EMPLOYMENT TRIBUNALS

Claimant: **Mr E.N. Komeng**

Respondent: **Creative Support Ltd**

Heard at: Birmingham **On: 06 February 2018 to 09 February 2018**

Before: Employment Judge Butler
Members: Mrs D.P. Hill and Mrs N. Gill

Representation
Claimant: **In person**
Respondent: **Mr Howson, Consultant**

JUDGMENT

The unanimous Judgment of the Tribunal is that the Respondent subjected the Claimant to direct race discrimination pursuant to Section 13 of the Equality Act 2010 and the Respondent is ordered to pay to the Claimant the sum of £8,400.00 in respect of injury to feelings.

REASONS

Background

1. By a claim form submitted to the Tribunal on the 07 July 2017, the Claimant alleged:

   a) The Respondent repeatedly failed and/or refused to enroll the Claimant on to a QCF Level 3 Course, whereas his comparators were enrolled on this course.
   b) From the latter part of the 2015, he was required to work constant weekend shifts whereas his comparators were not.

2. The Respondent denies the allegations, effectively arguing that it was for the Claimant to take responsibility for his own training and he failed to do

this and that it was not possible to accommodate a change in his working pattern largely because this would have meant interfering with the working patterns of other employees.

3. The Claimant describes himself as Black African. He worked as a support worker for the Respondent whose business was the provision of services for vulnerable people including those with dementia and learning difficulties.

The Law

4. Section 13 of the Equality Act 2010 provides A person ("A") discriminates against another ("B") if, because of a Protective Characteristic, A treats B less favourably than A treats or would treat others.
5. It is not disputed by the Parties that the Claimant's ethnicity as a Black African is a protected characteristic.

The Issues

6. The issues in this case are whether the Claimant was less favourably treated by the Respondent as alleged and as a result of his protected characteristic and whether the claim was submitted within the three month time limit set out in Section 123(1) (a) of the Equality Act 2010.

The Evidence

7. There was an agreed bundle of documents extending to 363 pages and references to page numbers in this Judgment are to page numbers in that bundle.
8. We heard evidence from the Claimant and for the Respondent from Ms. Jodie Raybould, the Claimant's Line Manager, Mr A. Smallwood, a Project Manager with the Respondent, Ms. O. Toop, a Unit Business Manager with the Respondent who heard the Claimant's initial grievance, and Mr D. Finan, Service Director of the Respondent, who heard the Claimant's appeal against the grievance outcome.

The Claimant's Evidence

9. The Claimant's Witness Statement was taken as his evidence in chief and he was cross-examined. Throughout his oral evidence we found the Claimant gave clear and concise evidence without hesitation and which was consistent with his written statement.
10. It was unfortunate that the Respondent was unable to disclose the Claimant's supervision notes which would have been taken by his previous Line Manager as she had left the Respondent's employment. This was important in this case because the Claimant alleges that in each of the supervisions he had with that Line Manager, he raised the issue of being allowed to pursue the Level 3 Course. We accept the Claimant's evidence in this regard due to the manner in which he gave his evidence generally which caused us no concern as to his truthfulness and his evidence could not realistically be challenged by the Respondent.

The Respondent's Evidence

11. The evidence of the Respondent's witnesses was broadly consistent. In relation to the Claimant's wish to enroll on the Level 3 Course, they said that it was not a necessary requirement to enable the Claimant to carry out his duties and, further, that the Respondent's training policy provided that employees should take responsibility for their own professional development and, in this regard, the Claimant had never completed an application form for the Level 3 Course.
12. In relation to the Claimant alleging that he had been required to work every weekend when others had not, the evidence was that he had agreed to this in a meeting with Ms. Raybould in 2016 and had confirmed that he wished to continue with this arrangement in a meeting with her in July 2016 when he was anticipating starting a University course in September of that year.
13. The evidence was also consistent in relation to the Terms and Conditions of Employment offered by the Respondent. The Claimant's Contract of Employment [page 44] is the same generic contract offered to all of the support workers. Whilst it provides that employees must work flexibly and rotas operate on a 24/7 basis, the evidence was that, at interview, employees were asked, for example, whether they could work weekends and if they said they could not, that would be accommodated in the days they were required to work. The Respondent's witnesses also stated that, in determining what shifts an employee would work, the "needs of the service" would be a paramount consideration.
14. In assessing the credibility of the evidence given by the Respondent's witnesses, we noted that Ms. Raybould said she would only give a staff member an application form if they were applying for a mandatory module necessary for the performance of their duties and the rest would be up to the individual staff member to sort out. This is at odds with page [344] which shows that a previous Manager, Gemma Cooper, completed an application form for Mr Qazafi, one of the Claimant's comparators, who then merely signed the form which was sent to the Respondent's Training Department. She also said that the Respondent would not be able to enforce a change in an employee's working pattern merely to suit another employee but could do so to meet the needs of the service. Mr Qazafi's needs, she said were due to his outside business interests and his family. We did not consider this had been applied consistently in the Claimant's case as his request to alter his working pattern was also for family reasons.
15. Ms. Raybould also stated that she discussed the Claimant's change to working weekends with him in May 2016 and he agreed to this on a permanent basis. However, there are no notes of that meeting and the Claimant was adamant he agreed to work weekends on a temporary basis to assist the Respondent in delivering its service. Ms. Raybould also stated that, in her meeting with the Claimant in July 2016, she said there was a further discussion with the Claimant to the effect that he wished to continue working weekends. The note of that conversation is at page 232 and makes absolutely no mention of a discussion about the Claimant working weekends.
16. We also noted the evidence of Mr Finan and, in particular, the contents of the outcome letter in respect of the Claimant's Grievance Appeal Hearing. At page 117 Mr Finan states "Creative Support maintains the right to use its resources to meet the needs of the service." We did not find that this was reflected in the practice of the Respondent to allow certain employees to have work patterns which fitted in with their lives outside employment

and which seemed to have been arranged for their benefit and had little to do with the needs of the Respondent's service.

17. In short, we found that the Respondent's evidence through its various witnesses was essentially that the Claimant was denied access to a Level 3 Course because he did not fill in an application form and was unable to change his hours and days of work to avoid working every weekend because this did not fit in with the needs of other employees in relation to non-work related matters or the needs of the service. We did not feel that this reflected the documents before us and, as noted above, was not reflected in documented conversations with the Claimant.
18. For the above reasons, where there was a dispute in relation to the facts, we preferred the evidence of the Claimant.

Findings of Fact

19. In relation to the issues before us, we find the following facts:-
    (i) The Claimant commenced employment with the Respondent as a support worker on 13 June 2011 (originally commenced employment with Dudley Metropolitan Borough Council who transferred the service in which he worked to the Respondent on 28 November 2013 when he was issued with the Respondent's generic Contract of Employment).
    (ii) The Claimant had regular supervisions on an annual basis, although the Respondent's evidence was that the supervisions should have been arranged more regularly. From the documents before us, they took place on 21 November 2013, 10 February 2014, 22 January 2015, 14 May 2015, 07 January 2016, 03 March 2016 and an annual appraisal took place on 28 March 2016. Throughout these supervisions, where notes were produced and where they were not, the Claimant repeatedly asked to be enrolled on the Level 3 Course. There is no evidence that the Respondent ever took any steps to assist the Claimant in enrolling on the Level 3 Course.
    (iii) In May 2016, the Claimant met with Ms. Raybould and agreed to work weekend shifts on a temporary basis. In fact, the Claimant had been working weekends prior to that under the impression that this would continue until new staff members commenced work. At a further meeting with Ms. Raybould in July 2016, the Claimant was still under the impression that his continued weekend shifts were temporary.
    (iv) In 2012, when Mr Hussain and Mr Qazafi were employed, they were allowed to enroll on the Level 3 Course even though they were less qualified than the Claimant because funding was available at that time to elect to take the Course when employees reached the stage of their mid-probation review. Thereafter, the Respondent alleges that access to the Course was limited to senior workers of which the Claimant was not one.
    (v) On 11 February 2014, the Claimant requested that he not have to work every weekend.
    (vi) In early 2017, the Claimant requested that other employees work flexibly so he did not have to work every weekend. The Respondent states that other employees were asked if they would agree to this but they would not. No pressure was put on these employees by the Respondent to work in accordance with the terms of their Contract of Employment as regards flexibility or being prepared to work weekends. As a result, the Respondent advised the Claimant that he would have to make a flexible working request which he did. He did this and the outcome was he was told he could not change his working pattern at the Wickets, the project at

which he was based, as other employees would not agree to change their working patterns.

(vii) On 17 March 2017, the Claimant submitted a formal Letter of Grievance to the Respondent's Area Manager, Ms. Carter, in which he complained about having to work weekends, that he had not been allowed to enroll on the Level 3 Course and "I certainly do not expect to be treated less favourable (sic) to my detriment in comparison to my colleagues." A grievance meeting was held on 06 April 2017 with Ms. Toop. The minutes begin at page 93. On 25 April 2017 [page 100] Ms. Toop dismissed the Claimant's grievance on both counts as they refer to the issues before the Tribunal. On 11 May 2017, the Claimant appealed that grievance outcome and attended a meeting with Mr Finan on 23 May 2017, the minutes of which begin at page 105. Mr Finan dismissed the Claimant's appeal referring to a compromise that had been suggested to the Claimant whereby he worked one night a week at a different project as being "the only way forward". In relation to the Level 3 Course, Mr Finan suggested [page 116] that the Claimant made another "submission" adding "however, for your current role I believe you are adequately qualified and this may influence the outcome of your request".

Submissions

20. For the Respondent, Mr. Howson submitted that it was the Respondent's policy that the Claimant should take responsibility for his further training and complete an application form which should then be signed by his Manager and sent to the Training Department. The Claimant had not submitted an application form until January 2018 and that was the reason he was not put on the Level 3 Course. He noted that the Claimant had never gone on line to download the application form, had not requested a form and had not contacted the Training Department or HR. He was an intelligent man who knew how to get things done so it would not have been beyond him to submit an application.
21. The Claimant had compared himself to Messrs. Qazafi and Hussain, but they had commenced employment with no qualifications at a time when the Level 3 Course was open to them with Government Funding. It had not been open to the Claimant during his probation, although he could still have made an application.
22. He submitted that it was the function of the Tribunal to determine whether the motive in treating the Claimant the way he was treated was because of his protected characteristic. There was no evidence in this case that race was a motivation.
23. In relation to the Claimant's working pattern, Mr Howson said the Respondent was not sure why the Claimant was initially put on weekend work because the Manager who dealt with that had left the company. Mr Howson submitted the Claimant was over a year out of time as he could have raised the issue a lot earlier. He suggested that as it was the Claimant who wished to change his work patterns, it should be the Claimant who compromised and not other employees. The Claimant had refused to compromise but his shift pattern had nothing to do with his race.
24. The Claimant submitted that he was not time-barred because the discrimination was a continuing act, but he had always understood that working weekends was a temporary arrangement. He had worked long hours for a very long time and complained about this in his supervisions.
25. He submitted that the needs of another employee's business, insofar as

they took priority over the needs of the Respondent's business, was inconsistent with the requirement under the generic Contract of Employment to work flexibly. Inferences should be drawn from the Respondent's failure to disclose earlier supervisions and mid-probation records.

26. The Respondent's diversity policy provided that ethnic minorities should be encouraged to better themselves. The Claimant had not been told why he was not given the opportunity to be placed on the Level 3 Course. He was a Black African and his comparators were White Asians so a prima facie case had been proved and the burden of proof passed to the Respondent who had failed to discharge it.

Conclusions

27. Dealing firstly with the Respondent's assertion that the claim is out of time, we find no merit in that submission. The Claimant clearly raised a grievance on 17 March 2017 which was finally disposed of under the Respondent's grievance policy with Mr Finan's letter dismissing his appeal on 26 June 2017. The grievance raised the issue of race discrimination which is before the tribunal. The claim form was submitted on 7 July 2017 and is within the three month time limit.
28. Section 136(2) Equality Act 2010 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". Section 136(3) provides, "But subsection (2) does not apply if A shows that A did not contravene the provision". There is thus a two-stage process to be followed. If the Claimant has made out a prima facie case and the explanation is unsatisfactory, then discrimination has to be found by the tribunal. We have considered the evidence as a whole before embarking on the application of the two-stage process.
29. The Claimant's comparators are two other support workers employed by the Claimant under the same generic contract of employment. Messrs Qafazi and Hussain are of British Asian ethnicity. They both had the opportunity to progress to the Level 3 qualification wanted by the Claimant and neither of them for family and/or outside business reasons worked every weekend.
30. In reaching our conclusions we have had regard to the decisions in Igen v Wong [2005] ICR 9311, Madarassy v Nomura International plc [2007] EWCA Civ 33 and IPC Media Limited v Millar [2013] IRLR 707.
31. In assessing whether, on the balance of probabilities, the Claimant has established a prima facie case of race discrimination, we find that he has. In comparison to his two comparators, he was denied access to a Level 3 course when they were not and was required to work every weekend when they were not. It could be that this was due to discrimination. We find that the burden of proof shifts to the Respondent to establish that the reason for the Claimant's treatment was not because of his race.
32. Regarding the access to the Level 3 course, the Respondent's witnesses each said that it was a matter for the Claimant to seek out and complete the necessary application form. This was somewhat at odds with their evidence that funding had only been available for the comparators when they reached a certain stage in their probationary period and this did not apply to the Claimant during his earlier probationary period. It was also stated on a number of occasions that the Claimant simply did not need the Level 3 qualification for the level of work he undertook. We could not

accept that the comparators were able to take the Level 3 course to carry out the same work as the Claimant if he did not need that qualification. We wondered why the Respondent would bother giving that opportunity to the comparators who did not need the qualification yet not afford the same opportunity to the Claimant. Funding is obviously an issue for any organisation but our concern here lay with the Respondent's line of evidence to the effect that the Claimant should have sought out and completed the application form. If there was no funding available, why was he not told this?

33. We were not satisfied with the Respondent's explanation as to why the Claimant could not progress to the Level 3 qualification. Our impression was that he was not taken seriously at all. We accept his evidence as to asking for access to the course at all of his supervisions but there is little evidence from the Respondent that any one took his request seriously enough to sit down and offer advice to him. The Respondent's evidence was also inconsistent. We noted Mr Finan's evidence that the Claimant was not enrolled on the Level 3 course because he did not follow the correct procedure and not because of a lack of funding as expressed elsewhere by the Respondent's witnesses. Mr Finan makes the point that the Respondent will support continuing professional development wherever possible and reasonable but there is no evidence of such support for the Claimant.
34. We also found it curious that, having sounded out the Claimant's comparators in relation to weekend working, the Respondent suggested the Claimant make a flexible working request. This was illogical for two reasons. Firstly, being relieved of some weekend working would, according to the Respondent, depend upon the comparators agreeing to work some weekends and they had already said they would not. Secondly, the Respondent simply failed to apply the terms of the generic contract of employment to the comparators but did so for the Claimant. His flexible working request was, in our view and for these reasons, a futile course of action and one that was doomed to failure.
35. Having considered the Respondent's evidence as to why the Claimant was treated differently to his comparators, we concluded that the explanation given by its witnesses was unsatisfactory. There is no consistent and coherent explanation. He was treated differently to his detriment. The Respondent applied terms of the generic contract to him and not to his comparators in making it virtually impossible for him to have some weekends off. He was denied access to the Level 3 course contrary to the Respondent's stated policy of encouraging all staff to obtain further qualifications.
36. Our conclusion is that this treatment of the Claimant was due to his race. Whilst we acknowledge the difficulty in looking into the minds of the Respondent's witnesses, their lack of a consistent explanation for the different treatment afforded to the Claimant led us to believe his situation was of no consequence to them and this was due to his race.
37. In assessing compensation for injury to feelings, we have considered the Vento bands as amended and updated. We also bear in mind the decision in Cadogan Hotel Partners Limited v Ozog [2014] UKEAT/0001/14 where the EAT held that the focus should be on the actual injury suffered by the Claimant and not the gravity of the acts of the Respondent.
38. In this case, the Claimant continued to work for the Respondent for several years in the face of its refusal to help him to access the Level 3 course. It refused to allow him to have some weekends off. This must have caused

significant upset and distress when he had to work with colleagues with less continuous service who had the Level 3 qualification and did not work every weekend. That he persevered with his aspirations to obtain better qualifications for several years whilst receiving no support indicates his distress was not insignificant. In our view, the appropriate level of compensation should be near the top of the lower band and we assess this as £8,400. There was no claim for interest.

Employment Judge Butler
10 April 2018