# EMPLOYMENT TRIBUNALS

**Claimant:** Mr J Johnson

**Respondent:** New Horizons Ltd

**HELD AT:** Manchester **ON:** 8 - 10 August 2018

**BEFORE:** Employment Judge Tom Ryan
Mr Q Colborn
Dr P Iyer

**Appearances:**
**Claimant:** In person
**Respondent:** Mrs M Peckham, Consultant

## JUDGMENT

The judgment of the Tribunal is that:

1. The complaint of race discrimination is not well-founded and is dismissed.

2. The complaint of detriment by reason of having made a protected disclosure is not well-founded and is dismissed.

3. The complaint of unfair dismissal by reason of having made a protected disclosure is not well-founded and is dismissed.

4. The complaint of breach of contract is not well-founded and is dismissed.

5. The complaint of unauthorised deduction from wages, including the complaint of unpaid annual leave, is, by consent, well-founded. The respondent is ordered to pay claimant compensation in respect of that complaint in the agreed sum of £223.05.

6. The tribunal orders that the compensation in respect of unauthorised deduction from wages should, by reason of the respondent's admitted breach of the ACAS Code of Practice, be increased by 25%, resulting in a total award of £278.81.

# REASONS

## Introduction

1. By a claim presented to the tribunal on 29 January 2018 the claimant brought complaints of unfair dismissal, race discrimination, breach of contract (i.e. for notice pay) and "other payments". Although the details in the claim were brief there was a reference to "whistle blew" and an allegation that a member of staff said of the claimant, "that black man thinks he knows it all" there were no further facts supporting complaints of discrimination or a complaint in respect of a protected disclosure. The claimant asserted that he was employed from 23 October to 30 November 2017.

2. The claim was accepted and served upon the respondent. The response was made in respect of a complaint of unfair dismissal contrary to section 103A of the Employment Rights Act 1996 ("ERA"), race discrimination, unlawful deduction from wages, and non-payment of notice pay. The respondent accepted that the claimant was an employee but denied that it had dismissed him. By its response the respondent denied the complaints.

3. The tribunal directed that there should be a preliminary hearing for case management.

4. On 5 April 2018 Employment Judge Warren gave directions and listed the case for hearing. She recorded the issues. At the outset of the hearing before us and in the beginning of his oral evidence, without objection from the respondent, the claimant further provided details of the allegations of discrimination and the protected disclosures and the detriments. We therefore set out the issues below based upon the record made by EJ Warren earlier and as clarified in the way we have described.

## Issues

5. The issues that we had to determine are as follows:

   <u>Unfair Dismissal</u>

   5.1. Was the claimant dismissed or did he resign?

   5.2. If the claimant was dismissed, was the reason that he had made public interest disclosures?

   5.3. If the dismissal was unfair did the claimant contribute to the dismissal by culpable conduct?

   5.4. Does the respondent prove that it would have dismissed the claimant fairly in any event, if so, when?

   <u>Public interest disclosures</u>

5.5. Did the claimant disclose information to the respondent which he reasonably believed was in the public interest and which tended to show that the health or safety of the children in care and the claimant as a non-smoker had been put at risk in that:

5.5.1. on 3 November 2017 he informed Ms Simmons that colleagues were smoking e-cigarettes in front of the children in the lounge, kitchen and staff room; and,

5.5.2. on the same occasion, that the children were smoking e-cigarettes;

5.5.3. on about 4 November 2017 he informed Ms Simmons that the day staff would not keep the house clean;

5.5.4. on 13 or 14 November 2017 he informed Ms Simmons that a member of the night staff had spotted some rats in the kitchen?

5.6. The respondent did not dispute that at least the first, second and fourth alleged disclosures could be qualifying disclosures if the tribunal found that the claimant had made them. It was not disputed by the respondent that if the claimant made any of the qualifying disclosures they would be protected on the ground that they were made to the employer.

5.7. Did the respondent treat the claimant unfavourably by:

5.7.1. the staff laughing at him;

5.7.2. by Ms Simmons excluding him from a staff meeting; and/or

5.7.3. by Ms Simmons cancelling his shifts.

5.8. Was the making of any private and protected disclosure the principal reason for the claimant's alleged dismissal?

5.8.1. It was not in dispute that the claimant did not have two years' continuous employment.

5.8.2. It was the respondent's case that burden of proof was upon the claimant to prove the reason for dismissal.

<u>Direct discrimination because of race</u>

5.9. Did the respondent subject the claimant to a detriment in one or more of the following respects;

5.9.1. by Mark Allen, a senior care worker, saying of the claimant, "that black man thinks he knows it all" and/or by Steven Fenn another senior care worker saying that the claimant was "too forward for a black man";

5.9.2. by cancelling the claimant's shifts and not offering any further shifts;

5.9.3. dismissing the claimant;

5.9.4. by Ms Simmons speaking to all other staff but not the claimant (the claimant confirmed that this was the same allegation as excluding him from a staff meeting)?

5.10. Did the respondent treat the claimant, who describes himself as a man of colour and black African by ethnic origin, less favourably than it treated or would have treated comparators, being, on the claimant's case, the rest of the workers in the home?

5.11. If so, has the claimant proved primary facts from which the tribunal could properly conclude that the difference in treatment was because of the protected characteristic?

5.12. If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

Unpaid annual leave/unauthorised deductions from wages

5.13. Since these matters were resolved by agreement during the course of proceedings, except for the "ACAS uplift" it is not necessary to set out the issue in these reasons.

Breach of contract

5.14. If the claimant proves that he was dismissed, to how much notice was he entitled? It was not in dispute that he was not paid notice pay.

**Conduct of the hearing**

6. The claimant had completed a witness statement in accordance with Judge Warren's order. It was almost totally lacking in detail. With the agreement of the respondent we permitted the claimant to clarify and to some extent to expand upon his complaints when he came to give evidence. The respondent produced a bundle of documents and some additional documents at the outset of the hearing. Yet even during the course of the hearing the claimant was requesting the respondent to produce further documents. Having regard to the fact that the claimant was unrepresented and unfamiliar with the tribunal process, we asked the respondent to procure any further documents that the claimant requested. Mrs Peckham agreed to do so.

7. We explained to the claimant at the outset that we would assist him by reminding him of the necessary steps as the case progressed and with formulating questions of the respondent's witnesses. It became necessary at one stage for the tribunal, with the agreement of the parties, to question one of the respondent's witnesses, Ms Simmons, before we invited the claimant to ask questions in order to ensure that we understood her evidence and that all matters were properly addressed.

8. Because of the way the case evolved Ms Peckham made an application to call a further witness Mr Blake Parikh. We granted this without opposition from the claimant.

9. All these matters led to the evidence becoming protracted. We managed to conclude the evidence and submissions in the time available. After the

respondent's submissions we offered the claimant a break to reflect upon the case before he addressed us. He declined that opportunity but he made the submissions that are summarised below.

**Evidence**

10. We heard evidence, and read witness statements, from:

    the claimant
    Mrs Bharati Parikh, the respondent's managing director
    Ms Maria Colette Simmons, manager of the care home
    Mr Steven John Richard Fenn, senior support worker
    Mr Mark Edward Allen, senior support worker
    Mr Warren Lawrence, senior support worker
    Mrs Tracey Dove, senior support worker
    Mr Blake Parikh, operations manager

11. We were provided with a bundle of documents and additional documents, as we have mentioned above, to which we refer by page number or otherwise identify. Mrs Peckham provided a skeleton argument identifying relevant matters of law. She also provided submission notes at the conclusion of the evidence in writing. She made additional brief oral submissions.

**Findings of Fact**

12. The respondent operates a number of homes for children who are looked after in local authority care between the ages of 6 and 18 years. Those children can present with backgrounds of abuse, conditions such as ASD and/or challenging behaviour.

13. Six children are looked after in the respondent's premises in a rural setting at Marple in Cheshire. The level of care, including the ratio of staff to child, and the activities which some of the young people are permitted to engage in, such as smoking e-cigarettes ,is to a large extent determined by the relevant local authority. The respondent can regulate such activity to some extent, for example by not permitting young people to "vape" in the home but only outside in the grounds, but cannot prohibit it or otherwise contravene their rights save as may be necessary and proportionate for their safety and well-being. The home is staffed by a rota of support workers 24 hours a day.

14. The claimant applied for employment at the respondent through an agency Jump Lane Recruitment. The parties' contact there was Mr Tony Graham.

15. The respondent has a business relationship with a number of agencies. The usual practice was to start staff on a "temp to perm" arrangement. Under this arrangement the agency would remain the employer of a staff member for the first few weeks or months and then the respondent would become the employer. Although at the time the respondent had thought that this was the basis upon which the claimant was engaged, it was accepted that in fact the claimant had been employed by the respondent with effect from his start date of 23 October 2017.

16. The claimant was interviewed by Ms Simmons on 9 October 2017 for the role of senior support worker based upon his history and experience. Although he gave an address in Clitheroe she recorded that he lived both in Clitheroe and Manchester. He was looking to work full-time. The relevance of his home address concerned the travel to work distance which, if the claimant were only based in Clitheroe, would be substantial and time-consuming.

17. On 10 October 2017 the claimant was offered the position at a salary of £9 per hour with a sleeping allowance of £32.50. This was subject to a three-month probationary period. The letter of offer from Mrs Parikh stated that during the probationary period the notice of termination was one week and thereafter it was one month.

18. By an email of the same day, sent on his behalf by Mr Graham, the claimant accepted the offer.

19. At about the same time as the claimant started employment the respondent had revised its rates of pay. The rate of £9 per hour had increased to £9.15 and the sleep-in allowance from £22.50 - £32.50 per night.

20. Mrs Parikh signed a contract of employment on 23 October 2017, the day upon which the claimant started his induction period. That provided for the rate of pay at £9.15 per hour but incorrectly stated that the sleep-in allowance was £22.50.

21. In the course of the hearing the respondent accepted that: the hourly rate of pay was £9.15 throughout the claimant's employment; that the correct rate of correct for sleep-ins was £32.50; and that the claimant had only been paid for 2 sleep-ins instead of the 3 sleep-ins that he had in fact undertaken. The respondent also accepted that the calculation of accrued holiday pay should have taken account of sleep-ins as well. It was these matters that led the parties to agree the figures and the complaints in respect of wages and unpaid holiday pay.

22. The claimant completed three induction shifts on 23, 24 and 27 October 2017 during which he shadowed other staff and it was intended and understood that he should also read care plans so as to be able to deal appropriately with any issues that the young persons might have on his first effective shift.

23. The normal "day" shift would either be from 10 am to 10 pm known as a "10/10". Staff would often perform a block or double shift comprising two such shifts with a sleep-in duty in between. These would be described on the rota as "10/S", denoting a 10/10 followed by a sleep, and for the following day, as an "E/10PM", denoting an early shift followed by a day shift.

24. Because he lived a significant distance from the respondent's premises and effectively had to commute from Clitheroe for each period of work, the claimant was anxious to be allocated double block shifts from the outset of his employment. The rota was drawn up fortnightly by Ms Simmons or the deputy manager Ms Billings. They would attempt to take into account staff preferences. Ms Simmons explained that some staff preferred just to work a 10/10 shift whereas others saw that working a 10/S followed by an E/10PM as beneficial.

25. Although the claimant alleged that shifts were not allocated fairly to him, he accepted that he had been allocated 3 such block shifts in the course of this short period of employment.

26. The claimant's first shift after induction was to be a 10/10 shift on Saturday, 28 October 2017. He cancelled this shift having overlooked that he needed to have his car submitted for an MOT test.

27. He worked 10/10 shifts on 30 and 31 October. He worked his first 10/S shift on 3 November 2018 and on that day had supervision with Ms Simmons. She explained that she would normally perform supervision monthly but did so this time because the claimant was a new employee. She made notes (142-143) which both she and the claimant signed.

28. Significantly she recorded that the claimant told that he was okay, that there were no issues at present and staff are okay. She recorded that the claimant had mentioned there were "lots of seniors on shifts". She explained that this was a reference to the fact that although many of the staff are senior support workers, as was the claimant, he was expected to follow the lead of more experienced staff at least in the early days.

29. She made a specific note that the claimant needed to safeguard himself in respect of one young person. That resident was currently being supported on a 2:1 ratio. In other words there should always be two members of staff present with him because of challenging behaviour and aggression and potential violence. The claimant had been observed sitting with this young person on his own and staff had raise this as a cause of concern.

30. Ms Simmons also recorded that the claimant wished to do double shifts because of travel cost and time. But she also recorded that he said he could not do Wednesdays because he would need to finish at 10 am on that morning. The claimant explained to the tribunal that was because of the need to undertake personal child care responsibilities. Ms Simmons advise the claimant to speak to Ms Billings the next day about the rota. It appears unlikely that he did so. We were provided with copies of the rotas for the period throughout the claimant's employment.

31. The rotas for the following week and the week after (121, 120) had the claimant on duty on the Wednesdays after a 10/S shift on the Tuesday night. Although the claimant denied it, it appears that he had cancelled both those Wednesday daytime shifts. The claimant's case was he had swapped these because he arranged to work on alternative shift. He had not in fact swapped his shift by agreement with another member of staff. The claimant also had been allotted a day shift on 11 November 2017 which he also cancelled because of an open day at a college he was hoping to attend. The claimant accepted that he had arranged to attend such a day but did not accept that he had cancelled the shift on that particular day. He could not identify the alternative date. It seems likely that the manuscript annotations to the rota were a correct record.

32. Ms Simmons explained how the rotas came to be created and how they were amended as the days passed so that they could be forwarded to payroll once complete in order that staff could be credited with the appropriate hours for

payment. There was no dispute about the number of hours for which the respondent was obliged to and did pay the claimant, save for the additional sleep-in mentioned above.

33. Ms Simmons' evidence was that by the time of that first supervision meeting there were already issues beginning to emerge with the claimant's performance. He appeared to be questioning other staff closely about which shifts they worked and examining the rotas carefully. To the tribunal's mind this indicated that he was anxious to secure the shifts that were most financially advantageous and convenient to him. However, such close scrutiny by a brand new member of staff was likely to provoke criticism from established staff members who might feel they had a legitimate expectation of consideration for their preferences. The fact that this had been raised to Ms Simmons so early on clearly supports her evidence that this did provoke such criticism of the claimant by other members of staff.

**Disclosures**

34. Ms Simmons also recorded that she "discussed smoking/esigs" with the claimant. She accepted that the claimant had raised a concern that the children were smoking e-cigarettes and that it had been observed in the home.

35. Ms Simmons, and the other witnesses denied that any staff member smoked their e-cigarettes indoors at the home or that the claimant made any such allegation. They accepted that e-cigarettes were used outdoors by staff and young people. On this evidence, we reject the allegation that staff did smoke inside the home. We find that the claimant did not reasonably believe that they did so. He gave no specific evidence of such an occasion. Nor do we accept that he provided information to that effect to Ms Simmons.

36. Ms Simmons accepted that the claimant did say that young persons were smoking in the house. Although the other members of staff maintained that there was no smoking allowed inside the premises, Ms Simmons said that it might be permitted to a limited extent in rare circumstances. Young persons would always push the boundaries, and try and smoke in the house, in the lounges or in their rooms. She explained that the general prohibition would sometimes be relaxed if to confront a young person and insist upon him ceasing would cause even worse behaviour possibly leading even to violence. In such circumstances it might be better, on that occasion, not to be insistent but to reinforce the ban later or in another way. The staff could control the children's access to their pocket money to prevent the purchase of the liquid used in the e-cigarettes.

37. The claimant did not give any evidence of such an event and his complaint to Ms Simmons was a generalised allegation rather than the provision of specific information.

38. Clearly, he believed it was wrong or inappropriate for the young persons to use e-cigarettes at all. In our judgment, it was likely that was at the heart of his complaint. We understand that is an opinion which might be widely shared. Ms Simmons' evidence was that permitting use of e-cigarettes, as an alternative to smoking tobacco, was thought better by the local authority social workers. Whatever their views about it, it was not a practice that she, or the respondent, or the claimant could prevent.

39. It is convenient at this stage to set out our findings in relation to the other allegations the claimant makes of having made disclosures.

40. The claimant's evidence was that he had said to Ms Simmons, "The house is in a mess and I can't believe how dirty it is. The microwave is not hygienic. It's not fit be used until it has been cleaned properly. The day staff aren't cleaning up after themselves." He said he had said this while he was in the kitchen cleaning the microwave.

41. Ms Simmons accepted that staff were meant to clean up during the day, as their other duties might permit, but that it was the night staff who, when other work was done and the children settled, should do the "deep"(i.e. thorough) cleaning.

42. She recalled only one occasion, when the claimant was cleaning the microwave so he could use it himself, that cleaning was mentioned. His complaint was more to do with the fact that he wished to use the microwave himself and the young people had left it in a mess. This was corroborated by Mr Lawrence. We accepted that was the extent of the claimant's disclosure on the topic.

43. But even if we had accepted the claimant's account as to what he said it amounts, we find to no more than an allegation.

44. On the evening of 7-8 November 2017 the claimant was on the overnight duty. Bev King was the person in charge. She saw a mouse in the kitchen and mentioned it to the claimant. She reported it. Pest control were engaged and found evidence of a single mouse and attended on 3 occasions to address the issue. We were not given details of the method. It was successful. This had not happened previously the Ms Simmons' knowledge although the home is in a rural setting. It was thought likely by the pest control operative that an early cold snap might have induced the mouse to seek warmth. Ms Simmons say that she had been employed at the house for about 12 years and in that period pest control had been called on only 2 or 3 occasions. The other occasions were in respect of wasps.

45. The claimant's case was that: "A night person on waking watch had spotted some rats in the kitchen and I'd said I wasn't surprised because of the state of the house. The house is in a state because people are not keeping it clean and as a result we are getting rats in the house." He thought that the person to whom he referred was a woman, Bev.

46. He alleged that he had reported this to Ms Simmons on 13 or 14 November 2017. It is likely that this is an incorrect date. The rota shows that Bev King was on duty on the relevant night shifts.

47. Ms Simmons' evidence was that Bev King had seen a mouse on 7 or 8 November 2017. She had been informed this on 8 November 2017 and had contacted pest control whom she booked to attend on 10 November 2017.

48. On the balance of probabilities the claimant could not have had a reasonable belief that there were rats in the premises. Taken as a whole the evidence supports the proposition that a mouse was seen, reported and dealt with by pest control. The

claimant did not himself see a rat. It is unlikely that Ms King said that she had seen a rat. Although Ms Simmons accepted that he had told her on or about 8 November that there were rats, she immediately corrected him and said it was a mouse. That allegation of disclosure is not made out of on its facts.

**Other allegations**

49. The claimant alleged that other staff had laughed at him. This allegation appears in the claim form as "calling me names, joking that I have OCD". It was repeated in the claimant's witness statement in the same terms without further factual detail. In cross-examination it was put to the claimant that in fact it was Mr Allan who was usually the person referred to in that way because he would be constantly cleaning, using hand gel and urging the young people to wash their hands and take care of their personal hygiene.

50. The claimant was asked whether he might be mistaken in saying that the comment was addressed to him rather than Mr Allan. He denied it referring to a list of issues compiled by Miss Simmons (105) in which it was recorded that he had challenged staff about the microwave being dirty.

51. The evidence of Mr Alan was that the claimant was not the butt of jokes by staff. This was corroborated by Mr Lawrence. Mr Fenn confirmed that nobody had referred to the claimant as having OCD, so far as he was aware.

52. We accepted the evidence of Mr Allen, Mr Lawrence and Mr Fenn as being reliable and honestly given. Having regard to the lack of factual detail in the claimant's evidence and that we have rejected it in other respects, we found on the balance of probabilities that the allegation of being laughed at was not made out on its facts.

53. The claimant also allege that Ms Simmons had excluded him from a staff meeting. The background context to this is that the nature of the work at the home is that not all staff would be present at any one point in time. Ms Simmons explained that when necessary she would conduct a staff meeting with those staff who were on duty and, she would conduct a further meeting, shortly thereafter with the other staff when they were on duty.

54. Ms Simmons gave evidence and produce notes to show that she conducted a staff meeting on 1 November 2017 (128-132) when the claimant was not on duty. She conducted a further meeting on 9 November 2017 when he was on duty (135-141). It appears that the banning of use of e-cigarettes by the young people was discussed at the first meeting. It was an agenda item. It does not appear to have been specifically mentioned at the second meeting. Given that managing a house of young people with a variety of issues and challenges must be a fluid and rapidly changing situation, it did not seem to us that the characterisation of being excluded from a meeting had substance. Certainly we were unable to draw any inference that the claimant was excluded from a meeting in the sense that Ms Simmons deliberately discussed the use of e-cigarettes on an occasion when he was absent.

55. As set out above, the claimant made allegations that both Mr Allen and Mr Fenn made specific comments containing what on any case could amount to offensive racist remarks. In this regard it is appropriate to note when these allegations were

first made. The claimant accepted that they were not raised prior to the last occasion on which he worked in the premises.

56. On 19 December 2017 the claimant wrote an email to Ms Parikh (99). In that he said, "I was racially abused by Steve Fenn, saying I was to forward for a black man when I reported him to the manager her reply was that's the way he is." That led the respondent to investigate that and a number of other allegations the claimant made made including: the allocation of shifts, smoking in the house in front of young persons, those young persons being allowed to smoke in the house by the staff, the assertion that the house was dirty and "infected with rats" (sic).

57. In his claim form the claimant said that the, "staff members started discriminating against me calling me names, joking that I have OCD and referring to me as that black man thinks he knows it all. Steve Fenn was the mastermind." At the case management hearing he allege that comment was made by "Mac" a senior care worker. At this hearing it was understood and agreed by the respondent that this was a reference to Mark Allen, there being no member of staff called Mac.

58. At the outset of this hearing the allegations were further clarified as set out at paragraph 5.9.1 above.

59. So far as Mr Allen was concerned, the claimant's case was that this occurred on an occasion when he was sitting in the small lounge playing on an Xbox with one of the younger children. The claimant put to Mr Allen in the course of cross-examination that the child got very excited because he had won the game but that Mr Allen came in and switched the Xbox off and stormed out. It was at that point that Mr Allen was alleged to have made the comment; "that black man thinks he knows it all".

60. Mr Allen denied the comment vehemently. He did recall an occasion when he had switched the television off. It was not because there was a younger child playing on Xbox game. His account was that the claimant was watching the Jeremy Kyle television programme with two slightly older children who were laughing and smirking because of the TV programme. The TV programme concerned sexual abuse of children. Mr Allen considered that it was inappropriate to permit the children to watch that and he accepted that he did switch the television off at that point. He said the reason he came in was because of safeguarding guidelines. Children in the respondent's care have sometimes come from a background of abuse. Such topics he thought might evoke recollections or inappropriate responses. It might conceivably have an effect upon the evidence that a child might have to give.

61. Mr Allen accepted, as the claimant had alleged, that he had left the room and gone into the kitchen and that Mr Fenn was at the back of him. Despite the claimant's insistence concerning the circumstances, Mr Allen was unshaken.

62. Mr Fenn's evidence was that he was in the vicinity generally watching the young persons. He confirmed that Mr Allen had gone into the room where the claimant was watching the television with two young persons and switched off the television. He was not aware of the programme that was being watched. He asked Mr Allen why he had done that. Mr Allen had said they were watching Jeremy Kyle but did

not mention what the subject matter was. He corroborated Mr Allen's refutation of an allegation by the claimant that he was aggressive.

63. For his own part, Mr Fenn denied that he said that the claimant was too forward for a black man.

64. The tribunal had to decide is a fact whether these allegations were true. The following matters seemed relevant: the evolution and the changing nature of the claimant's allegations of this racist abuse by first one then two other members of staff; the fact that no allegation was raised at all until a month after he had ceased work; the corroboration by Mr Fenn of the circumstances in which the television was switched off, namely that there were two young persons present rather than one and that it concerned the Jeremy Kyle programme. Moreover, the viewing of the Jeremy Kyle programme rather than a younger child had got excited over an Xbox game off is inherently a more probable reason for switching the television off.

65. For those reasons we preferred the evidence of Mr Allen and Mr Fenn and we therefore rejected on its facts the claimant's allegations that racist language was used.

66. The final allegation of detriment and less favourable treatment concerned the cancelling of shifts and the failing to offer the claimant further shifts. This was also intrinsically bound up with the allegation of dismissal. However, it is appropriate first to identify other concerns that Ms Simmons had with the claimant's performance since they form part of the background to the telephone conversation in which at least one of the claimant's shifts was cancelled and in which the claimant alleges the respondent cancelled all his shifts and thus dismissed him.

**Other matters of concern**

67. For the purposes of these proceedings Ms Simmons had compiled a document in which she set out, in a number of bullet points, issues and concerns with the claimant. They included the excessive interest in other staff members' shifts and the disclosure matters that we have recorded earlier in this judgment. They included also a number of minor concerns. However, three of the matters she recorded appear to have significance and they were not matters challenged by the claimant on their facts.

67.1. On 13 November 2017 when Maggie Mooney was in charge the claimant was present when she was talking to a young person, AB, in respect of whom the staff support ratio had been reduced. In passing, it was this reduction in ratio that led to shift cancellations. We address this further below. However, when AB became irate and was verbally abusive, the claimant interposed himself between Ms Mooney and AB and then closed the door shutting Ms Mooney out and taking over dealing with AB himself. Ms Mooney challenged the claimant's dismissive behaviour as undermining her authority in front of AB. She made a note (103) that the claimant accepted he had been in the wrong and apologised profusely. She reported the concern to Ms Simmons.

67.2. Ms Simmons also recorded that on one occasion the claimant had left site to make a 20 minute journey to collect a young person from school.

However he abandoned the journey because his mobile phone battery had died. When he returned to the home he was given a mobile phone car charger but then became reluctant to leave the site again so another member of staff had to go and collect the young person to avoid him being late.

67.3. Ms Simmons recorded also an incident when, having been on a sleep shift, the claimant insisted that a room search should be carried out after a young person had left for school saying he was sure that the young person had returned with "something in his pocket". Other staff were reluctant to do this as there were no historical risks of this sort. However, since the claimant was a senior support worker the staff felt that they took his concern seriously so the claimant and another member of staff carried out a search. Although they found nothing the claimant then failed to complete the appropriate paperwork.

68. On 14 November 2017 Ms Simmons contacted Jump Recruitment and spoke to Mr Graham about the concerns with the claimant's performance. Mr Graham said that he would speak to the claimant about those concerns and revert to her. It is likely that Ms Simmons took this step because in the early weeks of the employment she thought that the claimant was engaged on the "temp to perm" arrangement. If that had been the case it would be appropriate for Mr Graham to raise such matters with the claimant.

69. Leading up to this point a decision had been taken by the relevant social worker to reduce the ratio of support provision for AB. He had been on 2:1 supervision i.e. the requirement that two staff should be supervising him at all times. This was reduced to 1:1 supervision to take effect from 16 November 2017. Ms Simmons gave clear evidence of this and was not challenged as to the date of the reduction in supervision.

70. Such a reduction in the ratio of support affected the need to allocate staff on the rota. On 16 November 2017, a day when the claimant was not rostered for work, Ms Simmons telephoned him. She had looked at the rota for that week (120) and had decided to make the following cancellations: the claimant's 10/10 shift for 17 November 2017, Mr Lawrence's E/10PM shift on 18 November 2017, Mr Magumba's 10/10 shift on 19 November 2017 and an unallocated cover shift on 20 November 2017.

71. At the time Ms Simmons telephoned the claimant a number of other members of staff were present in the office. It was a small office with space for two desks which had computers on them and one additional chair where staff could sit to complete paperwork. Mr Lawrence and Ms Dove both gave evidence that they were present.

72. It was the claimant's case that he was dismissed by Ms Simmons in that conversation.

73. In the claim form the claimant asserted "… out of no where I got a call from my manager to say my shifts have been cancelled no explanation, no meeting, I was kicked out without paying me completely for the work I have done. I contacted the director of the company, she wasn't interested, said she would investigate and call me back, she never did." In his witness statement the claimant simply asserts fact of dismissal giving no further information.

74. Ms Simmons' evidence in her witness statement was that she telephoned the claimant on 16 November 2017 to inform him the cancellation of the shifts consequent upon the reduction in staff needed. In the course of that phone call she said to the claimant that, "it was not really working out and we need to have a discussion and we can do it on Monday, will you ring me and we will arrange a meeting and discuss it." After a long silence the claimant responded, "Oh". Ms Simmons repeated what she had said and there was another long silence and she then ended the call." Ms Simmons said that present in the office were Ms Billings, Ms Dove and Mr Lawrence.

75. Miss Simmons essentially repeated her account in oral evidence. It was confirmed by Mr Lawrence and Ms Dove save that, in answer to a request whether she had heard anything else, Ms Dove said that after the call ended Ms Simmons said words to the effect, "I can't believe that he has said I have just dismissed him." Mr said that after the call Ms Simmons said she didn't know whether the claimant was going to turn up on the Monday for the meeting or not. Ms Dove said she did not know where the word "dismissed" came from.

76. In cross-examination the claimant said that Ms Simmons had said she was ringing to say she had cancelled "your *shifts* because it's not working." (Emphasis added). The claimant said that when he had asked what was not working Ms Simmons said that she could not talk she had to go and repeated that. He then contacted Mr Graham who said he would get in touch with the director and try and get Mr Johnson moved to the respondent's Bury home. According to the claimant Mr Graham called him back to say he had spoken to the home manager (of the Bury home) who had asked whether he could go in for an interview the following day. The claimant asserted that the respondent had got rid of him because of race and has protected disclosures.

**Issue decided by a majority of the Tribunal**

77. The tribunal was unable to reach a unanimous conclusion on that evidence. The non-legal members considered that the evidence showed by inference that Ms Simmons dismissed the claimant in that telephone call.

78. On the balance of probabilities I, the Employment Judge, could not concur with that finding of fact. The onus is on the claimant to prove a dismissal where it is not admitted. In my judgment there was ample scope for confusion on the part of the claimant when Ms Simmons informed him that a shift was being cancelled and in the same conversation called him to a meeting. The evidence of Ms Simmons and the claimant both suggest that they agree that a meeting was mentioned. Whilst in the context of being told that "things are not working out" an employee might think that their assignment might be terminated and thus jump to a conclusion, that is not the same thing as establishing that they have been actually dismissed in that telephone call. Having regard to the other circumstances in which the claimant's evidence has been rejected by all of the tribunal I could not concur with a finding that the claimant had in fact been dismissed at that point.

79. However, the respondent did not contact the claimant thereafter to offer him further shifts at the Marple premises. There was no basis on which it could have been alleged properly that he had resigned.

80. However, having regard to the remainder of our findings, this single point on which unanimity has eluded the tribunal, is academic.

81. In her evidence, Mrs Parikh stated that on 10 November 2017 Mr Graham had called from the agency whilst the claimant was there present with him. The claimant denied that he was present with Mr Graham on that occasion. Her evidence was that Mr Graham apologised on behalf of the claimant from not working to his full potential and said that the claimant was pleading for his job. She said that as a result of that she gave him a second chance, spoke to Ms Simmons for her to arrange an informal chat and scheduled a shift on 11 November 2017 which the claimant then cancelled. Her evidence was, "I again contacted Jump after he failed to attend and inform them that it was not working out and referring him back to the Agency I believe this call took place on the 18th November 2017."

82. Whilst these dates are inconsistent with those otherwise given it is hard to reach any other conclusion than that Mrs Parikh had decided on 18 November 2017 that the claimant should no longer work for her company. Thus, even though I differed from the non-legal members as to the finding that the claimant had been dismissed on 16 November 2017, I find that he was dismissed when Mrs Parikh telephoned Mr Graham two days later.

**Relevant Law**

83. We next summarise the relevant legal framework in relation to the complaints in respect of protected disclosure and race discrimination. It is not necessary to rehearse the relevant law in relation to the matters in respect of which the parties achieved agreement during the course of the hearing.

84. Race is a protected characteristic. It is unlawful to treat someone less favourably and to their detriment because of race. Section 136 of the Equality Act 2010 provides for the burden of proof.

85. The tribunal has in mind the guidance given by the Court of Appeal in the case of Igen v Wong [2005] IRLR 258 and the decision in Madarassy v Nomura PLC [2007] IRLR 246 CA.

86. It is not enough for a claimant claiming discrimination to claim there is a difference in protected characteristic and a difference in treatment. There must be something more, as the case of Madarassy decided, upon which a Tribunal could conclude in the absence of an explanation that the case of discrimination has been made out.

87. Unfavourable treatment is not found simply because an employee thinks that he or she should have been treated better, see: trustees of Swansea University Pension & Assurance Scheme v Williams [2017] EWCA Civ 1008.

88. It is unlawful to dismiss someone for the reason or principal reason that he has made a protected disclosure. It is unlawful to subject someone who has made such a disclosure to a detriment.

89. A person who provides to their employer information which in his reasonable belief tends to show, for the purposes of this case, that the health and safety of any

individual has been, is being or is likely to be endangered and who believes reasonably that it is in the public interest to disclose that information will have made a protected disclosure.

90. In respect of detriment claims it is for the employer to show the reason for the treatment. Although the respondent argued to the contrary in our judgment the guidance of the Court of Appeal in the case of Kuzel v Roche [2008] IRLR 530 CA is the proper approach to considering how the burden of proof should be considered, even in the case of an employee who has not acquired by service the right to bring a complaint of unfair dismissal under section 98 of the Employment Rights Act 1996.

> "It is for the employer to prove a fair reason for dismissal. There is no burden on the employee either to disprove the reason put forward by the employer, or to positively prove a different reason, even where the employee is asserting that the dismissal was for an inadmissible reason. However, the employee who positively asserts that there was a different and inadmissible reason for dismissal, such as making protected disclosures (as in this case), must produce 'some evidence' supporting the case that there was an inadmissible reason and challenging the evidence produced by the employer. The employer can defeat a claim of an inadmissible reason for dismissal either by proving a different reason or by successfully contesting the reason put forward by the employee. If the Tribunal is not satisfied that the reason for dismissal is the reason asserted by the employer, it is open to it to find that it is the reason asserted by the employee, but it does not have to so find." (summarised thus in the Unfair Dismissal: Guide to relevant Case Law, 32nd edition)

**Submissions**

91. On behalf of the respondent Mrs Peckham made submissions by reference to a written document.

92. The claimant in oral submissions argued his case by reference to the facts. In particular he stressed that he felt that he had been unfairly treated by the way in which the respondent had gone about things. He suggested that the respondent tried to paint a bad picture of him. He said that he did not deserve discrimination, name-calling and laughing. He said that nobody owned up to who dismissed him. He said that he did not dismiss himself. He said that he would never resign.

**Conclusions**

93. Based upon those findings of fact, taking into account the parties' submissions and in the light of the legal framework we have set out we reached the following conclusions.

94. For the reasons set out above we find that on the facts the claimant did not make protected disclosures of information.

95. We reject the claimant's evidence that Mr Allen and Mr Fenn made the overtly racist comments.

96. We reject the suggestion that Ms Simmons was speaking to all other members of staff but not to the claimant.

97. We accept that Ms Simmons cancelled at least one shift and that the claimant was dismissed.

98. Because we have not found that the claimant made protected disclosures we reject the contention that the reason for the dismissal was the making of a protected disclosure. The complaint of unfair dismissal fails for that reason.

99. Albeit the majority of the tribunal did not accept Ms Simmons' evidence in its entirety as to the content of the telephone call on 16 November 2017 we all agree that her explanation for cancelling at least one shift was not in any way due to the race of the claimant. On the balance of probabilities we are satisfied that the reason for that cancellation, matched as it was by the cancellation of shifts of other staff, was due to the reduction in the need for a 2:1 ratio for a particular resident.

100. In so far as the claimant established that Ms Simmons cancelled all his shifts and thus dismissed him on 16 November 2017, we find that the claimant has not made out on the balance of probabilities any fact which might point to an inference that the reason for his dismissal was connected to his race. The claimant is required to established such a link by reason of the decision in Madarassy to which we have referred above. For that reason we find unanimously that the complaint of race discrimination is not made out.

101. For those reasons we find that each of those particular complaints, are not well-founded and we dismiss them.

102. There was a residual argument in relation to the degree of uplift that should attach to the award we made in relation to unpaid holiday pay. This matter was not properly dealt with by the respondent at any point until the tribunal hearing notwithstanding that the claimant had raised a grievance about it. The appropriate rate of pay for any member of staff is a matter of critical importance. Even relatively small employers are required to get that right. The respondent's failure to do so at a much earlier stage is inexcusable. For those reasons the appropriate level of uplift is 25%.

103. Finally, we apologise unreservedly to the parties for the delay in sending this judgment and these reasons. This is due to the sheer volume of tribunal cases and the pressure of other tribunal work.

______________________________

Employment Judge T Ryan
Dated 25 October 2018

RESERVED JUDGMENT AND REASONS

SENT TO THE PARTIES ON

1st November 2018

FOR THE TRIBUNAL OFFICE

# NOTICE

## THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number(s): **2403354/2018**

Name of case(s): **Mr J Johnson** v **New Horizons Ltd**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: **1st November 2018**

"the calculation day" is: **2nd November 2018**

"the stipulated rate of interest" is: **8%**

MR J HANSON
For the Employment Tribunal Office