EMPLOYMENT TRIBUNALS

Claimant: **Ms A. Adegbite**

Respondent: **Ministry of Justice**

Heard at: **East London Hearing Centre**

On: **9-11 October 2024**

Before: **Employment Judge Massarella**
Mrs G. Forrest
Prof J. Ukemenam

Representation
Claimant: In person
Respondent: Mr S.S. Maini-Thompson (Counsel)

REASONS

JUDGMENT having been sent to the parties on 16 October 2024 and written reasons having been requested by the Claimant in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

Procedural history

1. The claim form was presented to East London Tribunal on 28 April 2023. The claims were of unfair dismissal and race discrimination; the Claimant is Black.

2. The ACAS early conciliation period was between 16 March and 4 April 2023.

3. Originally there was a Second Respondent, Brook Street (UK) Limited, the agency that assigned the Claimant to work for the Respondent.

4. There was a preliminary hearing on 10 November 2023 before EJ Lewis. The unfair dismissal claim was dismissed on withdrawal; the Claimant lacked the qualifying period of employment. The claims against the Second Respondent were also dismissed; the Claimant agreed that she was not alleging discrimination against it. A list of issues was agreed.

5. There was a second preliminary hearing on 12 April 2024 before EJ Howden-Evans. The Judge declined to make deposit orders. The list of issues was

refined; it is set out in the appendix to this judgment. The present hearing was listed.

6. The only claims are of direct race discrimination. The two allegations relating to the termination of the Claimant's assignment by the Respondent and its handling of her complaint are agreed to be in time; the Respondent does not accept that any of the other allegations are in time; the Claimant says that there was conduct extending over a period, alternatively, that time should be extended.

7. The Claimant arrived late on the first day of the hearing through no fault of her own. She had been wrongly informed by the Tribunal administration that the hearing was by CVP. The Tribunal began its reading into the case while she made her way to the hearing centre. When she arrived, she confirmed that she was ready to proceed.

The hearing

8. We had a 289-page bundle, to which two emails were added on the first day of the hearing.

9. We heard evidence from:

   9.1. the Claimant;

   and on behalf of the Respondent from:

   9.2. Ms Tricia Norris (permanent Band E administrative officer);

   9.3. Mr Anthony Walcott (operations manager, East and North East London Magistrates Group);

   9.4. Mr Chun Tao Tsang (admin officer at the time, Barkingside).

   9.5. Mr Billy Smith (at the time, list caller at Thames Magistrates Court, assigned by Brook Street).

Findings of fact

10. The Claimant was assigned to work for the Respondent by Brook Street Recruitment Agency. She was a contract worker for the Respondent. The Respondent accepted that it would be liable for any unlawful discrimination by its employees or workers against the Claimant by operation of s.41 Equality Act 2010.

11. The Claimant had a contract of employment with Brook Street, dated 4 November 2021. Clause 1.6 of the contract states:

> 'You agree that Brook Street or the Client may terminate an assignment at any time, without prior notice or liability. Termination of an assignment is not termination of your employment.'

12. The Claimant started working for the Respondent on 21 November 2021. She worked as a list-caller, mainly at Barkingside Magistrates Court, sometimes at Thames Magistrates Court. The courts in which the Claimant worked were

staffed by a racially diverse workforce; it was made up of a mixture of permanent employees and agency workers.

13. It was agreed that, in the first week of her assignment, the Claimant informed the Respondent for the first time that she was attending university until the end of December 2021. The Respondent agreed that she would not work on Tuesday mornings or Thursday afternoons. That arrangement continued until the end of 2021. From 1 January 2022, the Claimant worked full-time over five days.

14. The Claimant mostly did pre-court work which involved general usher's duties, including tasks such as managing the court room, locking and unlocking it, providing the magistrates, judges and legal advisers with their list for the day and completing certain paperwork relating to the cases.

15. Every morning a crate came from Thames Court to Barkingside, containing the court registers in hard copy. It normally arrived around 08:30. A member of staff (not the Claimant) opened it and sorted out the lists. Copies were immediately taken up to the Judge, magistrates room and legal advisers. The spare copies were left on the desk next to the one used by the Claimant for the list-callers to take a copy for themselves and copies for the duty solicitor and probation, if required.

16. The Claimant habitually arrived late for work, around 09.10 in the morning. Her colleague, Ms Norris, who arrived around 08:30/08:45 ensured that the Claimant's lists were delivered to the necessary people, so that the Claimant's absence did not cause delay or inconvenience to the court.

<u>The Claimant's performance</u>

17. In the course of the Claimant's work for the Respondent, a number of performance issues were raised with her. These are included in a list of agreed facts and correspond with contemporaneous documents, to which we were taken. They are as follows.

    17.1. On 15 December 2021, the Respondent raised concerns with the agency that the Claimant regularly arrived late to work, had fallen asleep in court and was struggling to take in training in the mornings. The agency raised those concerns with the Claimant. The Claimant agreed with them and agreed to improve.

    17.2. On 31 January 2022, the Claimant was late for work stating that she had a burst tyre.

    17.3. On 5 April 2022, the Claimant left the courtroom unattended at Thames Magistrates Court which allowed a member of the public to enter and violently throw a holy book on the court floor. The Claimant was spoken to by Aktar Ali and Katherine Robinson (Delivery Managers). The Claimant confirmed that she was aware that empty court rooms needed to be locked. The Claimant was informed that if a similar incident occurred again, her assignment may be terminated.

17.4. On 28 November 2022, the Magistrates' Bench the Claimant was working with that day reported that they were unhappy with the Claimant's performance.

17.5. The Claimant was given work in a different area (with the 'Post-Court' team). The Claimant had difficulties in carrying out that work. She did not know how to do everything she needed to do and had to ask a lot of questions.

18. We further accept Mr Wolcott's evidence that, when the Claimant was assigned in December 2022 to work mostly on post-court work, her work was inefficient and impacted negatively on the team's overall performance. The Claimant blames this on inadequate training; we return to that issue later in the judgment.

<u>The alleged hiding of the Claimant's keys/alarms (Issue 2.2.1)</u>

19. We turn now to the Claimant's first allegations of unlawful conduct: that three of her colleagues, Ms Norris, Mr Tsang and Mr Smith repeatedly hid her courtroom keys, mobile panic alarm and her clipboard (containing her court register), thereby preventing her from doing her job. These are allegations of direct race discrimination.

20. The Claimant has had every opportunity to particularise these allegations: to give dates on which she says the events took place, either specific dates or approximate dates; to give details of specific occasions, describing for example where she was when she discovered that the items were missing, where she found them etc. She did not provide those details at either of the preliminary hearings, nor did she provide them in her witness statement, where she dealt with these allegations in a single brief paragraph, nor at the hearing.

21. The Claimant did not complain about these alleged incidents at the time, nor did she keep a record of them. Her explanation was that she did not know which manager she should complain to. She confirmed that she did not make any enquiries about who that person might be.

22. As for the alleged hiding of her keys and her panic alarm, the allegation is that this occurred two to three times a week over a period of 11 months in 2022. If that is right, it would amount to dozens of occasions. The Claimant was unable to identify a single specific occasion when this occurred in her oral evidence.

23. Our starting point is that we heard direct evidence from all three witnesses. All of them denied the allegations without hesitation. They appeared to us to be serious and careful in the evidence they gave; that evidence suggested to us that they were professional in their approach to their work; one of them, Ms Norris is a long-standing permanent staff member at Barkingside; Mr Smith has subsequently been promoted to team leader; Mr Tsang has subsequently moved to Snaresbrook to progress his career. We found them to be credible witnesses. We also think it inherently improbable that professional court staff would act in this way, especially in cahoots with each other. If they did so, they would be putting their own – and each other's - professional reputation at serious risk.

24. Our second reason for rejecting these allegations is the sheer number of occasions on which these acts are said to have taken place, which we also find

inherently improbable. If this happened dozens of times, it would have had a damaging impact on the operation of the courts. With our knowledge of the court system, we are certain that it would have been noticed, complained about and looked into, either by members of the judiciary or senior members of staff. We also note that the Claimant's estimate of how often this happened changed in the course of her evidence.

25. Our third reason for rejecting these allegations is the Claimant's failure to give any dates, even approximate dates, for the occasions on which she says this occurred. If this conduct occurred, it would have been striking and memorable, especially as the Claimant alleges that the conduct was racially motivated. The fact that she cannot remember a single occasion in detail confirms us in our conclusion that the events did not happen as described.

26. Our fourth reason for finding that none of these colleagues hid the Claimant's keys or alarm is her own explanation that, when she referred to 'hiding', she meant handing them into security. On any definition, that is not hiding. It is, however, consistent with Mr Smith's evidence that, if he ever found the Claimant's courtroom keys hanging from the courtroom door or the keys or alarm left unattended by her in the courtroom or in the office, he would return the keys to the secure key safe and the alarm to security. That is, in turn, consistent with Ms Norris's recollection of a particular occasion when the Claimant could not find her keys; Ms Norris went to the court with her to help her look and found them hanging on the inside of the courtroom door. To be clear: neither of the situations described by these witnesses amounted to hiding the Claimant's belongings, or indeed improper conduct of any sort; rather, they reflected an appropriate degree of care by Ms Norris and Mr Smith as to the security of the court. In our judgment no reasonable employee would regard this as a detriment: if the Claimant had a sense of grievance about this, it was not justified.

27. On the balance of probabilities, we find that none of the three individuals against whom these allegations are made hid the Claimant's keys or her portable alarm at any point.

<u>The alleged hiding of the Claimant's clipboard (Issue 2.2.3)</u>

28. We turn now to the allegation that the three colleagues also hid the Claimant's clipboard (on which she kept her usher list and register). We also find that, on the balance of probabilities, they did not do so. Much of the reasoning we have given in relation to the keys/alarm applies equally to the alleged hiding of the clipboard.

29. The Claimant said in cross-examination that it happened 'a few times'; in response to questions from Counsel for the Respondent she said 'maybe two or three times'. She said that she did not know where it had been hidden. She claimed that security staff had 'told her who had brought it to them or who had hidden it'. She said that her clipboard was taken at lunchtime. She denied that it was possible that she had misplaced it. Again, she gave no details at all as to when these events are said to have happened. In making the allegation, she did not distinguish between Ms Norris, Mr Smith and Mr Tsang.

30. The only specific occasion the Claimant referred to was when she was cross-examining Ms Norris and put to her that when she, the Claimant, arrived late on 21 December 2022, Ms Norris, who had been covering her court, gave her her keys and her panic alarm, but did not give her clipboard. She then put to Ms Norris, that the latter told her that it was upstairs with another colleague. The Claimant went upstairs and found that it was indeed with the colleague Ms Norris had identified. Again, that does not amount to hiding the clipboard.

31. For all these reasons we find that none of these three individuals hid the Claimant's clipboard.

32. Because we have found that these acts did not happen as alleged, we do not need to go on to consider whether they were discriminatory.

<u>The failure by three colleagues to print out the Claimant's rota/register (Issue 2.2.2)</u>

33. We then turn to the Claimant's allegation that between February 2022 and December 2022, Ms Norris, Mr Smith and Mr Tsang did not print her rota. Again, she alleges that it occurred over an eleven-month period, without her raising any complaint or grievance. Again, she was unable to give any details at all as to the dates on which this is said to occurred. For the reasons we have given in relation to the keys, alarm and clipboard allegations, this was an important factor in our conclusions about this allegation.

34. There was some confusion during oral evidence about whether the Claimant actually meant the rotas (which assigned the list-caller to a particular court or activity) or the registers (which gave details of the cases in the courts). The register needed to exist in multiple copies because it was the document which was given to magistrates, judges and legal advisers at the beginning of the day. It emerged that the Claimant was referring to the register. We were prepared to consider the allegation on that basis, even though it was not pleaded in that way and Mr Smith, in particular, had given his evidence in his statement about the rotas not the registers. Nonetheless, the Respondent's witnesses did their best to deal with the allegation as it was now pursued.

35. When the Claimant was asked about this allegation in cross-examination, and after she had clarified that she meant the registers, her initial answer was that the three individuals printed out the register for the day and that they did this for everyone, including her. Of course, if that were true, the Claimant was not treated differently and the claim would immediately fail.

36. The Claimant then changed her answer and said that they printed it for everyone else but not for her.

37. We have already made findings as to how hard copies of these registers arrived at court. They were also sent through by email, which contained a series of PDF attachments, each of which was a register for one court.

38. We find that what happened was as follows. If the register received in hard copy from Thames court was up-to-date, additional copies would be made. Enough copies were made for judges, magistrates and legal advisers and those copies were taken up to the courts to give to them as soon as they were printed, so that they knew what their list for the day would be. Extra copies were made for the list-callers, and in case duty solicitors or probation needed them. Whether

or not they would be needed was unpredictable. Multiple copies were left on the desk near the Claimant's desk.

39. If the list which arrived from Thames court needed updating, one of the three colleagues would print out the PDFs which had been sent through by email. Again, sufficient copies would be made for all users, including the list callers, plus spare copies.

40. We then considered whether it was likely that the three individuals would have deliberately not printed a copy for the Claimant. In order to do so, they would have needed to work out precisely how many copies were needed altogether and leave a pile of that number of copies on the desk, minus one, so as to disadvantage the Claimant and no one else. It seems to us inherently implausible that anybody would have either the time or the inclination to do that. We also think that it is practically impossible because, when copies were made or printed out, the person doing the copying and printing would not know how many spares would be needed in each court. They could not possibly engineer the number of spares so as to disadvantage the Claimant. We have concluded that this is a conspiracy theory on the Claimant's part without any basis in reality.

41. We note that this task would normally have been completed by the time the Claimant arrived for work. We think it is possible that there may have been occasions when she arrived and found that all the spare copies had been taken for use by other people. All she needed to do then was to log in to her computer and print herself an additional copy. We accept Mr Smith's evidence that she was often unable to do so because she had forgotten her login details. As a DSO he then tried to help her resolve the problem and log into the computer. That may have been frustrating for the Claimant, but it was not the fault of her colleagues.

42. We find that on no occasion did any of the three colleagues deliberately fail to make a copy for the Claimant of the register for her court. Accordingly, this claim fails on its facts.

<u>The allegation that, in or around December 2022, Tricia Norris told the new manager, Carl Kingshott, to terminate the claimant's assignment (Issue 2.2.4)</u>

43. In late 2022, Mr Carl Kingshott took over as manager at Barkingside. The Claimant alleges that Ms Norris told him to terminate the Claimant's assignment.

44. Asked in cross-examination how she came to believe this, the Claimant's evidence was as follows. She alleged that Ms Norris told her that she (the Claimant) was going to be dismissed when Mr Kingshott took over. Ms Norris denies this. The Claimant then said: 'she told me the new team leader will not take any … I can't remember how she put it … She was happy the new team leader was the team leader and I can't misbehave'. Asked by the Judge if she used that expression, the Claimant said: 'she said I should be careful'. We note that, even within those answers, the Claimant changed her position significantly.

45. The Claimant confirmed that it was an assumption on her part that Ms Norris told Mr Mr Kingshott to terminate her assignment. She did not witness the conversation. She assumed from the fact that her assignment was terminated that Ms Norris must have instructed Mr Kingshott to do so.

46. Ms Norris is not a manager. The Claimant accepted that she did not have authority to give such instruction but observed that 'she has influence'.

47. Mr Walcott's evidence was that it was he who took the decision to terminate the Claimant's assignment. It is right that that decision was taken following a conversation with Mr Kingshott, who raised with Mr Walcott his own concerns about the Claimant's performance. Mr Walcott was aware of the background of concerns raised by others over the previous year. Mr Walcott, who is Black, decided that the time had come to bring the assignment to an end. He instructed Brook Street accordingly and they communicated with the Claimant.

48. There is no evidence to support the Claimant's assertion that Ms Norris had any involvement whatsoever in the decision. The Tribunal have concluded that this is an entirely speculative allegation, based on nothing more than a belief on the Claimant's part.

49. For the reasons given above, and on the balance of probabilities, we find that Ms Norris did not tell Mr Kingshott to terminate the Claimant's assignment.

Mr Kingshott's failure to train the claimant adequately on the email system (Issue 2.2.5)

50. Around the beginning of December 2022, the Claimant was moved from the pre-court team to the post-court team, where she worked on resulting. This involved checking the information contained in two emails to ensure that they matched and then validating the result.

51. Mr Kingshott trained the Claimant in how to do this.

52. The only evidence we heard as to the length of that training was from the Claimant. She said it lasted 20 minutes. Mr Kingshott, who no longer works for the Respondent, was not present to say otherwise. Mr Walcott, who was not present at the training, gave evidence that training for this task, which he regarded as relatively simple, would normally last about an hour.

53. Absent any evidence to the contrary, we accept the Claimants assertion that her training on this occasion was shorter than it should have been. We will deal with our conclusions in relation to time limits and discrimination later in the judgment.

The termination of the Claimant's assignment (Issue 2.2.6)

54. We now turn to the termination of the assignment. On 19 December 2022, Mr Kingshott came to see Mr Walcott and they discussed the ongoing issues with the Claimant's performance, which had not improved after her move to the post-court team. Mr Walcott knew the background circumstances. He instructed Mr Kingshott to inform Brook Street that the Respondent no longer needed the Claimant's services.

55. We accept that this conversation took place on that day, partly because, on the Claimant's own account, by the time she arrived to work on 21 December 2022 (a day when she was delayed again because of a flat tyre), her name no longer appeared on the rota. She phoned the agency to ask why and that is when the agency informed her that the Respondent had terminated the assignment. They used what the Tribunal regarded as a euphemism of referring to 'business needs'.

56. Brook Street emailed the Claimant on 21 December 2022, terminating the assignment. The Claimant remained Brook Street's employee.

57. The Claimant relies on a permanent member of staff called Ash, employed as a list caller, as a comparator. She alleges that he used to watch programmes on his laptop at work; no action was taken against him. She was not aware that any performance concerns were raised about him. We accept Mr Smith's evidence that Ash watched videos on his phone during his lunch break. He did nothing wrong.

<u>The Respondent's alleged failed to deal with the Claimant's complaints properly (Issue 2.2.7)</u>

58. On 27 December 2022, the Claimant lodged a complaint.

59. The Claimant did not explain in her witness statement why she regarded the investigation as inadequate. This was explored with her in cross-examination, Wayne she said that 'nothing was done about it' and 'they did not take my evidence into account'.

60. Dealing with the first point that is factually incorrect. Enquiries were initially made by Brook Street, who asked the Claimant to explain why she thought that she had been discriminated against. She replied by email on 6 February 2023, giving very little additional explanation as to why her race was a factor:

> 'Below are the answers to the questions you asked.
>
> I can confirm that Tricia Norris and Carl Kingshott discriminated against me on the grounds of my race.
>
> Yes, I dispute the rationale provided by Carl Kingshott that I did not perform the roles/duties I was assigned to carry out.'

61. At that point Brook Street referred the matter to the Respondent and asked it to investigate. The investigation was assigned to Mr Jones, who was a manager at a different court. He was selected because he had not been directly involved in the relevant events. Mr Jones had a copy of the Claimant's original complaint. He took witness statements from Ms Norris, Mr Tsang and Mr Smith and he interviewed Mr Kingshott.

62. We are satisfied that Mr Jones did take the Claimant evidence into account in that he reviewed her complaint and the additional information she had provided to Brook Street.

63. The Tribunal was surprised that Mr Jones did not interview the Claimant in person. However, it is not one of the reasons the Claimant gave for the complaint not being properly handled.

64. It is agreed between the parties that the Claimant began a new assignment via Brook Street on 8 February 2023. That assignment was terminated by the new client for underperformance. The Claimant's employment with the agency terminated on 31 March 2023.

Time limits

65. Because the Claimant had not dealt with the question of time limits in her witness statement, I asked her some open questions at the beginning of her evidence to elicit her explanation as to why she did not complain to a Tribunal earlier about the acts of discrimination which she now says occurred in 2022. She gave three reasons: she spoke with Ms Norris about hiding her keys, who told her that she was just joking; she thought she had to exhaust the internal process before she could go to the Tribunal; she had three managers and she did not know who to speak to.

66. She confirmed that she was aware of the Employment Tribunal and knew that it deals with complaints of race discrimination. She knew that there was a three-month time limit from the date of the incident.

67. She took advice from a friend 'while I was going through the discrimination, while I was still working.'

The preparation of the Respondent's witness statements

68. The Claimant alleged that the Respondent's witnesses had seen her 'statement' before they drafted their statements for this hearing. At one point the Claimant said that by statement she meant her original internal statement/grievance; at another she suggested it was the statement for this hearing, which she had sent unilaterally to the Respondent on 29 July 2024, without waiting for the Respondent to confirm it was ready to exchange. The Claimant suggested that the Respondent's witnesses had used her statement as a 'template'.

69. We reject that allegation. We have seen an email from the Respondent's solicitor to the claimant, explaining to her that her statement had been received but would not be read or disclosed to anyone within the organisation until the Respondent was ready to exchange.

70. We are satisfied that that is what happened. We reached this conclusion primarily because, contrary to the Claimant's assertion, there was no sign that the Respondent's witnesses had used her Tribunal witness statement as a template for theirs. The Respondent's statements followed a different structure altogether, based on the list of issues. There was no procedural impropriety, let alone what the Claimant described as 'manipulation' on the Respondent's part.

The law

Direct discrimination

71. S.13(1) EqA provides:

> **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.**

72. The question whether the alleged discriminator acted 'because of' a protected characteristic is a question as to their reasons for acting as they did; the test is subjective (*Nagarajan v London Regional Transport* [1999] ICR 877, *per* Lord Nicholls at 884). Lord Nicholls considered the distinction between the 'reason why' question from the ordinary test of causation in *Chief Constable of West Yorkshire Police v Khan* [2001] ICR 1065 at [29]:

> **'Causation is a slippery word, but normally it is used to describe a legal exercise. From the many events leading up to the crucial happening, the court selects one or more of them which the law regards as causative of the happening. Sometimes the court may look for the "operative" cause, or the "effective" cause. Sometimes it may apply a "but for" approach…The phrases "on racial grounds" and "by reason that" denote a different exercise: why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact.'**

73. It is sufficient that the protected characteristic had a 'significant influence' on the decision to act in the manner complained of; it need not be the sole ground for the decision (*Nagarajan* at 886).

74. However, the fact that a claimant's race is a part of the circumstances in which the treatment complained of occurred, or of the sequence of events leading up to it, does not necessarily mean that it formed part of the reason for that treatment (*per* Underhill J (President) in *Amnesty International v Ahmed* [2009] ICR 1450 at [37]).

75. In *Martin v Devonshires Solicitors* [2011] ICR 352 (a victimisation case) Underhill J said at [22-23]:

> **'In our view there will in principle be cases where an employer has dismissed an employee (or subjected him to some other detriment) in response to the doing of a protected act (say, a complaint of discrimination) but where he can, as a matter of common sense and common justice, say that the reason for the dismissal was not the complaint as such but some feature of it which can properly be treated as separable. The most straightforward example is where the reason relied on is the manner of the complaint**
>
> **[…]**
>
> **the reason asserted and found constitutes a series of features and/or consequences of the complaint which were properly and genuinely separable from the making of the complaint itself. Again, no doubt in some circumstances such a line of argument may be abused; but employment tribunals can be trusted to distinguish between features which should and should not be treated as properly separable from the making of the complaint.'**

76. The conventional approach to considering whether there has been direct discrimination is a two-stage approach: considering first whether there has been less favourable treatment by reference to a real or hypothetical comparator; and secondly going on to consider whether that treatment is because of the protected characteristic, here race/religion.

77. More recently, the appellate courts have encouraged Tribunals to address both stages by considering a single question: the 'reason why' the employer did the act or acts alleged to be discriminatory. Was it on the prohibited ground or was it for some other reason? This approach does not require the construction of a hypothetical comparator: see, for example, the comments of Underhill J in *Martin v Devonshires Solicitors* [2011] ICR 352 at [30].

78. In *Reynolds v CLFIS (UK) Ltd* [2015] ICR 1010 at [36], the Court of Appeal confirmed that a 'composite approach' to an allegation of discrimination is unacceptable in principle: the employee who did the act complained of must himself have been motivated by the protected characteristic. In *Alcedo Orange Ltd v Ferridge-Gunn* [2023] EAT 78, the EAT confirmed that this may be

contrasted with the position in whistleblowing cases in *Royal Mail Group v Jhuti* [2020] ICR 731, in which the Supreme Court held that, in exceptional cases, it is possible to look behind the motivation of the decision-maker and consider the influence of others who may have been motivated by the employee's status as a whistleblower.

79. It is an essential element of a direct discrimination claim that the less favourable treatment must give rise to a detriment (s.39(2)(d) EqA). There is a detriment if 'a reasonable worker would or might take the view that [the treatment was] in all the circumstances to his detriment' (*Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 at [35]). An unjustified sense of grievance does not fall into that category.

The burden of proof in discrimination cases

80. The burden of proof provisions are contained in s.136 EqA:

> **(1) This section applies to any proceedings relating to a contravention of this Act.**
>
> **(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision.**

81. The operation of the burden of proof provisions was summarised by Underhill LJ in *Base Childrenswear Ltd v Otshudi* [2020] IRLR 118 at [18]:

> **'It is unnecessary that I reproduce here the entirety of the guidance given by Mummery LJ in *Madarassy*.[1] He explained the two stages of the process required by the statute as follows:**
>
> **(1) At the first stage the Claimant must prove "a *prima facie* case". That does not, as he says at para. 56 of his judgment (p. 878H), mean simply proving "facts from which the Tribunal could conclude that the Respondent 'could have' committed an unlawful act of discrimination". As he continued (pp. 878-9):**
>
> > **"56. … The bare facts of a difference in status and a difference in treatment 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.**
> >
> > **57. 'Could conclude' in section 63A(2) [of the Sex Discrimination Act 1975] must mean that 'a reasonable Tribunal could properly conclude' from all the evidence before it. …"**
>
> **(2) If the Claimant proves a *prima facie* case the burden shifts to the Respondent to prove that he has not committed an act of unlawful discrimination – para. 58 (p. 879D). As Mummery LJ continues:**
>
> > **"He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the Tribunal must uphold the discrimination claim."**

[1] *Madarassy v Nomura International plc* [2007] ICR 867, CA

> **He goes on to explain that it is legitimate to take into account at the first stage all evidence which is potentially relevant to the complaint of discrimination, save only the absence of an adequate explanation.'**

82. The consequence of the way that s 136 works is that, if a respondent fails to show that the relevant protected characteristic played no part in its motivation for doing the act complained of, a tribunal is not obliged to make a positive finding as to whether or how it did so: indeed one of the reasons for the (partial) reversal of the burden of proof which it effects is that it can often be very difficult for a claimant to prove what is going on in the mind of the putative discriminator (*per* Underhill LJ in *Otshudi* at [44]).

83. In *Field v Steve Pye & Co (KL) Ltd and Others* [2022] IRLR 948, HHJ Tayler noted that an Employment Tribunal should not ignore evidence that suggests discrimination. In *Artem Limited v Edwins* [2024] EAT 136, he added that it is equally important that Employment Tribunals do not ignore evidence that suggests there has *not* been discrimination. What must be ignored at the first stage is any exculpatory explanation for the treatment.

84. The burden of proof provisions should not be applied by the Tribunal in an overly mechanistic manner: see *Khan v The Home Office* [2008] EWCA Civ 578 *per* Maurice Kay LJ at [12]. The approach laid down by s.136 EqA will require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but where the Tribunal is able to make positive findings on the evidence one way or another, the provisions of s.136 will be of little assistance: see *Martin v Devonshires Solicitors* [2011] ICR 352 at [39], approved by the Supreme Court in *Hewage v Grampian Health Board* [2012] ICR 1054 at [32].

85. The Court of Appeal in *Anya v University of Oxford* [2001] ICR 847 at [2, 9 and 11] held that the Tribunal should avoid adopting a 'fragmentary approach' and should consider the direct oral and documentary evidence available and what inferences may be drawn from all the primary facts.

Conclusions

86. We have found that, of the seven allegations of race discrimination, four did not take place and/or were not detriments: the allegation relating to the keys/alarms (Issue 2.2.1); the allegation relating to the clipboards (Issue 2.2.3); the allegation relating to the registers (Issue 2.2.2); and the allegation that Ms Norris told Mr Kingshott to terminate the Claimant's employment (Issue 2.2.4). Those claims have all failed on their facts.

87. That leaves three outstanding matters; the allegation relating to training; the termination of the assignment; and the handling of the grievance.

<u>Issue 2.2.5 (direct race discrimination): In early December 2022, Carl Kingshott did not train the claimant adequately on the email system. The claimant asserts she received only 20 minutes training.</u>

88. Dealing first with the training allegation, there is a time limits issue, which we deal with first.

89. This training took place at the beginning of December 2022. In order to bring a claim to the Tribunal, the Claimant had to contact ACAS by the beginning of March 2022, which would have led to an extension while the early conciliation

process took place. She did not contact ACAS until 16 March 2022, which is more than three months after the alleged act of discrimination. She therefore does not benefit from any extension relating to the conciliation period. She presented her claim on 28 April 2023 (we take that date because it was the date she sent the claim to East London). That was nearly two months out of time.

90. This cannot be conduct extending over a period linking to a claim which is in time because, for reasons we will go on to explain, we have not upheld those in-time claims. Nor do we consider it just and equitable to extend time. The Claimant knew that she had three months to bring her claim. There is no good explanation as to why she delayed in issuing her claim. Her explanation that she thought she needed to wait for the internal process to be exhausted cannot apply here because she did not make an internal complaint about the length of the training she received from Mr Kingshott. For these reasons the claim is out of time and be Tribunal does not have jurisdiction in respect of it. It is dismissed.

91. For completeness we considered whether, if we did have jurisdiction, we would have concluded that his was an act of race discrimination.

92. Had the Claimant proved facts from which we could conclude that her race was a material factor in the shortness of the training? She relies on the fact that Mr Kingshott is white. That in itself is not sufficient to shift the burden of proof to the Respondent. She also relied on the fact that Ms Norris warned her before Mr Kingshott arrived to be careful of him. Even if it was said, it would not be a factor from which we could conclude that the Claimant's race was a factor in the shortness of the training; it might just as well have been a warning as to Mr Kingshott's strictness as a manager generally; there was no suggestion on Ms Norris's part that he was racist. The Claimant also said that she believed that race was a factor 'because of what Ms Norris had told him. She wanted anything which would get me out of the department. She was looking for any excuse.' There is no evidence whatsoever that Ms Norris was involved in, or had any influence over, how long Mr Kingshott spent training the Claimant on resulting.

93. The Claimant has not proved facts from which we could reasonably concluded, had we accepted jurisdiction, that race was a factor in the short length of the training she received on the resulting system.

94. We then turn to the termination of the assignment and the handling of the complaint. We first summarised the factors which the Claimant relied on.

<u>Factors which the Claimant says points to race as a factor in her treatment</u>

95. The Claimant asserted that she had dealt with the question of why she believed that race was a factor in her treatment in her original complaint. She referred us to the following passage:

> 'Tricia Norris and sometimes in conjunction with Chun Tsang and Billy Smith had always wanted me to be dismissed and I don't know why – from hiding the court room key, hiding the court alarm, frustrating my efforts of taking registered up to the DJ, bench and legal advisers, hiding my clipboard, making statements that I will be dismissed etc.'

96. This simply repeats the factual allegations. On the contrary, we note that in this account the Claimant said 'I don't know why' colleagues behaved in this way; she did not assert that it was because of her race.

97. The Claimant did not explain in her witness statement why she believed that race was a factor in the treatment she alleged.

98. The Claimant mentioned (for the first time in cross-examination) a colleague called Ladyn Mbangu, who she said was the only other black administrative member of staff; she said Ms Mbangu was dismissed. She said that she did not mention her before this 'because she is black and I did not want to involve her in the case'.

99. Ms Norris explained that there were other black colleagues in the team. The Claimant then said that Ms Mbangu was the only one who was an agency worker. Ms Norris disagreed with that and identified another black agency worker (Ms Lorraine Grainger).

100. The Respondent cannot be expected to adduce evidence raised for the first time in the middle of the hearing in response to a suggestion which the Claimant could have made at any point in the many months leading up to this hearing. We are not satisfied that the Claimant has provided any cogent evidence of systemic less favourable treatment of black staff within the Respondent organisation.

Issue 2.2.6 (direct race discrimination): On 19 December 2022, the respondent informed the claimant's agency that her assignment would be terminated (the claimant was informed of this by her agency on 21 December 2022), her assignment terminated on 22 December 2022

101. Having heard all the evidence, we are satisfied that the sole reason for Mr Walcott's decision to terminate the Claimant's assignment was the fact that he was not satisfied with the Claimant's performance. There was a history of performance concerns, of which he was fully aware. The Claimant had been tried out in various roles and had not impressed in any of them. That included the time she had spent on the resulting team, which Mr Walcott's regarded as the simplest type of work available. He concluded that the Claimant was unlikely to improve and that the time had come for her assignment to be terminated.

102. There is no evidence whatsoever that Mr Walcott was in anyway influenced in his decision by the Claimant's colour.

103. This claim is not well-founded and is dismissed.

Issue 2.2.7 (direct race discrimination): Following the termination of her placement, the respondent failed to deal with her complaint properly

104. Even if we read into this allegation the fact that Mr Jones did not interview the Claimant when conducting his investigation, the Claimant has, in our judgment, not proved facts from which we could conclude that he was materially influenced in his handling of the grievance by the Claimant's race. There is simply nothing to support such a contention, taking into account all the factors the Claimant raised during the hearing.

105. To be clear we do not draw any inference from the fact that Mr Jones did not attend to give evidence. He no longer works for the Respondent and has not done so for some time.

106. Because the Claimant has not discharged the initial burden of proof on her, the burden does not pass to the Respondent and the claim must fail.

107. In conclusion, the Tribunal has unanimously decided that the Claimant's claims of direct race discrimination are not well-founded and are dismissed.

Employment Judge Massarella
25 October 2024

APPENDIX: LIST OF ISSUES

1. The issues the Tribunal will decide are set out below.

1. **Time limits**

1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 17th December 2022 may not have been brought in time.

1.2 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

1.2.2 If not, was there conduct extending over a period?

1.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.2.4.1 Why were the complaints not made to the Tribunal in time?

1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

2. **Direct race discrimination (Equality Act 2010 section 13)**

2.1 The claimant identifies as a black woman.

2.2 Did the respondent do the following things:

2.2.1 From February 2022 until December 2022, two-three times a week, Tricia Norris (in conjunction with Chun Tsang and Billy

Smith) hid the courtroom key/alarm and/or took those items to security thereby preventing the claimant from doing her job.

In addition, the claimant asserts:
(a) on 3 or 4 separate occasions in 2022, the claimant asked Tricia why Tricia had hidden the claimant's courtroom key / alarm or asked Tricia why Tricia had given the claimant's courtroom key / alarm to the security guard; and
(b) on at least 2 of these occasions, Tricia responded that she was "only joking"

2.2.2 From February 2022 until December 2022, Tricia Norris, Chun Tsang and Billy Smith did not print the claimant's rota.

2.2.3 From February 2022 until December 2022, Tricia Norris, Chun Tsang and Billy Smith hid the claimant's clipboard thereby preventing her from doing her job.

2.2.4 In or around December 2022, Tricia Norris told the new manager, Carl Kingshott, to terminate the claimant's assignment

2.2.5 In early December 2022, Carl Kingshott did not train the claimant adequately on the email system.

The claimant asserts she received only 20 minutes training.

2.2.6 On 19 December 2022, the respondent informed the claimant's agency that her assignment would be terminated (the claimant was informed of this by her agency on 21 December 2022), her assignment terminated on22 December 2022;

2.2.7 Following the termination of her placement, the respondent failed to deal with her complaint properly.

2.3 Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether they were treated worse than someone else would have been treated.

2.3.1 For allegations 2.2.1, 2.2.2, 2.2.4, 2.2.5 and 2.2.7, the claimant has not named anyone in particular who she says was treated better than she was (although for allegation 2.2.7 the claimant says that evidence given by white individuals spoken to during the investigation was given more weight than her evidence).

2.3.2 For allegation 2.2.2, the claimant relies on other, non-black list callers as comparators.

2.3.3 For allegation 2.2.6, the claimant relies on 'Ash', an Asian, permanent member of staff, employed as a list caller who she alleges used to watch programmes on his laptop at work but against whom no action was taken.

2.4 If so, was it because of race?

3. **Remedy for race discrimination**

3.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

3.2 What financial losses has the discrimination caused the claimant?

3.3 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

3.4 If not, for what period of loss should the claimant be compensated?

3.5 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

3.6 Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

3.7 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

3.8 Did the respondent or the claimant unreasonably fail to comply with it?

3.9 If so is it just and equitable to increase or decrease any award payable to the claimant?

3.10 By what proportion, up to 25%?

3.11 Should interest be awarded? How much?