dated from 2018. Whilst Mr Gordon had been suspended between July and December 2018 his grievance pertaining to the Claimant was dated 3 June 2019. Therefore, there can be no question that this was reopened.

143. In relation to Ms Felix we find that her grievance had not been resolved between it being raised on 8 November 2018 and the TUPE transfer on 1 May 2019. We consider that this was partly explained as a result of Amey’s possible reluctance to address more difficult employee issues given that the contract had been terminated and all outstanding employee issues would transfer to the Respondent with effect from 1 May 2019. We also consider that the delay was partly a result of uncertainty between those involved, to include Mr Cunningham, Mr Oni and the Claimant, regarding who had responsibility for the conduct of disciplinary and grievance procedures relating to her. Again, we do not therefore consider that Ms Felix’s grievance was being reopened as we find it had never been resolved. We find no evidence that in Mr Rahman’s conduct in this matter was in any way motivated by the Claimant’s race.

Allegation

Did Mr Rahman decide to suspend the Claimant?

144. We find that Mr Rahman was undoubtedly involved in the decision to suspend the Claimant. We reach this finding based on the following:

- a) he had some level of involvement in the drafting and finalisation of the letter of suspension;
- b) he called the Claimant on his mobile phone on the evening of 12 July 2019 to invite him to attend a meeting on 15 July;
- c) he would have attended the meeting on 15 July during which the Claimant would have received notice of suspension; and
- d) by his actions more generally in the period immediately prior to and during the Claimant’s suspension he had a high level of involvement in the process to include interaction with Occupational Health.

145. We do not, however, find any evidence to infer that Mr Rahman’s involvement was in any way on account of the Claimant’s race.

Allegation

Did Mr Rahman “swear at the Claimant repeatedly” and act aggressively and rudely during a telephone call on 12 July 2019 at which the Claimant was invited to attend a meeting with him and HR the following Monday?

146. Whilst we find that Mr Rahman was likely to have expressed a degree of irritation and frustration with the Claimant during his calls to him on 12 July 2019 we do not find that this extended to “repeatedly and aggressively” swearing at him. In reaching this finding we consider it relevant that by this point the Claimant had undoubtedly developed a heightened sensitivity to what he perceived to be Mr Rahman “stalking” or harassing him. We reach this finding based in part on what we found to be the Claimant’s disproportionate reaction to what we consider to be relatively minor incursions in his private time, for example, the telephone call regarding the alarm at the Stephen Wiltshire Centre. In any event we find no evidence to infer that this conduct was on account of the Claimant’s race.

RACE RELATED HARASSMENT CONTRARY TO S.26 EQA

Allegation

The matters listed at 2.2 above

147. Given our findings as set out above we do not find any of these matters to constitute harassment under s.26 EQA.

Allegation

Did Mr Rahman decide to refer the Claimant to Occupational Health?

148. We find on the balance of probabilities that Mr Rahman was involved in the decision to refer the Claimant to Occupational Health. We also find that the Respondent, whether via Mr Rahman or otherwise, acted with an unusual level of alacrity in making such a referral. Whilst the Respondent says that this was a result of its concern on account of the Claimant being absent from work on account of stress we find that the apparent haste to refer him to Occupational Health was at least in part attributable to his suspension and a perception that his illness was not genuine and that he was seeking to evade the investigation and potential disciplinary process. We do not, however, find any evidence to infer that this conduct was on account of the Claimant’s race. In any event, we do not consider that being asked to attend Occupational Health, even in the early stages of a sickness absence, could be regarded as harassment under s.26.

Constructive Unfair Dismissal

Time limits and continuing course of conduct

149. The first issue we need to address is whether any of the matters relied on by the Claimant are out of time. In other words, was there a continuing course of conduct and if so from when did it commence? For the reasons set out above we have found that those matters which took place prior to the TUPE transfer on 1

May 2019 are outside the jurisdiction of the Tribunal and are referred to only as background evidence. We do, however, find that those matters subsequent to the TUPE transfer which culminated in the letter of suspension dated 15 July 2019 and the Claimant's grievance dated 18 July 2019, and all matters thereafter up to his resignation on 2 September 2019, form a course of conduct and matters upon which the Claimant was entitled to rely in his claim of constructive dismissal.

Allegation

The matters listed at 2.2 above

150. In relation to 2.2.1 and 2.2.2 given our findings above to include those on time limits, the non-transference of these matters under TUPE and our findings of facts and conclusions we do not find that they constituted either individually, or as part of a cumulative course of conduct, repudiatory acts leading to the Claimant's resignation.

Allegation

The matters listed at 3.1.3 above

151. Whilst we do not find that in itself Mr Rahman's involvement in referring the Claimant to Occupational Health was capable of constituting a repudiatory breach of the implied term of trust and confidence we nevertheless consider his involvement to be significant in the context of the overall decision to suspend the Claimant and we will address this in more detail below.

Allegation

Did the Respondent remove the Claimant's supervisory duties following the transfer?

152. Whilst we accept that the Claimant had some basis to perceive that his status had been reduced subsequent to the assimilation process after the TUPE transfer we do not consider that it was sufficient to amount to a breach of the implied term of trust and confidence. We find that the matters complained about by the Claimant regarding his reduction in status to be relatively minor, for example, loss of responsibility for disciplinary and grievance processes and the ability to suspend employees and were not, in any event, part of his contractual job description at Amey. We further find that the Claimant's principal reason for complaining that his status had been reduced was because of the improved pay and enhanced job titles of cleaning staff previously more subordinate to him. We also consider it significant that this was not a matter referred to in the Claimant's grievance dated 18 July 2019.

153. In any event, we find that by his continuing employment and failure to raise a grievance in relation to these matters that any such breaches were affirmed by the Claimant. We further find that his resignation was not in any way attributable to concerns regarding adverse changes to his status consequent upon the TUPE transfer.

Allegation

Did Mr Rahman decide to “reopen” and “reinvestigate”, grievances made against the Claimant by Ms Felix and Mr Gordon in 2018?

154. For the reasons set out above we do not find that these grievances were reopened as alleged but rather in the case of Mr Gordon it was a new grievance and in the case of Ms Felix a grievance which had never been resolved.

Allegation

Was the decision to suspend the Claimant taken in breach of the Respondent’s disciplinary policy?

155. It is important for us to consider both the express terms of the power of suspension within the Disciplinary Policy (the Policy) but also the implied term of trust and confidence. The Policy expressly provides that suspension should never be automatic and only be imposed after careful consideration. As we have set out the Policy gives as one example of when suspension may be appropriate circumstances where an employee’s continued presence at work poses a risk and/or relationships in the workplace have broken down.

156. A power of suspension is subject to an implied term that it will only be exercised reasonably, with good cause, consistently and not in a capricious or vindictive manner. Therefore, whilst the Respondent has on the face of it the power to suspend it is necessary for us to consider the particular circumstances as to whether the Claimant’s suspension was in accordance with the power under the Policy but also whether the fact and circumstances of the Claimant being suspended breached the implied term of trust and confidence.

157. We find that the Claimant’s suspension was an unnecessary and excessive act given the circumstances known to the Respondent as at the date the decision to suspend was determined (12 July 2019). We reach this finding for the following reasons:

- a) The grievances raised by Ms Felix and Mr Gordon were not sufficient to warrant suspension without investigation. In relation to Ms Felix her grievance had been extant since 8 November 2018 and had not been regarded as sufficiently serious by either Amey or the Respondent over the following eight months to invoke any form of disciplinary process against the Claimant. Whilst we do not find the Respondent sought to invoke stale grievances we do, however, consider that the delay in taking any action against the Claimant was indicative of it not being perceived by either Amey or the Respondent that Ms Felix had raised serious issues regarding the Claimant’s conduct.
- b) In relation to Mr Gordon we find his letter of 3 June 2019 disclosed insufficient matters to warrant the Claimant’s suspension.

- c) Further, we consider that there was a failure to take into account the extent to which Ms Felix and Mr Gordon could have been motivated by antipathy towards the Claimant as result of his being a manager responsible for ensuring that service provision standards were maintained, for example, his being required to attend the Shepherds Bush library as result of complaints being raised regarding cleaning standards and as result of his involvement in the respective suspensions of Ms Felix and Mr Gordon.
- d) We also consider that as the date of the Claimant's suspension there was little, if any, contemporaneous evidence that he had been inciting employees to raise false complaints against Mr Rahman. We find that what evidence existed to this effect was only obtained during the resultant investigation and therefore not matters upon which the Respondent could reasonably rely on at the time it invoked the Claimant's suspension.
- e) We also consider that the letter of suspension dated 15 July 2019 was woefully inadequate in its lack of particularity as to the grounds of suspension. First, it referred to the Claimant subjecting a member of his team to bullying and harassment without specifying which employee. Further, the reality of the position was that the Respondent was referring to two employees namely Ms Felix and Mr Gordon. This should have been disclosed to the Claimant. Secondly, the Claimant was alleged to have breached the Council's code of conduct in respect of working with his management team. No particulars were provided as to why and in respect of whom.
- f) We also consider the extent of Mr Rahman's involvement in the fact and process of the Claimant's suspension to have been inappropriate and in breach of the implied term of trust and confidence. Given that it became apparent that the Respondent's concerns regarding the Claimant's conduct were largely predicated on Mr Rahman's perception that the Claimant was inciting dissention towards him from employees working under his control it was wholly inappropriate in our view that Mr Rahman had any involvement in the process. We consider that he should have secluded himself from the process and the matter should have been handled by HR or other managers not directly involved.
- g) We also consider that there was a dichotomy between the approach taken by the Respondent in respect of the Claimant's suspension and the failure by the Respondent to take any action in respect of Mr Rahman when the Claimant made a series of complaints regarding him in his grievance dated 18 July 2019. We consider that this evidences a situation where the Respondent had a preconception that the breakdown of the working relationship between the Claimant and Mr Rahman was solely attributable to the Claimant and again we find this to be in breach of the implied term of trust and confidence.

Allegation

Should the Respondent have postponed referring the Claimant to Occupational Health?

158. We do not find that the early referral of the Claimant to Occupational Health constituted a breach of the implied term of trust and confidence.

Allegation

Should Ms Tuthill have passed the Claimant's address to Mr Rahman and allowed Mr Rahman to contact the Claimant about his suspension on 18 July 2019?

159. As set out above we consider that Mr Rahman's involvement in the Claimant's suspension and subsequent process was a breach of the implied term of trust and confidence. We do not, however, find that the passing of the Claimant's address to him was a breach of the implied term of trust and confidence. We find this to have been a minor administrative act and one in respect of which the Claimant had a heightened and unreasonable sensitivity.

Allegation

Should the Respondent have continued investigating the Claimant after receiving the Claimant's grievance on 18 July 2019?

160. The investigation undertaken by Mr Davies and Mr Draper related to both the Claimant's grievance and the matters giving rise to his suspension. We do not consider it inappropriate that this investigation continued and it would not have been known to the Respondent at its initiation that he would remain on sick leave and resign before returning to active employment. We therefore do not find that this gave rise to a breach of the implied terms of trust and confidence.

Allegation

Was the email of Mr Davies, investigator, of 28 August 2019 a repudiatory breach of contract?

161. We find that whilst Mr Davies' email of 28 August 2019 was not in itself a repudiatory breach it did give rise to a repudiatory breach when read in conjunction with the letter of suspension dated 15 July 2019 and various subsequent matters regarding the fact and circumstances of the Claimant's suspension. Given that the Claimant had not yet been interviewed we find it to have been very surprising that the extent of the allegations against him in Mr Davies' email had expanded significantly from those in the letter of suspension in that they now related to both Mr Gordon and Ms Felix and also that the Claimant was alleged to have sought to persuade staff to present a fraud case against Mr Rahman. No such particularity was contained in the original letter of suspension.

162. Whilst not directly relevant to our decision it is nevertheless noteworthy that on the conclusion of an extremely detailed investigation Mr Davies found the

allegations against the Claimant to be unsubstantiated. We consider this provides retrospective support for our view that the original suspension was premature, disproportionate and unnecessary.

Last Straw

163. We find that the Claimant's resignation was in respect of cumulative breaches of the implied term of trust and confidence in the period from 12 July 2019 and cumulating in Mr Davies' email of 28 August 2019 entitling him to resign and claim constructive dismissal. We find that the Claimant resigned in response to Mr Davies' email in the context of the fact and circumstances of his suspension and various subsequent events

Affirmation

164. We do not consider that by his actions the Claimant had affirmed individual or cumulative breaches breach of the implied term of trust and confidence in the period after his suspension. We consider that there was a continuing course of conduct which culminated in the Claimant's receipt of Mr Davies' email of 28 August 2019.

165. The Claimant's claim for constructive unfair dismissal therefore succeeds.

Remedy

166. The question as to whether there should be any reduction in compensation for unfair dismissal as a result of any contributory conduct, any failure by the Claimant to comply with the ACAS Code of Conduct or otherwise has not been considered and any arguments in this respect would be considered at any remedies hearing.

Employment Judge Nicolle

Dated: **9 November 2020**

Sent to the parties on:

09/11/2020

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For the Tribunal Office