



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant
Miss T Rose

Respondent
Bupa Care Homes (Ans)
Limited

and

Held at Croydon on 2 & 3 August 2017

Representation

Claimant:

In Person

Respondent:

Ms T Burton, Counsel

Employment Judge Harrington

Members: Mrs R C Macer
Mr M Walton

REASONS

Introduction

1. These written reasons for the Tribunal judgment dated 3 August 2017 are provided pursuant to a request from the Claimant dated 4 August 2017. The Claimant, Miss Tiphonie Rose, brings a claim against BUPA Care Homes by an ET1 presented on 17 January 2017. At a preliminary hearing on 15 March 2017, the claim was set down for a full merits hearing and the issues in the case were clarified as follows,
 - '2. The Claimant claims race discrimination and wrongful dismissal (notice pay).
 3. The issues in the wrongful dismissal claim are reasonable straightforward and are whether the Claimant was entitled to receive notice pay and if so what sums are outstanding.
 4. With regard to the race discrimination claim the Claimant relies upon the racial group of her Jamaican ethnic origin.
 5. The Claimant argues three main points, which constitute direct race discrimination and / or race harassment:
 - (1) the Respondent undertook insufficient checks with the Home Office regarding the Claimant's immigration status;

(2) the manner with which the Claimant was escorted from the Respondent's premises; and

(3) insulting behaviour received by the Claimant from Respondent staff.'
[35]

2. At the full merits hearing, the Claimant has represented herself and the Respondent has been represented by Ms Burton, Counsel. The Tribunal thanks them both for their assistance. This case obviously raised distressing issues for the Claimant, with a number of the Respondent witnesses also being visibly affected by their recollections. We thank both the Claimant and Ms Burton for assisting the Tribunal with its consideration of the case. The Tribunal was referred to a bundle of documents to which some further pages were added during the course of the hearing. The bundle is paginated 1 – 184. The numbers appearing within square brackets in this judgment refer to that bundle. We heard evidence from 5 witnesses each of whom had prepared a written witness statement. Yesterday we heard evidence from the Claimant and Ms Matthews (Receptionist) and today we heard from Mrs Smallwood (job title), Mrs Collins (Home Administrator) and Mrs Thompson (job title). Both parties made closing submissions with Ms Burton also providing written submissions on behalf of the Respondent.
3. The Tribunal has considered all of the witness evidence it has heard and has taken into account the entirety of the documentary evidence to which it has been referred.

The Facts

4. Around June / July 2016 the Claimant expressed an interest in the role of Administrator Assistant at the Respondent's Manley Court Nursing Home in Newcross, London. The Claimant initially had a telephone interview on around 4 July 2016 with Nathan Patton from the Respondent's central recruitment team. During that interview the Claimant told Mr Patton that her passport had expired but that she had been a permanent citizen of the UK since 1996 and that she was applying for British Citizenship. The Tribunal notes at this stage that the Claimant's passport had expired around 13 years before and within the visa section of the passport it was recorded that the Claimant had been given leave to remain in the UK for an indefinite period. The stamp within the passport recording this leave to remain was dated 7 March 1996 [143].
5. Mr Patton proceeded to arrange a face to face interview for the Claimant at the Collingwood Court Care Home (another of the Respondent's homes) on 7 July 2016, which the Claimant duly attended. This interview was arranged as apparently Ms Maureen Minto, Home Manager of Manley Court, was unavailable.

6. On or around 11 or 13 July 2016 the Claimant attended at Manley Court ('the Home') for a meeting with Ms Minto. It appears that the Claimant's attendance was not expected by the staff at Manley Court. The Tribunal notes that Manley Court was short staffed at this time and this resulted in an extremely busy working environment for, in particular, Jacqui Collins the Home Administrator and Claire Matthews, the Receptionist. An example of the heavy workload being covered by the existing staff included Claire Matthews having to assist and cover a significant amount of the administrative work including that relating to staffing issues, all in addition to her receptionist work.
7. As stated, on 11 or 13 July 2016, the Claimant met Ms Minto and Mrs Collins. The outcome of that meeting was the Claimant being offered the assistant role. Written confirmation of that offer was sent to the Claimant dated 18 July 2016 [108]. The offer was stated to be conditional subject to the receipt of two written references and a medicheck form. In addition, it was also accepted by all relevant witnesses, that it was also understood that the Claimant had to pass a DBS check.
8. Around 21 July 2016 the Claimant attended the Home again. On that occasion she brought in paperwork which had been sent to her by the Respondent and gave various documents to Ms Matthews. She also signed the terms and conditions document [46-47]. At that visit, it is agreed that the Claimant produced some documentation about her right to work. By way of example, Ms Matthews accepts that the Claimant produced her passport, which Ms Matthews photocopied.
9. At this stage, it is important to note what the Respondent has explained to the Tribunal is its usual procedure when appointing new employees. In respect of establishing a right to work, copies of acceptable documents for right to work checks are taken and forwarded to the Employment Compliance Team. The Compliance Team are responsible for confirming that an applicant has the right to work and therefore can commence the offered employment. Unfortunately in this case it is accepted by Ms Matthews, that due to the overwhelming pressure of work in July 2016, she failed to follow this process.
10. This led to a situation in which during July and August 2016, when the Claimant made contact with Ms Matthews, the Claimant was informed that upon receipt of a successful DBS check, the Claimant would be able to commence her induction and employment.
11. On 12 August 2016 the Claimant resigned her employment at the Bellingham Green Surgery. The Claimant attended the Respondent's induction training on 10 October 2016 and commenced her employment on Monday 17 October 2016.

12. On 18 October 2016 Mrs Collins checked the Claimant's file and realised that the correct internal paperwork was not on there. In particular, that the right to work documents had not been sent to the Employment Compliance Team. Accordingly the Claimant was asked to bring in her passport. On 19 October 2016 the Claimant did not bring in her passport and was sent home to get it. The Claimant went home and returned with her passport. Later that day, Ms Matthews forwarded relevant documentation, including signed and dated copies of the Claimant's passport, to the Employment Compliance team [138] - [144]. At 16.24 hours on 19 October 2016 an email was received by Ms Minto from Mrs Smallwood stating that the Claimant was not eligible to work in the UK based on the documents provided. In the email she states as follows,

'This is due to a change in legislation from May 2014 whereby we can no longer accept visa endorsements in expired passports for our new starters.

The Home office have advised the applicant needs to have the details of their Indefinite leave transferred to a Biometric Residence Permit and therefore complete a No Time Limit (NTL) application. This is available on the Home Office website.

There is a cost involved of £308 which the applicant must pay.

*As such Tiphonie can **NOT** be legally employed by Bupa at this time. When the individual has received their new bio metrics residence permit please re - submit the new starter documents to our team for review.'*

[145]

13. On the morning of 20 October 2016 Mrs Collins and Ms Minto met with the Claimant and shared with her the contents of the email.
14. Mrs Collins has told us that during the meeting on 20 October 2016 the Claimant was very upset. The Claimant referred to her friend getting a biometric residence permit within 7 days and that she was going to try to get the money together to make that application. Mrs Collins describes sympathising with the Claimant's position and that she told the Claimant to go downstairs to her office (the Claimant's office) and to make as many phonescalls as she needed to. Mrs Collins went downstairs to her own office about 20 minutes later and saw the Claimant. Mrs Collins asked the Claimant if everything was ok and the Claimant responded that it was, so Mrs Collins left. After Mrs Collins had been in her own office for a further 15 - 20 minutes, she went back into the Claimant's office apologising but saying that the Claimant would have to leave, to which the Claimant again said 'ok'. It is of note that neither Mrs Collins nor Ms Matthews describe a situation in which Mrs Collins physically escorted the Claimant from the premises.

15. The Claimant describes the meeting very differently. The Claimant says in her statement that she was told to leave the premises immediately because she was '*illegal to work*'. She states that Ms Minto told her she was doing the Claimant a favour by not calling immigration officers and that the Company could be fined £20,000
16. The Claimant further told us in evidence that during the meeting in Ms Minto's office, she saw an email on Ms Minto's computer screen that had the word 'illegal' in large and bold letters. The Claimant says that she queried the word 'illegal' in the email with Ms Minto and she described Ms Minto as responding that she too felt insulted by the word.
17. The Tribunal has carefully considered the two accounts given to us by the witnesses and we have reminded ourselves of the contents of the witness statements and the wording of the email [145]. We are satisfied that the account of the meeting given by Mrs Collins is to be preferred to that given by the Claimant. The Claimant was understandably emotional and very distressed at the time and we consider that this is likely to have affected her detailed recall of what happened at the meeting. We found the evidence of Mrs Collins to be an honest and detailed recollection of the matter and we considered her account to be credible. The Tribunal was also struck by the paragraph in the email on page 145 referring to biometric residence permits and the reference being made to obtaining such a permit in the conversation, as we have found it to have occurred. We therefore find that the meeting happened as Mrs Collins described.
18. Mrs Collins account is also supported by the evidence from Ms Matthews that when the Claimant came downstairs she was not escorted out of the premises forthwith but went into the office. We have also taken into account the Claimant's acceptance, in questions from Ms Burton, that she did not refer in her witness statement to Mrs Collins escorting her out of the premises. The Claimant responded,

'No – she was just walking behind me and telling me to leave.'
19. Further, we accept Mrs Smallwood's evidence that the only email written about this matter was that at page 145 of the bundle and that there was therefore no email on Ms Minto's screen including the word 'illegal'.
20. A letter was sent to the Claimant the same day (20 October 2016) confirming the discussions which had taken place, informing the Claimant that she should update Jacqui in the next 7-10 days and that failure to do so may result in the withdrawal of the application to work at Manley Court.
21. On the following day, 21 October 2016, the Claimant attended the Home. She met with Mrs Collins in her office and handed over some

documentation and contact details for the Home Office. Mrs Collins recalls that the Claimant was very distressed and Mrs Collins told her that no one was saying she was illegal but that the appropriate paperwork had to be in a current passport.

22. The Claimant asked Mrs Collins to pass on the Home Office information to Ms Minto and Mrs Collins said that she would. After this, there was some ongoing contact between the parties. Ms Matthews recalls the Claimant telephoning the Home on one occasion and that the Claimant was unable to speak to either Ms Minto or Ms Collins at that time. In any event on 31 October 2016 the Claimant telephoned the Home and was put through to Mrs Collins. Mrs Collins recalls the Claimant asking her what was happening and that she felt very awkward because she was aware that a letter had been sent out to the Claimant confirming that the Respondent could no longer offer her the position of Administrator Assistant. Mrs Collins described feeling very sorry for her as she knew the letter had gone out that day and that she told the Claimant that she was very sorry but that they had had to terminate her position and the letter had been sent out. The Claimant alleges that Mrs Collins was loud over the phone and aggressive in her tone saying 'what do you want now'. On the Claimant's account, Mrs Collins' voice was loud enough for the Claimant to be shocked. The Claimant describes in her witness statement (paragraph 29) that Mrs Collins spoke very loudly over the telephone raising the attention of other staff members.
23. The Tribunal again prefers the account of Mrs Collins to that of the Claimant in respect of this matter. When challenged as to this phone call, the Claimant changed her description of very loud and referred more to Mrs Collins' tone of voice. It is also of note to the Tribunal that the Claimant failed to ask Mrs Collins any questions about this matter until after it was raised by the Tribunal, following the conclusion of the Claimant's questioning. Furthermore, the Tribunal was particularly struck by the compelling account given by Mrs Collins on this issue. She was clearly emotional about the conversation and gave a detailed and straightforward account of what she had said and how she felt during the conversation.
24. The Claimant duly received the Respondent's letter dated 31 October 2016 [148]. Within that letter, reference was made to a completion of an ECS check with the Home Office. This was an incorrect reference as no ECS check had been carried out. The Claimant raised a grievance about the entire matter dated 8 November 2016 [149-152]. On 17 November 2016 Ms Thompson, Regional Director, wrote to the Claimant confirming that following her investigation of the matters raised in the grievance, the decision taken to withdraw employment was in line with the standard employment checking process. Mrs Thompson apologised for all the distress caused to the Claimant.

25. Before moving on from the findings of fact, the Tribunal does wish to comment upon this case, which is an extremely unfortunate state of affairs. The Claimant resigned her employment at the NHS surgery at which she worked, because she understood she had a job to go to at the Respondent's Home. She understood that she had attended to all of the documentation required by the Respondent and that all matters were completed as at the date of her resignation from the GPs Surgery, save for the DBS check. This, of course, was not the case because of the Respondent's failure to comply with their own internal procedures and properly process the starter documentation. The Tribunal has great sympathy for the Claimant who not only proceeded with her employment with the Respondent in good faith but was also understandably extremely distressed when told only a matter of days into her new job that she was unable to stay.

The Law

26. The relevant provisions of the Equality Act 2010 ('EqA 2010') in this case are as follows:
- 26.1 Section 4: race is a protected characteristic;
- 26.2 Section 39: an employer must not discriminate against an employee.
- 26.3 Section 13: 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.
- 26.4 Section 26: A person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
27. The burden of proof in respect of the EqA 2010 is contained in section 136. That provides that if there are facts from which the court could decide, in the absence of any other explanation, that A contravened the provision concerned, the court must hold that the contravention occurred. However, it also provides that that provision does not apply if A shows that A did not contravene the provision. It is therefore for the Claimant to prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed a discriminatory act. If the Claimant does that, the Tribunal shall uphold the complaint unless the Respondent proves that he did not commit that act.
28. It is recognised that it is unusual for there to be clear evidence of discrimination and that the Tribunal should expect to consider matters in accordance with the relevant burden of proof and the guidance in respect thereof set out in Igen Ltd v Wong and Others [2005] IRLR

258, confirmed by the Court of Appeal in the case of Madarassy v Nomura International PLC [2007] IRLR 246.

29. At the first stage, the Tribunal has to make findings of primary fact. It is for the Claimant to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed an act of discrimination. At this stage of the analysis by the Tribunal the outcome will usually depend on what inferences it is proper to draw from the primary facts found by the Tribunal. The Court of Appeal reminded Tribunals that it was important to note the word 'could' in respect of the test to be applied. At this point, the Tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. The Tribunal must assume that there is no adequate explanation for those facts. It is appropriate to make findings based on the evidence from both the Claimant and the Respondent, save for any evidence that would constitute evidence of an explanation for the treatment.
30. Guidance from the Court of Appeal in Madarassy emphasised that the burden of proof does not shift to the employer simply if the Claimant establishes a difference in status (in this case, for example, race) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal could conclude on the balance of probabilities the Respondent had committed an act of discrimination. 'Could conclude' must mean that a reasonable Tribunal could properly conclude from all the evidence before it (see Madarassy). As stated in Madarassy, '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'.
31. If the Claimant does prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed the act of discrimination, unless the Respondent is able to prove on the balance of probabilities that the treatment of the Claimant was in no sense whatsoever because of her protected characteristic, then the Claimant will succeed. The Court of Appeal said in Igen that at this stage, it is for the Respondent to prove that he did not commit or is not to be treated as having committed the act of discrimination. Since the facts necessary to prove an explanation would normally be in the possession of the Respondent, a Tribunal would normally expect cogent evidence to discharge that burden of proof and to prove that the treatment was in no sense whatsoever on the prohibited ground.
32. The Tribunal also reminds itself of the guidance set down in the Equality and Human Rights Commission: Code of Practice on

Employment (2011) although neither party referred to any specific provisions in this case.

Conclusions

33. The Claimant makes three complaints of direct race discrimination and / or harassment on grounds of race. The first aspect of the Tribunal's consideration is whether the treatment complained of actually occurred.
34. The Claimant alleges that the Respondent undertook insufficient checks with the Home Office regarding her immigration status. In particular the Claimant alleges that the Respondent should have made checks through the Home Office website or through a dedicated contact number. The check to which we have been referred is the Employer Checking Service (ECS).
35. As set out above, in our findings of fact, the Claimant's documents were considered by the Respondent's Compliance team. We are satisfied that the documents produced by the Claimant did not satisfy the criteria required, as set out in what is referred to as List A [75]. That List sets out the 'acceptable documents to establish a continuous statutory excuse'. The Claimant accepts that List A is applicable and argues that she fell within category 1 on that List. The Tribunal does not accept that contention and prefers the evidence of Mrs Smallwood that the Claimant's documents did not satisfy any category on that List.
36. It is important for the Claimant to understand that in reaching that conclusion, no doubt at all is cast upon the Claimant's indefinite leave to remain, the fact that she has not travelled outside the country for a number of years and that she is now a British Citizen. One of the many sad aspects of this case is that the Respondent would have been able to accept a certificate of naturalization as establishing a right to work, which the Claimant will no doubt receive shortly at the relevant ceremony [181].
37. On the facts of this case, we are unable to find that the Respondent carried out insufficient checks. It is relevant to note that the checks carried out in this case were the standard checks carried out in all cases, complying with the statutory obligations upon employers. Further we do not accept that it was incumbent upon the Respondent to carry out further checks. In fact, the onus was on the Claimant to provide the Respondent with documents as required by List A.
38. In addition, the Claimant has contended that the Respondent could have made necessary checks using the ECS. There are 6 categories of person to whom such a check applies [178] and it is agreed that the Claimant did not fall within any of these categories. The Claimant asserts that if 'none of the above' had been selected, an employer could have progressed on the online system to make a check. This is categorically denied by Mrs Smallwood as she repeatedly told us in her

evidence today. On balance, we prefer the evidence of Mrs Smallwood on this matter. We have taken into account her obvious familiarity with the ECS and her regular usage of this system. Consequently, we do not find that it was possible to make a further check on the Claimant using this tool.

39. By way of summary, we do not find the first allegation proven as a matter of fact.
40. The Claimant next alleges that she suffered discrimination and or harassment by the manner in which she was escorted from the premises. It is said on 20 October 2016 the Claimant had to leave the premises, that she was told to leave, that Ms Minto would not contact the Home Office and that the Claimant was to contact her again in 7 – 10 days for an update.
41. As set out in our findings of fact we have preferred the evidence from the Respondent's witnesses on this matter. Accordingly we do not accept that the Claimant was escorted from the premises, rather Mrs Collins (after some further periods of time during which the Claimant was in her office) informed the Claimant she would have to leave and the Claimant responded 'ok'. We do not find that anything arises from the factual circumstances as we have found them to be, which could amount to a questionable manner in which the Claimant had to leave the Respondent's premises. To the contrary, the evidence is that Ms Matthews and Mrs Collins were sympathetic to the Claimant and her unenviable position and demonstrated understanding and kindness to her, suggesting that she make any phonecalls as were necessary.
42. Finally the Claimant complains of insulting behaviour received from the Respondent staff. This complaint is particularised as Ms Matthews telling the Claimant on 21 October 2016 that Mrs Collins and Ms Minto would get back to her but that they failed to do so and Mrs Collins conduct in a conversation on 31 October 2016.
43. The Tribunal does not accept the first part of this complaint. As a matter of fact the Claimant did see Mrs Collins on 21 October. This was actually agreed by both the Claimant and Mrs Collins. Therefore we do not find as a matter of fact that an issue arose from the Claimant only seeing Ms Matthews on that day. The Claimant is mistaken on this point.
44. As set out in our findings of fact, we do not accept that Mrs Collins made the comment identified by the Claimant during the conversation on 31 October and therefore again we do not find as a matter of fact that this is established.
45. As the Tribunal has not found that, as a matter of fact, the complaints made by the Claimant actually occurred, the Tribunal has not had to proceed further with its deliberation on these claims. The Claimant has

not established before us facts from which we could properly conclude that the provisions of the Equality Act 2010 have been contravened. There are no inferences to be drawn and the burden of proof is not reversed.

46. In respect of the Claimant's claim for notice pay, we accept the submissions made by the Respondent on this matter. We find that the contract of employment covering the Claimant's probation was unlawful and that as a result the contract is void and there can be no claim for notice pay.
47. The entirety of the Claimant's claims are dismissed.

Employment Judge Harrington
Date: 11 September 2017