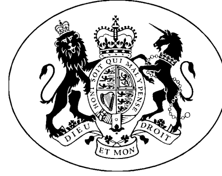

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
MR HOWARD HASHA		NOTTING HILL GENESIS

Heard at: London Central

On: 21 and 22 February, 2019; in chambers 6 March 2019

Before: Employment Judge O Segal QC
Members: Mr R Lucking, Ms S Boyce

Representation
For the Claimant: In person
For the Respondent: Mr T Perry, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that the Claimant claims are dismissed.

REASONS

1. The Claimant brings a claim of direct race discrimination and victimisation. The Claimant represented himself and the Respondent was represented by Mr Perry of Counsel. We express our gratitude for the way in which both conducted the proceedings.

Evidence

2. We had an agreed bundle of 223 pages, together with some additional documents relating to a separate, as yet unresolved grievance. We had witness statements and heard live oral evidence from:

2.1. on the Claimant's behalf, himself;

2.2. for the Respondent, Jeremy Stibbe (JS), a Group Director; David Pace (DP), Head of Genesis Property Management Services (GPMS); and Jill Cook (JC), HR Director.

3. We comment at the outset that we consider that all the witnesses were doing their best to assist the Tribunal.

Issue

4. The details of claim set out an account of the Claimant's manager, Vanessa Reilly (VR) shouting at the Claimant on 30/1/18 and saying, *"For fuck's sake read your job profile!"* (the Incident); that the Claimant had raised a grievance about the Incident which had been upheld; and implying dissatisfaction with the Respondent's actions following that outcome.

5. The case came before EJ Snelson at a PH (Case Management) on 23/11/18, at which the dispute was significantly clarified, taking account in inter alia of a COT3 settlement the parties had entered into on 22/2/18. The PH focused on ways in which the Claimant alleged the Respondent had failed to implement the recommendations in the grievance outcome and the following was identified as the only claim which would proceed to a hearing: **that the Respondents failed to offer the Claimant any or adequate support following the grievance**.

Facts

6. There were few if any disputed facts (unless one includes people's reasons for doing or not doing things). In setting out the material facts below, we exclude those which we have decided are not relevant to the issues we have to determine.

7. The Respondent is a provider of social housing for those on lower incomes. It was formed in April 2018 by the amalgamation of Genesis Housing Association Ltd and Notting Hill Housing Trust. During the period April to July 2018, the Respondent was restructuring, including within GPMS, with several employees changing jobs or leaving the Respondent.

8. The Claimant's continuous employment began in 2011. From December 2014 he worked in GPMS, headed by DP. From January 2017 he was line managed by VR. He began a new role in a different part of the Respondent on 2/7/18. He left the Respondent's employment on 31/1/19.

9. The Claimant had raised concerns/complaints in 2017, including about VR in January and April 2017. None of these was a protected act. The Claimant told us that he believed that as a result, he had been labelled "challenging" and "difficult".

10. Following the Incident, the Claimant raised a concern with HR in which he said he believed VR's treatment of him was related to his race and then raised a formal grievance in writing. The latter did not mention discrimination/race, but when the Claimant met with Susan Crow (SC), the independent investigator the Respondent appointed to investigate his grievance, the Claimant told her that race was an issue. The Respondent accepts that in raising his concerns in this way, the Claimant did a protected act.

11. Around the same time, the Claimant raised a grievance that DP had (whilst the Claimant was on holiday) made a joke which the Claimant considered discriminatory. That too was investigated by SC as part of the same process.

12. On 1/5/18 SC published the final, full grievance report **[100-106]**. This was not provided to the Claimant. Materially,

    12.1. The report notes that the Claimant requested that the investigation consider VR's comments as racial discrimination and bullying.

    12.2. It found that VR had used unacceptable language towards the Claimant during a loud confrontation; that the Claimant had lost trust and confidence in his line management and team leadership; that the working environment in the team was poor with different members feeling less favourably treated because of their (different) races/genders.

    12.3. It made various recommendations, including the key one for present purposes (the Recommendation), that *"With the onset of the restructure and the broader company merger it is imperative that HH is supported to rebuild his*

trust and confidence with his management. Mediation could be explored as a way to approach this". It recommended that DP apologise to the Claimant, which DP was happy to do. It did not recommend that VR apologise.

12.4. It upheld the grievance against VR and SC wrote: *"No formal disciplinary action and firm management guidance to be issued to VR"*, giving reasons for that relating to the context of relationships within that team and between VR and the Claimant and on the basis (disputed by the Claimant) that it was a one-off incident.

13. On 3/5/18 DP met with VR and inter alia told her that her language during the incident had been inappropriate.

14. On the same day SC met with the Claimant to tell him in outline the outcome of the grievance. That was the first time the suggestion of mediation was raised; the Claimant was not interested in mediation (at least, he told us, at that time). That was followed up by a letter from HR on 11/5/18. The Claimant wanted more information than he had been given and particularly wanted to know if disciplinary action was to be taken against VR – which he considered the Respondent was obliged to do under its own policies. JC replied that such matters were confidential.

15. Ms Lee, HR Manager, wrote a more detailed letter to the Claimant on 15/5/18 explaining some of the recommendations which had been made to improve the situation going forward and including the Recommendation. The Claimant replied on 20/6/18 saying that it looked like VR and DP were being "rewarded" and that the Culture Workshop being organised to deal with poor behaviours in the group *"should not be used to cover the wrongs that have already been done"*.

16. JC's evidence was that the work of ensuring implementation of the recommendations was allocated to members of her team. On 16/5/18 one of her team, Ms Sonola, wrote to Mike Wilson (MW), DP's boss, telling him that the key individuals had been informed of the outcome and that it was for *"the senior manager (in this case yourself) to ensure that the recommendations put forward by Sue are put into practice"*. She noted that the Claimant had said he was not interested in mediation. Ms Sonola chased MW on 8/6/18 to which MW replied that day that it had *"somehow*

passed me by" and asking about dates for the Cultural Workshop (which we deal with below).

17. JS had been concerned about certain behaviours and relationships within the group from at least the end of 2017 and by March 2018 had resolved that steps needed to be taken to reform the culture within GPMS, to which end a Culture Workshop would be organised at which staff could assist in creating a vision and charter of values, including diversity and inclusion, to be adopted within the group. JS took the view that (as he put it in his statement) *"my belief was that the best way to achieve [the Recommendation] would be by continuing to give the Claimant the opportunity to share his views about GPMS, this time in the more formal setting of the culture workshops. That way, the steps that were necessary to support the Claimant and others within GPMS could be taken"*.

18. Two focus groups were organised for staff to raise issues and say what they wanted the Culture Workshop to address. The Claimant attended one of those.

19. On 26/6/18 JS met with the Claimant at JS' invitation. The Claimant expressed his concern that no action had been taken against VR which was (he said) contrary to policy. The Claimant again rejected an offer of mediation. The meeting became uncomfortable at one point when the Claimant observed that VR had previously defended inappropriate behaviour on the basis of discrimination against herself as a woman – which JS considered was itself a discriminatory comment. It is not strictly relevant, but the parties disputed the context of this observation of the Claimant. We consider it more likely that, as the Claimant recalled, it was made in response to JS raising the issue of VR feeling herself the victim of discrimination.

20. As noted above, the Claimant left GPMS on 2/7/18.

21. The Culture Workshop took place on 26/7/18. The Claimant attended. The Respondent's witnesses considered it to have been successful.

22. In June 2018 the Claimant raised a separate grievance against VR and DP. The details do not matter, save that it made serious accusations which merited investigation. It became clear during the hearing that this later grievance had not been yet concluded, as the result of: initial unavailability of the Claimant; a

subsequent change of investigator; a lengthy process of interviewing witnesses and obtaining documents; and taking legal advice more than once. The relevance of this, the tribunal considered, was that it might shed light on whether the Respondent was attempting to support the Claimant or not following the outcome of the earlier grievance arising out of the Incident.

23. During the material period, indeed from February 2018, the Claimant had no 1-to-1's with his mangers. However, those did not take place generally at this time because of the restructure.

<u>The Respondent's procedures</u>

24. The Respondent had a grievance, a disciplinary and a Dignity at Work policy. The latter is not referred to in SC's report, which states she was dealing with the Claimant's complaint under the grievance procedure. Nonetheless she recorded that the Claimant considered he had been bullied and it would be normal, once the relevant facts had been found, for an employer to consider whether any of its policies were applicable.

25. The Claimant's main concern following the outcome of his grievance has always been, he told us, and remains, his view that the Respondent did not comply with the Dignity at Work Policy. Whether that is strictly relevant to his claim may be doubted, but given the time spent on the issue and its obvious importance to the Claimant we make the following findings and observations.

26. There is a definition of Harassment at para 2, mirroring the definition of harassment under the Act but without reference to a protected characteristic, which could potentially apply to the Incident: "an isolated incident which has the purpose or effect of violating a person's dignity [etc.]".

27. Under the heading "Outcomes", it is said:

> … the Investigating Manager will confirm one of the following decisions with a justification for the outcome:
>
> . The case is upheld because there is enough evidence to substantiate the complaint and therefore the disciplinary policy and procedure will be initiated …

…

. The case is partially upheld because there is some evidence to substantiate the complaint, but not enough to initiate the disciplinary policy and procedure. In such cases, an alternative resolution such as diversity or self-awareness training must be found.

28. The Claimant believes that once his grievance was upheld, those Policy provisions meant that VR had to be subject to the Respondent's disciplinary procedure.

29. SC did not have those provisions in mind. However, even if she had done so, we all consider it clear that the effect of her report is that she was strongly of the view that the latter bullet point and not the former one applied: that, in the words of the Policy, the grievance should be treated as "partially upheld". This is because she expressly recommended no disciplinary action and instead made recommendations of mediation, training, etc.

<u>The Law</u>

<u>Direct race discrimination</u>

30. Section 13 EqA 2010 provides that

"A" discriminates directly against "B" if B establishes the detrimental action relied upon (e.g. dismissal), and A treated B less favourably that A treated or would treat others (an actual or hypothetical comparator) whose circumstances are not materially different to B's and the less favourable treatment is because of a protected characteristic.

<u>Victimisation</u>

17. Section 27 provides that

A person (A) victimises another person (B) if A subjects B to a detriment because … B does a protected act.

<u>Burden of proof</u>

18. Section 136 provides:

> 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 … [unless] A shows that A did not contravene the provision.

19. There is an initial burden of proof on the Claimant and the Tribunal must look at the entirety of the evidence to establish if the first stage of s136 is reached (***Ayodele v Citylink Ltd and anor*** [2017] EWCA Civ 1913).

20. The tribunal bore in mind the guidance in the ***Igen***, ***Madarassy***, and ***Hewage*** cases in relation to what is now s. 136. We acknowledge that something more than simply unfavourable or less favourable treatment is needed in order to "shift the burden of proof", though that does not need to be a great deal: ***Deman v CEHR*** [2010] EWCA 1279.

21. Finally in this context, we bear in mind the observation of the EAT in ***Chief Constable of Kent v Bowler*** EAT 0214/16, that *"Merely because a tribunal concludes that an explanation for certain treatment is inadequate, unreasonable or unjustified does not by itself mean the treatment is discriminatory, since it is a sad fact that people often treat others unreasonably irrespective of race, sex or other protected characteristic."*

<u>The parties' submissions</u>

22. The Claimant submitted that the Dignity at Work policy had not been followed (which we have addressed above); that no senior manager had taken ownership of implementing the Recommendation; that JS was *"too focussed on focussing on the future"*; that nobody had met with him properly to empathise or explain the conclusions of the grievance process; that VR had not apologised to him; that he had had no 1-to-1's since January 2018; that nobody had thought of moving him or VR out of the team in May or June 2018.

23. The Respondent submitted that the issue was a very narrow one; that adequate support had been provided, particularly in the meeting with JS and by the organisation of and involvement of the Claimant in the Culture Workshop; that the Claimant had been difficult and unreasonably resistant to mediation; and that the

"Respondent had done its best, and made mistakes perhaps". Mr Perry further submitted that if there had been any discernible failures, they were innocently explicable and had been explained by reference to the ongoing restructure, the belief by less senior managers that JS was providing the Claimant with the one to one support he needed; the belief of JS and JC that the Culture Workshop was an appropriate way for the Respondent inter alia to deliver on the Recommendation; and because overall responsibility for supporting the Claimant had at times *"fallen between two stools"*, leading to certain *"oversights"*.

Discussion

24. On the basis of the facts we have found, we conclude that in respect of the following facts and matters, we could decide in the absence of any other explanation, that the Respondent contravened ss. 13 and/or 27, read with s. 39:-

    24.1. The failure, once the Claimant had rejected the offer of mediation, to arrange a meeting(s) between him and Ms Reilly, to ensure that the working relationship between them going forward could function constructively and/or to talk through any concerns about the grievance process.

    24.2. The failure to require, or at least request, that Ms Reilly apologise to the Claimant for her outburst on 31 January.

    24.3. The failure to ensure that someone sufficiently senior took ownership of implementing Ms Crow's recommendations, and in particular the Recommendation.

25. We do not conclude that the failure of Ms Reilly or Mr Pace to hold 1-to-1's with the Claimant following the grievance and prior to his leaving that team (and of his subsequent managers to do so) requires further explanation. Given the fact of the major restructure and the fact that nobody received 1-to-1's during the material period, we are satisfied that the explanation was that 1-to-1's were neglected generally and perhaps predictably during that period.

26. Further, we do not conclude that the failure to move either the Claimant or Ms Reilly out of the team in the period May to June requires further explanation. Given the

grievance outcome, that would have been a surprising step to have taken (if it were to have been taken at all, the usual time to consider doing so would have been after the Claimant first complained and during the period of the investigation).

27. Taking, then, the matters set out in para 24 above, in turn.

Not holding a meeting between the Claimant and Ms Reilly

28. It would have been preferable for the Respondent to have arranged a meeting between the Claimant and Ms Reilly, or at least separate meetings, to discuss their working relationship going forward.

29. The Respondent's explanations for not doing so are that they were hoping and pressing the Claimant to agree to mediation (even after his initial refusal); that the Claimant only remained in that team for a short time following the grievance and it was known by late June at least that he was to leave; there were no ongoing concerns raised by either of them after the grievance outcome; that the Respondent gained the clear impression that only the institution of disciplinary action against Ms Reilly would have addressed the Claimant's concerns; and that to some extent the responsibility for giving consideration to such issues "fell between two stools".

30. We accept those explanations as truthfully and adequately explaining the failure to hold such a meeting.

The failure to require, or at least request, that Ms Reilly apologise to the Claimant for her outburst on 31 January

31. We considered it a little surprising that this did not happen; particularly in light of Mr Pace's willingness to apologise (albeit that only actually took place after a lengthy delay). The Respondent, including Mr Pace himself in evidence, accepted that such an apology would have been appropriate.

32. Mr Pace, who de-briefed Ms Reilly following the grievance, states that it was an oversight on his part. We note that SC had not recommended that VR apologise.

33. Given that Mr Pace had himself been prepared to apologise to the Claimant for the remark which had caused the Claimant offence, that seems likely to be true.

Certainly, it makes it rather unlikely that part of the reason for his not requesting Ms Reilly to apologise was because of the Claimant's race or because he had done a similar protected act in complaining about Ms Reilly as he had done in complaining about Mr Pace.

The failure to ensure that someone sufficiently senior took ownership of implementing Ms Crow's recommendations, and in particular the Recommendation.

34. This struck the tribunal as the most culpable failure. The evidence is not complete on the issue. We did not hear from Mr Wilson, who seems to have been the person who formally had been given the relevant responsibility, perhaps with Ms Lee (from whom we also did not hear). Whether Mr Wilson did in fact turn his mind to how to implement the Recommendation, and whether (if he did not) it would have made any difference had he done so, must remain matters of speculation.

35. The Respondent's explanation is to the effect that collectively it did all it should have done, other than in the two respects above; and that in so far as it could have provided the "support" of a nominated senior manager (Mr Wilson) to fully de-brief the Claimant on the grievance outcome and to check on his welfare thereafter but did not do so, that was due to innocent factors: (a) the pressure of the ongoing restructure; (b) the belief that Mr Stibbe was performing that role; (c) oversight.

36. We accept those explanations. We also remind ourselves, that save in a rather abstract sense, it is not easy to characterise any failure of the Respondent/Mr Wilson to provide an additional avenue of communication/support as "subjecting the Claimant to a detriment" within the meaning of ss. 27(1), 39(2)(d), 39(4)(d).

Conclusion

37. In respect of all these three issues, we note the Claimant's fair concession in closing that *"Everyone assumed someone else was dealing with the issue"*. That observation was made as a criticism and to the extent that it is true (and it seems to have been to some extent) it merits criticism. However, it provides a non-discriminatory explanation for the failures we have identified.

38. We also note that when the Claimant was pressed by Respondent's counsel and by the tribunal as to what made him suspect a discriminatory reason for the matters which concerned him, he said that

    38.1. *"Vanessa Reilly treated black people unfavourably"* – which could not explain the Respondent's failure to offer support following the grievance;

    38.2. *"Because having pointed out the Respondent's failures to follow policies [in the past] I was labelled as challenging and difficult"* – which might be true, but would constitute a non-discriminatory explanation; and

    38.3. *"I felt that the Respondent was not taking me seriously because I was a black employee raising a grievance against a white manager"* – which, in so far as that refers to any failure to give support as opposed to not disciplining Ms Reilly, does not do more than state the premise of his claim.

39. In the end, we did not consider that the delay in resolving the more recent grievance shed relevant light on the issue we had to determine.

40. In all events, we are satisfied that the Claimant's race and the fact of his having done protected acts were not, separately or together, part of the reason(s) for the Respondent's failures in the respects we have identified as requiring explanation.

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Employment Judge Segal

Date 6 March 2019

JUDGMENT & REASONS SENT TO THE PARTIES ON

14 March 2019

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FOR THE TRIBUNAL OFFICE