EMPLOYMENT TRIBUNALS

Claimant		***Respondent***
Mr M Nwanze	**AND**	**Edenred (UK Group) Limited**

HELD AT: London Central ON: 7 and 8 October 2019 and 27 and 28 (in Chambers) January 2020

BEFORE: Employment Judge Nicolle

Members:

Ms Ihnatowicz
Mr I McLaughlin

Representation

For Claimant: in person

For Respondent: Mr S. Hoyle of Croners

JUDGMENT

1. The Claimant's claim for direct race discrimination pursuant to s.13 of the Equality Act 2010 (the "EqA") fails.

2. The Claimant's claim for harassment on the grounds of race under s.26(1) of the EqA fails.

3. The Claimant's claim of automatic unfair dismissal based on his allegation that he was dismissed for asserting his statutory right, specifically taking time off for a dependant under s.57(A) Employment Rights Act 1996 (the "ERA") fails.

REASONS

Claims and Issues

1. The Claim Form dated 29 October 2018 contained multiple allegations of discriminatory treatment to include on the grounds of race. At a case management hearing before Employment Judge Russell on 31 May 2019 (the "CMO") the claims were considered and confined to the following:

- discrimination and/or arising from an (unnecessary) meeting of 26 May 2018 with the Respondent where he was treated less favourably because he had a Nigerian not a British passport; and

- that he had been dismissed because he had taken a day off as emergency time off for a dependant to look after his daughter.

2. During the hearing there were a number of occasions when the evidence of, and cross examination by, the Claimant related to elements of his original claim which were no longer being pursued. The Tribunal reviewed the Claim Form together with CMO and was satisfied that the claims being heard by the Tribunal reflected an appropriate consolidation of the potentially arguable claims from the Claim Form. In particular the Tribunal considered whether the Claimant's original intention had been to pursue a claim that his dismissal was an act of direct race discrimination under s.13 of the EqA and was satisfied that it was not.

3. In a document submitted by Employment Law Service (acting for the Claimant at this point but were not subsequently involved) dated 22 March 2019 they advised that the Claimant had been sacked for asserting his statutory right to dependant's care leave pursuant to s.104 of the ERA.

4. The Tribunal sought clarification as to the Claimant's original naming of four individual Respondents on his Claim Form: namely Clare McGettigan, (Ms McGettigan), Neil Bigrave, (Mr Bigrave), Rebecca O'Neil, (Ms O'Neil) and Stella Campbell, (Ms Campbell). The individual Respondents were not subsequently referred to in case management orders. Having discussed the position with the parties it was agreed that the claim related solely to the corporate Respondent. Mr Hoyle confirmed that the Respondent was not relying on the statutory defence.

The Issues

<u>Direct race discrimination - EqA, s13</u>

5. Whether the Respondent treated the Claimant less favourably because the Claimant is not white than they treated or would treat a comparator.

<u>Harassment – EqA, s26</u>

6. Whether the Respondent engaged in unwanted conduct related to race.

7. Whether that conduct had the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading or offensive environment for the Claimant.

8. If the conduct did not have that purpose, but it did have that effect, whether it is reasonable for the conduct to have that effect, taking account of the Claimant's perception and the other circumstances of the case.

Dependant's care leave s.104 of the ERA

9. Whether the Claimant was dismissed for asserting his statutory right to dependant's care leave pursuant to s.104 of the ERA.

The Hearing

10. Following a CMH on 31 May 2019 the claims were limited to the matters above. The case was listed for a full merits hearing on 7 and 8 October 2019. During the first two days of the hearing there were a number of matters which contributed to the case going part heard to include the belated disclosure of emails and audio transcripts by the Claimant, the downloading and copying of which took time, and the inclusion of which were opposed by the Respondent. Further, as a result of the inclusion of additional email correspondence on the second day of the hearing the Respondent made an application for the strike out of the entirety of the Claim on the basis that it had no reasonable prospect of success. The Tribunal rejected this application. Unfortunately, the case went part heard and was listed for a further two days on 26 and 27 January 2020.

11. There was a largely agreed bundle comprising 221 pages, but added to piecemeal during the first two days of the Hearing, with the belated disclosure of documents by the Claimant albeit that the majority of these documents would have been in the possession of the Respondent.

12. On 7 and 8 October 2019 the Claimant gave evidence. At the reconvened hearing evidence was given on behalf of the Respondent by Mr Bigrave, Infrastructure Operations Manager and the Claimant's Line Manager and Ms McGettigan, Human Resources Manager.

13. There was considerable animosity and lack of trust between the parties. This included numerous disputes regarding the disclosure process and the preparation of the trial bundle. Significant Tribunal time was wasted as a result of the belated disclosure of documents during the hearing, which should have been disclosed in accordance with the Case Management Order and included in an agreed bundle of documents. We consider that both parties were culpable given that many of these documents would have been in the custody of the Respondent.

14. During the evidence of Ms McGettigan on the third morning of the hearing Mr Hoyle sought an adjournment to take instructions from his client.

The Tribunal adjourned to consider this request and reached the unanimous decision that an adjournment would be inappropriate. In reaching this decision the Tribunal wished to effectively manage time and took account of the previous applications made on behalf of the Respondent for the inadmissibility of additional documents and then a strike out application. Mr Hoyle strongly objected to the Tribunal's decision and referred to the matter in his closing submissions.

15. Mr Hoyle said on various occasions that he considered that the Tribunal had over stepped the mark in providing "assistance" to the Claimant in the conduct of the case and had been insufficiently robust in curtailing the Claimant's interruptions and the length and manner of his cross examination. The Tribunal sought at all times to maintain equality between the parties, but at the same time recognising that the Claimant, as a litigant in person, was unfamiliar with Tribunal practice and procedure and therefore explained matters to him and provided a degree of latitude in the way he cross examined the Respondent's witnesses.

16. During the Claimant's cross examination of one the Respondent's witnesses, Mr Hoyle made an application for the Tribunal to take over cross examination, and then to provide the Claimant with the opportunity to ask any outstanding questions. The Tribunal considered this application and was of the unanimous view that it would be inappropriate.

Findings of Fact

The Respondent

17. The Respondent is an online platform for the provision of employee benefits. The Respondent currently has 179 employees split between offices in London and Chester.

The Claimant

18. The Claimant has a background in IT. He commenced employment with the Respondent on 8 May 2018 and his employment was terminated on 8 June 2018, when he was given notice of the termination of his employment, with payment in lieu of his one-week notice period.

19. The Claimant's CV includes details of his technical areas of expertise and positions of employment providing IT support services from July 2004 onwards. His most recent position was IT Operations Engineer with the Royal College of Nursing in London.

20. The Claimant was introduced to the Respondent via Abs Ali (Mr Ali) of a recruitment agency called CodeSource.

21. The Claimant was sent a letter dated 17 April 2018 by Ms Campbell, HR Director offering him a position as 2nd/3rd Line System Administrator. It stated that the Respondent would require a copy of his EU passport or current valid working visa or permit.

22. The Claimant's statement of main terms of employment dated 17 April 2018 included:

> Where you have a time limit on your right to work in the UK the Company will repeat document checks as and when required by law.

23. The Claimant's employment was subject to a probationary period of three months, during which his performance would be assessed, and his employment was terminable on one week's notice.

24. The Claimant signed an Employee Details form on 8 May 2018 when his employment commenced. This stated that his birthplace was Lagos in Nigeria.

25. The bundle included the Respondent's 54-page Employee Handbook. The following sections are relevant:

<u>Time off for dependants</u>

26. You are entitled to reasonable time off, without pay, for urgent or unexpected incidents of real need involving a dependant, who is a member of your immediate family, or someone who reasonably relies on you for help when they are ill or injured, or for making arrangements for them to be cared for in the event of illness or injury.

<u>General Rules</u>

27. You are expected to show the skill or aptitude required for the job, especially where such skills are claimed or implied at the time your employment commenced.

28. The Claimant very quickly became dissatisfied with various aspects of his working arrangements with the Respondent. Whilst it is not necessary for us to go into detail regarding these matters, given that the claim primarily relates to the events giving rise to the termination of the Claimant's employment on 1 June 2018, it is appropriate to summarise the issues which arose.

<u>The Principal grounds of the Claimant's dissatisfaction</u>

29. These were:

- a failure to provide to him with an appropriate level of autonomy given his previous experience and expertise;

- treating him less favourably in work allocation; and
- treating him less favourably, in the extent and manner, of personal interaction to colleagues who are white.

The Respondent's concerns

30. The Respondent (principally Mr Bigrave) expressed concerns regarding the Claimant's performance and primarily what were categorised as his "communication skills". In particular Mr Bigrave referred to the Claimant having difficulty understanding basic instructions, being difficult to communicate with and not being a "good fit" in the workplace. The Respondent provided no examples of the Claimant not possessing the technical skills required to perform the role.

31. The Tribunal was not provided with any documentary record of performance concerns being raised with the Claimant prior to the termination of his employment on 1 June 2018.

32. When questioned by the Tribunal on his concerns with the Claimant's performance, Mr Bigrave said they related solely to poor communication on day to day and technical matters. There were no concerns as to the Claimant's professional knowledge but rather his manner of expressing issues. Mr Bigrave gave the example of the Claimant starting to talk about a matter without providing background. Whilst Mr Bigrave referred to team members expressing dissatisfaction with the Claimant's communication, he was unable to provide specific examples.

The Claimant's nationality and passport

33. At the time of his employment with the Respondent the Claimant had a Nigerian passport which contained a certificate of entitlement to the right of abode within the United Kingdom. His passport and right of abode were due to expire on 14 July 2018.

34. The Claimant regards himself as British. This is reflected in the email from Mr Ali to the Respondent of 10:24am on 15 March 2018, which attached a copy of the Claimant's CV and stated that he is British.

The Issue relating to the Claimant's passport

35. On 15 May 2018 the Claimant advised Ms O'Neil that he would have to take time off after pay day to resolve issues regarding his passport and right of abode.

36. It is disputed as to when the Claimant informed Mr Bigrave that he would be taking time off. The Claimant thought that this was on 28 May, whilst Mr Bigrave believed it may have been on 30 May 2018. We find that this conversation was most likely at about 4.30pm on 29 May 2018. We make this

finding based on the subsequent email sent by Ms O'Neil to Mr Ali at 17:03 that day where she said:

> Just a quick one – were you aware that Michael is on a Nigeran passport that is due to expire in a matter of weeks?

37. Mr Ali replied to Ms O'Neil at 17:08 on 29 May 2018 to state:

> No, this is news to us. He informed us he was a British national as mentioned in the original email.

38. We find that the Claimant, on the balance of probabilities, advised Mr Ali that he was British. Whilst we find that Mr Ali did not check the Claimant's passport and right of abode, we find that it highly unlikely that he would have stated in his email to the Respondent on 15 March 2018 that the Claimant was British, if this had not been communicated to him by the Claimant.

39. In an email of 18:00 on 29 May 2018 Mr Bigrave asked Ms O'Neill and Ms McGettigan in the HR department the following:

> Before we make any decision on Michael, further to the information below from Abs, can you provide the facts around the original information we received about Michael and his nationality including the dates that we found out about his Nigerian nationality/passport/certificate of entitlement to work in the UK please.

40. At 9:38am on 30 May 2018 Ms O'Neill sent an email to Mr Ali of CodeSource seeking clarification regarding the Claimant's nationality and visa status. There is no evidence that Mr Ali replied prior to the Claimant's dismissal.

41. The Claimant was sent an email by Ms McGettigan at 10:29am on 30 May asking him to come to the HR office for a meeting. We find that the meeting between the Claimant and Ms McGettigen took place on 30 May 2018 and not 26 May 2018 as stated by the Claimant in the Claim Form.

42. The Claimant and Ms McGettigan have different recollections as to what was said during the course the meeting on 30 May 2018. The Claimant's says that Ms McGettigan told him that the company wanted someone with a British passport. Ms McGettigan says that it was a short informal meeting during which she asked for clarification regarding the Claimant's passport and UK work status. Ms McGettigan says that she ended the conversation with the Claimant stating that she was satisfied with his responses regarding his UK work status, and his saying that his mother is a British citizen and that he had a right to British citizenship through her. She denies having said that the Respondent wanted someone with a British passport.

43. We find that on the balance of probabilities Ms McGettigen did not advise the Claimant that the Respondent would have preferred someone with a British passport. We make this finding for the following reasons:

- given that the Respondent acknowledged the Claimant had the right to work and reside in the UK there would have been no reason to have a concern that he did not hold a British passport;

- the recruitment of the Claimant who is self-evidently black, and from his name of likely Nigeran origin, would have been inconsistent with Ms McGettigen subsequently stating that the Respondent preferred someone who had a British passport; and

- Ms McGettigen subsequently confirmed that after investigating the matter that there were no issues with the Claimant's passport and right of abode and that it was solely a question of addressing a potential issue regarding the expiry of his passport and right of abode

Time off for dependants

44. The Claimant requested time off on 1 June 2018 as a result of his daughter being ill and his daughter's mother (with whom the Claimant was no longer living) being at work and no other child carer being available.

45. The Claimant sent an email at 6:06am on 1 June 2018 to Mr Bigrave to advise that he would not be able to attend work as a result of the situation. Mr Bigrave forwarded this email to Ms McGettigan at 09:13am and she responded to him at 09:23am to include the comment:

> "Not good … my suggestion would be that this is unpaid leave".

46. Ms McGettigan went on to confirm in her email at 9.23am on 1 June 2018 to Mr Bigrave that in the event of the Claimant's dismissal CodeSource would provide a free replacement but that she was still trying to get a credit note. Mr Bigrave had previously contacted CodeSource seeking a credit note for a replacement in the event of the termination of the Claimant's employment.

The Claimant's dismissal

Email of 11:56 on 1 June

47. Ms McGettigan sent a further email to Mr Bigrave at 11:56am on 1 June stating that to benefit from the 75% credit note with CodeSource the Claimant's employment would need to be terminated by 4 June at the latest. The email went on to set out an outline of the matters to be communicated by Mr Bigrave to the Claimant.

48. This included advising Mr Bigrave to inform the Claimant as follows:

> Tell him that you have concerns regarding his communication, his unreliability in terms of taking annual leave yesterday at short notice and not being in today, and overall performance.

We find that these matters were then communicated to the Claimant by Mr Bigrave in a call later that day.

49. The Claimant left a voice mail message with Mr Bigrave at approximately noon that day. Mr Bigrave called him back at 13:46 and a summary of that call is included in the transcript of the grievance hearing which took place on 24 September 2018. During the course of the hearing the Tribunal was played an audio recording of the call. The typed transcript, of what Mr Bigrave stated to the Claimant as being the reasons for the termination of his employment, omitted the words "and not being in today". This is significant as it was a reference to the day off to look after his daughter.

50. The Claimant was sent a letter dated 1 June 2018 by Mr Bigrave confirming the content of the earlier telephone conversation and his dismissal. This letter referred to on-going concerns regarding his lack of communication within the team and reliability.

51. At 14:40 on 1 June 2018 the Claimant sent an email to Ms McGettigen following Mr Bigrave informing him that his employment was being terminated. The Claimant said that it "seems like there is prejudice towards him and that race can be the only reason I can see". He also referred to Ms McGettigen having said that she wanted someone with a British passport.

52. Ms McGettigen replied to the Claimant at 18:39 on 1 June 2018. She stated as follows:

> The decision to terminate your probation period was based on Neil's concerns regarding your lack of communication, including taking time away from the office at short notice on two occasions, which have led to questions around your reliability during the probation period.

53. She also stated:

> As far as we are concerned, you are clearly currently eligible to work in the UK and that status has had no bearing on Neil's decision to terminate your probation period.

<u>Grievance</u>

54. In the email to Ms McGettigan and Ms O'Neil of 29 August 2018 the Claimant invoked the Respondent's grievance procedure. His grievance related to:

- the Respondent had breached its statutory duties relating to equality and health and safety within the working environment;
- he had been the victim of a racial discrimination to include that he had been restricted from taking calls from the ticketing system, even if he could resolve them;
- Ms McGettigen had advised him that the Respondent would have preferred someone with a British passport;
- that he had been subject to a systematic campaign of racism and discrimination; and
- the Respondent had failed to return his personal possessions.

55. In a letter to the Claimant dated 4 September 2018 David Weight, Head of IT (Mr Weight), advised the Claimant that he would be responsible for the adjudication of his grievance and proposed a meeting on 24 September 2018.

56. The Claimant attended a grievance meeting with Mr Weight on 24 September 2018. Ms Campbell was in attendance in a note taking capacity.

57. Paragraph 29 of the notes of the hearing concerns a call with Mr Bigrave during which he advised the Claimant that his employment was being terminated and which the Claimant had covertly recorded on his mobile phone. The outline of what Mr Bigrave informed the Claimant on this call had been prepared by Ms McGettigen and sent to Mr Bigrave in an email at 11:56am on 1 June 2018. The summary of the call in the note of the grievance hearing omits the words "and not being in today" which are in the transcript of the audio recording of the call. This relates to his absence on 1 June 2018 to take care of his daughter.

58. At the conclusion of the hearing Mr Weight advised the Claimant that he would investigate his claims and confirm an outcome in writing.

59. Mr Weight sent an email to Ms O'Neil, Mr Bigrave and Ms McGettigen on 28 September 2018 seeking clarification on various matters which the Claimant had raised during the course of the grievance meeting.

60. Ms McGettigen responded later that day and made the following comments:

> I can confirm that I had a brief informal five minute conversation with Michael at the request of Mr Bigrave regarding a discrepancy with Michael's passport and nationality, this was due to Michael being submitted by the agency as being a British national but when he

produced his documents at the HR induction, Michael had a Nigeran passport with a Certificate of Entitlement and Right of Abode attached to it. Neil's concern was that Edenred had been misled by the agency and/or Michael in order to secure employment.

61. She went on to state:

> I confirm that at no time during the conversation did I state or imply that we wanted someone with a British passport.

62. Mr Weight sent a grievance outcome letter to the Claimant dated 4 October 2018. It is not necessary for us to set out most of the matters dealt with in this letter as they are outside the scope of the claims being pursued. The following sections are however relevant:

Passport renewal

63. It was clear that there had been a conversation between the Claimant and Ms O'Neil where it was established that he would need to make arrangements to update his passport and that she had advised him that he would need to update his manager about this to ensure that he obtained the necessary permission for the time off.

Meeting with Ms McGettigan

64. Ms McGettigan confirmed that she was satisfied with the responses provided by the Claimant regarding his passport and right of abode. Further at no point had she stated or implied that the Respondent wanted someone with a British passport.

Performance

65. That the Claimant's technical performance during his probationary period was not specifically an issue, or in question, and it was concerns regarding his communication and unreliability that were issues and the reason for terminating his probationary period. This included Mr Bigrave saying that he had advised the Claimant that he needed to "slow down" and start from the beginning when discussing technical queries/issues, in order to improve communication between himself and the rest of the team.

The Law

Race

66. Under s13(1) of the EqA read with s9, direct discrimination takes place where a person treats the Claimant less favourably because of race than that person treats or would treat others. Under s23(1), when a comparison is

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

67. 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 he was.

68. 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 can show that he or she did not contravene the provision.

69. 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] IRLR870:

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.

Harassment – EqA, s26

70. Whether the Respondent engaged in unwanted conduct related to race.

71. Whether that conduct had the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading or offensive environment for the Claimant.

72. If the conduct did not have that purpose, but it did have that effect, whether it is reasonable for the conduct to have that effect, taking account of the Claimant's perception and the other circumstances of the case.

Time off for Dependants

73. The relevant statutory provisions are in the ERA:

S.57A Time off for dependants

(1) An employee is entitled to be permitted by his employer to take a reasonable amount of time off during the employee's working hours in order to take action which is necessary:

(a) to provide assistance on an occasion when a dependant falls ill,

(b) to make arrangements for the provision of care for a dependant who is ill,

(d) because of the unexpected disruption or termination of arrangements for the care of a dependant, or

(e)to deal with an incident which involves a child of the employee and which occurs unexpectedly in a period during which an educational establishment which the child attends is responsible for him.

(2) Subsection (1) does not apply unless the employee—

(a)tells his employer the reason for his absence as soon as reasonably practicable, and

(b)except where paragraph (a) cannot be complied with until after the employee has returned to work, tells his employer for how long he expects to be absent.

(3) Subject to subsections (4) and (5), for the purposes of this section "dependant" includes, in relation to an employee—

(b)a child.

S57B Complaint to employment tribunal

(1) An employee may present a complaint to an employment tribunal that his employer has unreasonably refused to permit him to take time off as required by s.57A.

(3) Where an employment tribunal finds a complaint under subsection (1) well-founded, it—

(a)shall make a declaration to that effect, and

(b)may make an award of compensation to be paid by the employer to the employee.

(4) The amount of compensation shall be such as the tribunal considers just and equitable in all the circumstances having regard to—

(a)the employer's default in refusing to permit time off to be taken by the employee, and

(b)any loss sustained by the employee which is attributable to the matters complained of.

S99 Leave for family reasons

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if—

(a)the reason or principal reason for the dismissal is of a prescribed kind, or

(b)the dismissal takes place in prescribed circumstances.

(2) In this section "prescribed" means prescribed by regulations made by the Secretary of State.

(3)A reason or set of circumstances prescribed under this section includes—

(d)time off under section 57A.

74. The right is intended to cover unforeseen matters and would not cover, for example, a parent taking a child to a hospital appointment. If employees know in advance that they are going to need time off, they may be able to arrange with their employer to take annual leave.

75. In all cases, the right will be limited to the amount of time which is reasonable in the circumstances of a particular case.

76. In Qua v John Ford Morrison 2003 ICR 482, EAT, the Appeal Tribunal considered how employment tribunals should approach the question of whether it was necessary for an employee to take time off in any given situation. The EAT held that factors to be taken into account include the nature of the incident which has occurred, the relationship between the employee and the dependant in question, and the extent to which anybody else can provide assistance.

77. Whether or not the employee has complied with the notice requirements is a matter for the employment tribunal to decide on the facts of each case.

78. In *Qua*, the EAT held that an employment tribunal should ask itself four questions in order to determine whether an employee has been automatically unfairly dismissed for taking time off for dependants:

Question 1

79. Did the employee take time off or seek to take time off from work during his working hours? If so, on how many occasions and when?

Question 2

80. If so, on each of those occasions did the employee:

- as soon as reasonably practicable inform the employer of the reason for the absence, and
- tell the employer how long he or she expected to be absent?
- If not, were the circumstances such that the employee could not inform the employer of the reason until after he or she had returned to work?

81. If on the facts the tribunal finds that the employee did not comply with these requirements of s.57A(2) then the right to take time off work under subsection (1) does not apply. The absences would then be unauthorised and the dismissal would not be automatically unfair.

Question 3

82. If the employee did comply with the above requirements, then the following questions arise:

a. did the employee take or seek to take time off work in order to take action which was necessary to deal with one or more of the five situations listed at paras (a) to (e) of S.57A(1), and

b. if so, was the amount of time off taken or sought to be taken reasonable in the circumstances?

Question 4

83. If the employee satisfies questions 3(a) and (b), was the reason or principal reason for his dismissal that he had taken or sought to take that time off work?

84. If the answer to the final question is in the affirmative, then the employee is entitled to a finding of automatic unfair dismissal.

Conclusions

Race

85. We applied the statutory burden of proof. The first question we considered was whether the Claimant had proved facts from which the Tribunal could conclude in the absence of an adequate explanation that the Respondent had treated him less favourably because of his race and/or Nigerian national origin.

86. We find that it was reasonable for Ms McGettigen to request that the Claimant attend a short meeting to address her concerns regarding the imminent expiry of his passport and right of abode. We find that this meeting was of a short duration. We do not find that either the calling of the meeting, or what was said during it by Ms McGettigen, constituted harassment of the Claimant on account his race.

87. We find no evidence that Ms McGettigan used words to the effect of the Respondent preferring someone with a British passport. We make this finding for the following reasons:

- the absence of any corroboration of Ms McGettigan having made such a comment and further the absence of any obvious motivation for her to do so;
- it would have been self-evident to the Respondent at the time of the Claimant's recruitment that he was black and given his surname it would have been likely to have been apparent that he may have been of Nigerian nationality;
- given that the Respondent had paid a recruitment fee to CodeSource it would have been unlikely that less than a month later they would forfeit that fee by terminating the Claimant's employment as a result of discovering that he had a Nigerian passport;
- the imminent expiry of the Claimant's passport was not a matter which would give rise to any significant concern from the Respondent's perspective given that he had a right of abode and it was a relatively straightforward administrative process for him to renew his existing passport; and
- Mr Bigrave had concerns regarding the Claimant's performance. We considered the timing of Mr Bigrave's email, at 18:00 hours on 29 May 2018, to Ms O'Neill and Ms McGettigan which referred to "making any decision on Michael" as being significant. Whilst this email sought confirmation regarding the Claimant's nationality, we find that this was secondary to a pre-existing determination that the Claimant's

performance during his probationary period was unsatisfactory and that his employment should be terminated.

88. Therefore, we find no evidence to infer that the Claimant was treated less favourably on account of his race. As such the burden of proof has not been reversed requiring the Respondent to adduce evidence to rebut discrimination.

<u>Emergency Dependant's Leave</u>

89. We find that in his email to Mr Bigrave at 06:06am on 1 June 2018 advising that he would not be able to attend work that day as a result of taking emergency leave to look after his daughter, that the Claimant had told his employer the reason for his absence as soon as reasonably practicable, and that the reason was one covered by S57A. We consider that the amount of time off was reasonable.

90. Whilst not a claim being pursued, we find that the Claimant was in fact paid for this day. There is no evidence to support a suggestion by the Claimant that he was not.

91. We then need to consider whether the reason, or principal reason, for the Claimant's dismissal was that he had taken that time off work?

92. Given that the only evidence concerning a lack of reliability appeared to involve the Claimant's short notice leave on 31 May 2018, during which he dealt with the renewal of his passport, and his absence on 1 June 2018 to look after his daughter, we find that these matters were at least in part the reason for the Claimant's dismissal.

93. We find that the Claimant taking leave on 1 June 2018 to look after his daughter was a source of irritation to the Respondent a factor in the decision to terminate his employment. We make this finding based on:

- Ms McGettigen's email to Mr Bigrave at 09:23 on 1 June 2018 when she stated, "not good … my suggestion would be that this is unpaid leave"; and

- the Claimant's absences on 31 May 2018 (to deal with his passport) and 1 June (to look after his daughter) being referred to by Ms McGettigen in her draft reasons sent to Mr Bigrave in her email of 1 June 2018 and then communicated by Mr Bigrave to the Claimant later that day and reflected in the audio recording and typed transcript of that call.

94. We need to consider whether the Claimant taking emergency dependant's leave was the principal reason for his dismissal. We find that it was not. It was a factor, but not the main reason, for his dismissal. We reach this finding for the following reasons:

- the Respondent had almost certainly reached the decision to terminate the Claimant's employment prior to his email to Mr Bigrave at 06:06am on 1 June 2018. This is reflected in Mr Bigrave's email to Ms O'Neil and Ms McGettigan at 18:00 hours on 29 May 2018 where he asked for clarification to be obtained from CodeSource before making any decision on Michael. We find that the reference to making a decision on the Claimant concerned his likely dismissal;

- whilst there is no documented evidence of performance concerns relating to the Claimant, and his manner of communication, we find that these were, on the balance of probabilities, the most likely reason for the Respondent's decision to terminate his employment; and

- there were reasons for Mr Bigrave dismissing the Claimant by telephone on 1 June 2018 which did not relate to irritation that he had taken leave to look after his daughter. These were:

    - Mr Bigrave going on holiday from 4 June 2018;
    - to benefit from the 75% offset against future hire from CodeSource the Claimant's employment needed to be terminated before 4 June 2018; and
    - offsetting a discount having been negotiated by the Respondent with CodeSource evidences a pre-existing decision that the Claimant's employment would almost certainly be terminated predating his notifying Mr Bigrave at 06:06 on 1 June 2018 that he needed to take the day off to look after his daughter.

95. We find that the Respondent had already determined that the Claimant was an unsatisfactory employee as a result of the communication and performance issues. As such we do not consider that the chronology of events, to include Mr Bigrave's email at 18:00 hours to Ms McGettigan on 29 May 2018, is consistent with the Claimant's employment being terminated where the principal reason was his taking time off for a dependant under s.57A of the ERA.

96. As such we find that the Claimant's dismissal was not automatically unfair pursuant to s.99 ERA as a result of it being for taking time off under s.57A.

Employment Judge Nicolle

Dated: **14 February 2020**

Judgment and Reasons sent to the parties on:

20/02/2020

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For the Tribunal Office