Case No: 2304199/2018
2304309/2018
2300246/2019
2300703/2019

EMPLOYMENT TRIBUNALS

Claimant: Mr. O Anjorin
Mr. A Barrie

Respondent: Mitie Limited

Heard at: London South, Croydon
On: 17-21 August 2020

Before: Employment Judge Sage
Members: Ms. C Edwards
Mr. M. Marenda
Representation

Claimants: In person

Respondent: Mr Platts-Mills of Counsel

REASONS

Requested by the Respondent

1. The Claimants claimed race discrimination and unlawful deductions from wages, this related to the decision not to award pay increments to the Claimants following a relevant transfer from the London Borough of Sutton to the Respondent. The First Claimant also pursued a separate claim for direct race discrimination in relation to his suspension and investigation in 2018 and a claim for unauthorised deduction from pay from the 1-9 December 2018.

2. The Respondent defended the claims.

Preliminary Issues

3. The Tribunal ordered that the Respondent produce documents in relation to the apology provided by the First Claimant's colleague in respect of the incident on the 5 April 2018. These documents were relevant to the issues in claim 1 and should have been disclosed at the relevant time. These were produced on the morning of the 18 August and marked R1. The Tribunal further ordered that the Respondent produce a

report that was appended to one of the emails produced and the second page of an email at page 339 that had only been produced in part. These were provided by 11.45 on the Second day.

Agreed Issues
Claim 1

4. The First Claimant brings a claim for direct race discrimination. The detriments he relies on are as follows:
    a. being suspended during a phone call from his manager on 16 August 2018. The suspension was purportedly as a result of an incident on 5 April 2018 at the site in Sutton, but the Claimant's colleague, Ms Thaddens, who was also involved in the incident was not suspended.
    b. Being subject to an investigation when his colleague who was White was not.
    c. Following the investigation, when no disciplinary action was taken, not allowing the Claimant to return to the site and redeploying him to another site.
5. The comparator for the First Claimant's claim is Ms Thaddens or a white hypothetical comparator.
6. The Respondent will state that the First Claimant's comparator apologised but the Claimant did not, the client then asked for the First Claimant to be removed from site.

Claims 2 and 3

7. This is the claim for unauthorised deduction from wages and race discrimination. Both Claimants contend that a team of four transferred from the London Borough of Sutton on local authority terms and conditions of employment. The Claimants' white colleague Mr Garrood had his pay increased to point 25 after raising a grievance. However, the Claimant's pay was not increased. The Claimants also did not receive a letter providing an outcome to their grievance. The comparator for this head of claim is Mr Garrood, or a hypothetical comparator.

Claim 4

8. This is pursued by the First Claimant only; he contends that he should have received his December pay on or around 20 December 2018 but received nothing. He then received some pay in January 2019, but not his full salary.

9. The Respondent contends that the First Claimant was not entitled to any pay for the 1st to 9 December 2018 because he was suspended without pay, as he had not produced documents proving his continued right to work in the UK, which they had been requesting for some time. The First Claimant produced those documents to the Respondent on 10 December 2018.

Witnesses before the Tribunal

The First and Second Claimant
For the Respondent we heard from Mr Rauza Operations Manager

Findings of fact

10. Both Claimants were originally employed by the London Borough of Sutton as Out of Hours Security Guards. The Tribunal saw the contracts of employment of the Claimants at pages 207 (for the Second Claimant) and at pages 229 for the First Claimant. The First Claimant's contracts were fixed term and ran from the 1 February 2013 to the 2 December 2014, the reason given for the fixed term nature of the contract was provided at paragraph 20 (page 237) that "*This appointment is made on a fixed term basis for the period 1st February 2013 to 2nd December 2014 only. This is because your eligibility to work in the UK is valid up until 2nd December 2014*. *The contract is stipulated as a fixed term contract due to the length of your permission to work in the UK and it will automatically expire on the 2nd December 2014 without further notice if formal confirmation of your entitlement to work in the UK is not provided to the Central Operations Team*". At paragraph 2 of the contract the First Claimant was appointed at point 18 which at the time was £18,915 and would rise to point 20 which at the time was £20,205 (page 230).

11. The Second Claimant's contract was also a fixed term contract starting on the 3 September 2012 and ending on the 17 July 2014, he was also appointed on point 18 of the salary scale (page 208) rising to point 20. The reason for the fixed term contract was also due to the time limitation of his eligibility to work in the UK and the contract was timed to expire on the day before his eligibility expired.

12. The First Claimant attended an interview for the role on the same day as Mr Garood and his contract of employment was seen on pages 219 – 228. He was given a contract of 'indefinite' length which commenced on the 18 January 2013. He again started at point 18 and it was confirmed that "*subject to satisfactory service in this post, your salary will rise in increments to point 25 on the Greater London Council Outer London pay spine. This current rate for point 25 being £23,277*". The Tribunal find as a fact that the reason Mr Garrood was given a contract of indefinite length was because he was not subject to a limitation on his right to work due to his nationality. Mr Garrood was White British and the First Claimant was Black Nigerian and the Second Claimant was Black African.

13. The Out of Hours Security function was outsourced to Mitie on the 1 April 2014 and the Claimants and their comparator were transferred (together with another two white colleagues Rick Hill and Justin Moser – who was day security). All the White British employees were on an indefinite length contract where the pay scales could increase to point 25 whereas the Claimants' could only increase to point 20 (see page 339) due to the fixed term nature of their role at the time of the transfer. They transferred across with their existing terms and conditions of employment.

14. The Respondent checked the Claimants' right to work documents and we have evidence to corroborate that the First Claimant's documents were checked and copied on the 14 April 2014 (see pages 330-3), they were signed by the Operations Manager at the time Mr Rajgor, he signed to confirm that he had seen the originals of each document. The Tribunal saw that he also signed the document at page 332 which was the First Claimant's permanent residence card which had been issued on the 13 January 2014. This card was valid for 10 years. The Tribunal was also told that the Second Claimant was also granted indefinite leave to remain prior to the 1 April 2014, this evidence was not challenged in cross examination. The Tribunal therefore find as a fact that the Claimants were no longer subject to a limited right to remain in the UK, they had been granted permanent residence in the UK.

15. The Claimants worked on after the expiry of their fixed term contract and it was accepted by the Respondent that their employment had continued and was on an indefinite basis.

Claim 1: The Incident of the 5 April and subsequent action taken.

16. There was an incident on the 5 April 2018 where the client the London Borough of Sutton complained about the conduct of the First Claimant and Petra Thaddens, who is White. The incident was entered on to the Duty Officers Log by the First Claimant which was seen at page 243 of the bundle.

17. The witness statements of the First Claimant and Ms. Thaddens were at pages 243(a) to 245. It was not disputed that an employee of the client had been rude to both officers. The Tribunal saw that as a result of the incident the client (London Borough of Sutton) lodged a formal complaint which had to be investigated (see page 255). It was noted that the matter was not investigated as quickly as it could have been, however in the bundle of documents marked R1, it was noted that a formal complaint was presented by the London Borough of Sutton and a report had been produced by them into the incident. One of the follow up actions that they required Mitie to carry out was for the officers involved to "*give a face to face apology*" to the employee who had raised the complaint. It was later seen that the issue of the apology was again raised in an email from the client on the 19 July 2018.

18. The client then wrote to Mitie on the 15 August 2018 (pages 261-2) asking for the First Claimant to be removed from site for failing to perform his duty in compliance with the Contract and Specifications. The letter stated that they had given the First Claimant "*an opportunity to reflect on his actions and make an apology for his failure to act which he has refused to do*". They concluded that his failure to apologise reflected his "*lack of awareness of the failure to support a vulnerable member of Sutton staff and, as such, gives us no reason to believe this would not happen again under his watch*". The Tribunal noted that the issue of an apology was obviously felt to be an important factor going forward and although the Claimant put to the Tribunal that he did not accept that Ms. Thaddens

apologised, seeing this letter it appeared to be pivotal to the client's consideration of who should remain on the contract. The First Claimant accepted in cross examination that he did not apologise to the client because in his view he had done nothing wrong. Although the First Claimant said in cross examination that the apology had nothing to do with his suspension because the apology was given after he was suspended, the Tribunal find as a fact based on the contemporaneous documents before us that Ms Thaddens had agreed prior to the date of his suspension to give an apology and therefore this was the reason for the difference in treatment. We prefer the evidence of the Respondent on this point, that the difference in treatment was due to Ms. Thadden agreeing to apologise as an informal resolution to the incident whereas the First Claimant would not.

19. The Tribunal saw an email asking for the First Claimant to be removed from site on the 15 August 2018 (page 260) and although Mr Rauza pushed back on this request and asked for the client to be encouraged to reconsider due to the fact that removal from site "was a serious step and will affect his well-being", the Facilities Manager on site (for the Respondent), confirmed that the client would not reconsider. The Tribunal also saw the terms of the Client contract with Mitie which gave them the power to request the removal of any Mitie staff member from the contract where they were found to be in breach. The Tribunal saw the terms of the contract at page 238(a).

20. The First Claimant was therefore suspended from the Sutton site on the 18 August 2018. He was then invited to a meeting to discuss the incident by a letter dated the 21 September 2018 (see page 264). He was advised of the right to be accompanied. The First Claimant also received a letter of the same date advising him of the reason for his removal from the Sutton site and advised him of the redeployment process (page 266-7). The Tribunal saw that Mr Rauza also that day sent the Claimant details of a contract that may be of interest to him as part of the redeployment process (page 268).

21. The First Claimant raised a grievance on the 28 September 2018 (page 271) about his suspension. He stated that the reason he was suspended was because of his race. Although Mr Rauza said in cross examination that he was not aware of this grievance at the time, this conflicted with the evidence in his statement at paragraph 36 where he stated that he was aware of the grievance and he knew that it was against himself and Mr Rugg. It was not disputed that the grievance was not dealt with and no outcome was forthcoming.

22. The First Claimant attended a meeting with Mr Rauza on the 9 October 2018 and the minutes were on pages 285-295. It was noted by the Tribunal that it was explained to the First Claimant that the meeting was called to discuss the events of the 5 April and the reason for his removal from site. The Tribunal find as a fact that the reason the First Claimant was called to a meeting was to discuss his removal from site, it was not

because of his race. As the First Claimant had been removed from site and could not return to Sutton he had to be redeployed.

23. The decision was relayed to the First Claimant in a letter dated the 22 October 2018 (pages 303-4); no disciplinary action was taken against him as this was recognized to be an "*isolated incident and out of character*". The letter also confirmed that Ms. Thaddens had apologized to the client, but the First Claimant had refused to do so. The Tribunal noted that the Respondent's evidence on this point was consistent, in that the difference in the treatment of the First Claimant and Ms. Thaddens, was because she had apologised whereas he had refused to do so.

24. The First Claimant was not allowed to return to the Sutton site, and he claimed that this was a detriment because of his race. Mr Rauza in his statement at paragraph 33.1.3 told the Tribunal that he could not return the First Claimant to the site because the client was '*unequivocal in its insistence that [the First Claimant] would not return to their site'*. Although it was put to him in cross examination that the First Claimant should have been returned to the site as he had been found to have done nothing wrong, it was the client who had asked for him to be removed from the contract and the First Claimant had been put into the redeployment process. The Tribunal prefer the evidence of the Respondent on this point as we have seen clear evidence to show that the client had specifically requested that the First Claimant be removed from site due to his conduct. There was no evidence to suggest that this was due to his race.

Claim 2 and 3: The rates of pay paid to the Claimants as compared to the rate of pay paid to Mr Garrood.

25. The Tribunal were informed that the Claimants and Mr Garrood transferred under TUPE. At the date of the transfer the Claimants had progressed to spine point 20 but their colleague Mr Hill was already on the maximum point 25 for the role.

26. The Claimants' received no pay increments under the terms of their contract while working for the Respondent. The Second Claimant raised a grievance on the 10 August 2015. The Tribunal saw an outcome in the bundle dated the 10 September 2015 at page 240. The Second Claimant told the Tribunal that the first time he saw the outcome was when it appeared in the bundle. The Tribunal find as a fact that the Second Claimant received no outcome after raising this grievance whilst employed by the Respondent.

27. The grievance outcome in the bundle was written by Mr Rugg the Regional Director which stated that "*you were engaged at Greater London Provincial Council Outer London salary spine point 18 which would rise annually to point 20. You are currently on pay point 20, £20,406 so no further increments will be applied*". The letter stated that "*from the information I have available (ELI and your contract of employment) you are not entitled to a 1% salary increase. If you have any further evidence that backs up your statement, please send to me and I will review further*".

Mr Garrood had also raised a grievance at the same time and his outcome was seen at page 240(a), it was confirmed that he was entitled to have his salary increased to up to salary 25 and confirmed that he was presently on point 20. It was also confirmed to Mr Garrood that he was not entitled to a 1% increase. It was not disputed that no action was taken to increase Mr Garrood's pay in line with this decision and we therefore find as a fact that this decision was not provided to him at the time and this was consistent with the way the Second Claimant's grievance was dealt with.

28. The First Claimant raised a further grievance on the 28 September 2018 which was seen at page 271. In this grievance he claimed that he was "*presently in a pay dispute with Mitie due to no salary increment since my TUPE even as it is stated in my contrac*t". This grievance was acknowledged on the 1 October 218 (page 270) by a People Support Advisor.

29. The Second Claimant raised a grievance on the 29 October 2018 (pages 314-5) complaining that "*I have been paid less for doing the same job with other colleagues. The only reason I have been paid less is because of my race. I have another black colleague who is on the same pay scale as myself. We have two other white colleagues who are being paid the same rate above us. I and my black colleague started work after one of the white colleagues and before the second white colleague. As stated already the two white colleagues are on the same pay scale, and the only explanation is that we are been (sic) treated differently for no other reason than belonging to two different racial groups*.". This grievance letter was sent to Mr Rauza on the 31 October 2018 (page 313)

30. It was agreed that the First and Second Claimants raised the issue of their pay in a discussion with Mr Rauza on the 2 October 2018, this was referred to in brief in Mr Rauza's statement at paragraph 49. He provided no minutes of their discussions and there was no detail provided as to what was discussed. Mr Rauza confirmed that he had received the Second Claimant's grievance, but he did not respond to it personally because he had "*nothing further to add*". Mr Rauza also accepted in answers to the Tribunal that he did not respond to the First Claimant's grievance on the issue of pay.

31. HR sent an email to Mr Rauza after learning that the Second Claimant (and one other although they did not know the identity of the First Claimant at this time) had indicated that he intended to present a claim for race discrimination, HR asked for information about the Claimants' terms and conditions and ethnicity to be provided.

32. His reply was at page 339 of the bundle dated the 3 December 2018; he stated that Mr Garrood had commenced employment with the London Borough of Sutton after the Second Claimant and he stated that *"the difference in the contracts is [Mr Garrood's] contract is indefinite and both [the Second and the First Claimants] are fixed term subjected to the right to work. That is probably why the contracts are starting up to point 20*". He accepted in his email that he had not replied to the Second Claimant's

grievance due to the fact that he had been off sick and he asked HR to "*please let mek (sic) now (sic) if you would like me to invite him in for the grievance. I will then start the process ASAP*". He went on to confirm that he was "*currently liaising with pay roll (sic) to calculate [Mr Garrood's] back pay as this is stated in the contract but has not been applied*". The table that Mr Rauza completed for HR showed that the three White British employees on the contract were paid up to pay point 25 but the two Claimants who were Black Nigerian/Black were only paid up to point 20. The Tribunal saw no further action on this matter after the date of this email.

33. The Tribunal noted that the evidence of Mr Rauza was inconsistent on what he did after receiving the grievances about pay. He told the Tribunal that he did not reply to this personally because he had nothing further to add, but the email on page 339 suggested that he had discussed with HR about the arrangements for starting the grievance process. It was also noted that Mr Rauza had not told HR that he had already responded to the Claimants' grievances, his evidence of what he did after receiving the grievances was therefore inconsistent and not credible.

34. Mr Rauza confirmed in cross examination that after the transfer to Mitie under TUPE the Claimants continued to work after the expiry of their fixed term contracts. He confirmed that they were therefore considered to be permanent employees and continued to work on an indefinite contract on the same terms and conditions. It was put to Mr Rauza in cross examination that it would be fair for the Claimants to be offered the same terms as their white colleagues which was to go up to point 25 on the salary scale and he replied that "*for Mitie the answer was no*". It was put to Mr Rauza in cross examination that they were employed on the same work doing the same job same hours but the Black employees were paid 5 salary points less than their White colleagues and it was put to him that this was less favourable treatment because of race; he denied that it was. Mr Rauza stated that "*some people are on different terms and conditions are paid a lot more money*". However, the Tribunal find as a fact that all those who transferred from the London Borough of Sutton contract were employed on the same terms and conditions save for clause 20 of the Claimants contract. This clause was referred to above and was in place due to their time limited visa, which at the time the contracts was transferred and at the time that Mr Rauza carried out his investigation had been superseded by indefinite leave to remain.

35. In answers to the Tribunal's question Mr Rauza confirmed that in his personal opinion the Claimants employment contracts were 'ongoing' and he was then asked for the difference between the Claimants situation and that of Mr Garrood and he replied "*I have forwarded it on to HR, I compared the contract, I discovered the one discrepancy, I reviewed then what was probably the reason for the fixed point was being subject to the right to work*". Mr Rauza was asked whether he considered if the cap on increments was due to the fixed term nature of the contract he replied "*I don't think I had, if a fixed term contract we would not be able to compare the Claimants and Mr Garrood's*". Mr Rauza confirmed that the only

difference in the contracts at the time of comparison was the points on the salary scale. He confirmed that at the time he considered this, the Claimants were no longer employed on fixed term contracts and were no longer subject to time limited visas.

36. The Tribunal find as a fact and on the balance of probabilities that the Claimants were employed at the relevant time on comparable terms and conditions. It was accepted in cross examination by Mr Rauza that the Claimants contracts were of indeterminate length and they were considered to be permanent employees. The reason that the Claimants contracts limited their salary to a maximum of pay point 20 was due to the time limited visa. The Tribunal also find as a fact that reference to pay point 20 in the contract was linked to the length of the visas. The Claimants' evidence was not challenged that they were appointed to a role which was graded up to pay point 25, and those on contracts of an indefinite length were entitled to be paid up to this grade. The only reason the Claimants contracts referred to the lower pay point 20 was to provide a termination or end date for the contract that was consistent with the expiry of the visa they had produced at the time of their recruitment.

37. Mr Rauza said in his statement at paragraph 51 and 52 that the Claimants were paid the salary "*based on their contractual terms and their race did not come into this*". He also stated that they had "*been paid in accordance with their contracts*" and Mr Garrood was "*entitled to receive a higher pay scale*". At the time Mr Rauza carried out this comparison there was no material difference in the terms and conditions of employment.

38. The Tribunal saw no investigation of these serious complaints of discrimination by HR even though Mr Rauza had indicated in his email referred to above at page 339 that he was prepared to call the Claimants to a meeting to discuss the matter. This did not appear to have happened and there has been no explanation as to why this was. It was of concern that even though this matter had been raised in 2015 nothing was done to address the issue and again in 2018, no action was taken to conduct a full investigation into the matter.

39. The Tribunal noted that Mr Rauza had concluded that Mr Garrood was "*entitled to receive a higher pay scale"* but the Claimants were not. His only explanation was due to the fixed term nature of the Claimants contracts, however this he conceded was no longer the case at the time he conducted his comparison. There was no reasonable explanation provided for the differential in pay increments they were entitled to receive under the contracts as compared to the higher increments that Mr Garrood was entitled to receive.

40. Although the Claimants' have argued in the alternative that the Respondent made an unauthorised deduction from wages by failing to pay to them an additional increment each year, there was no evidence before the Tribunal to suggest that this was a term of their contract at the relevant time. The terms of the contract only entitled the Claimant to increments up to a maximum of point 20.

Claim 4

41. The next issue for the Tribunal is in relation to the First Claimant's suspension without pay. Mr Rauza's evidence was that he had received an email from Mr Rugg (which the Tribunal did not see) of those who had documents on record that were considered to be of poor quality. Mr Rauza said that this was the reason that he contacted the First Claimant on or around the 16 November and we saw a text in the bundle at page 319 which corroborated that he requested sight of the original of his documents.

42. The Claimant's evidence in cross examination was that Mr Rauza telephoned him and told him that "*we don't have any right to work on file*" and he told the Tribunal that he had given them the documents back in 2014 and he was concerned that the Respondent had lost his documents. The First Claimant said that when he said this to Mr Rauza, he said he would check with HR and call back. The First Claimant said that the following day Mr Rauza called and said that the documentation was "not valid" and the exchange was further described by the First Claimant as follows: *"I said if it was not valid I would not be working here. He said he would check then he said it wasn't clear enough. I said in a later phone call I was suspicious that he had lost it. I said I wanted to see the file. I was adamant that he should show me the file*". The First Claimant questioned why if the copies had been checked in 2014 why they would need to take copies again. The Tribunal find as a fact that the First Claimant's recollection of the telephone calls between himself and Mr Rauza appeared to be consistent. Mr Rauza's recollection as to precisely what he discussed with the First Claimant on the telephone and the contents of his subsequent texts were vague and only referred to getting the documents from him.

43. The next stage taken by Mr Rauza was to text the First Claimant on the 20 November (page 319) to suspend him but it did not mention that this was to be without pay. The letter written on the same day confirmed that suspension would be without pay and we saw the letter on pages 321-2. Mr Rauza emailed the First Claimant on the 20 November confirming that it was the "quality of the copies of the documents" (page 320) that was the problem and they only required a new and clear copy. The reason for suspension was that "*currently the documents we have on record are not legible and we require a clear version. As per the Immigration and Asylum and Nationality Act 2006 we may not continue to employ you if we cannot identify you from your UK visa or work permit*". The First Claimant was suspended without pay from that date. The Tribunal saw the right to work documents and they are referred to above. We have found as a fact that they were checked in 2014 and signed by the then Operations Manager. The date and number of the visa and the fact that it was a permanent residence was clear from the photocopy. The only part that was unclear was the photograph, which was too dark to identify the face, this was a fault of the person who took the photocopy. The First Claimant was called to a meeting on the 23 November but he was unable to attend.

44. When the First Claimant did not attend the meeting, Mr Rauza emailed him on the 23 November (page 324) asking him to make contact. He clarified that he just needed a "*clearer copy of the same documents as you have confirmed that they are still valid and they have not changed*". This evidence corroborated the First Claimant's recollection of the telephone calls referred to above at paragraph 42 that took place regarding this matter. He also confirmed that he would show the First Claimant the copies they had on file when he attended the meeting. He asked to meet with the Claimant on the 30 November 2018.

45. On the 26 November the First Claimant made a subject access request (page 325-6) of the documents held by the Respondent in respect of his right to work in the UK only.

46. The Tribunal were then taken to page 334-5 which was a letter dated the 30 November 2018. In this letter the First Claimant was again called to a meeting on the 4 December again stating that they needed a clear photocopy of his documents because the ones on file were "not legible". The First Claimant was warned that if he did not provide them with the documents to show his "*current entitlement or a new right to work in the UK at or before the meeting it is likely that your employment with Mitie will end*". The Tribunal noted however that Mr Rauza had previously confirmed that his right to work in the UK was not in issue, it was only the clarity of the photocopies that was a concern. The Tribunal find as a fact and on the consistent oral evidence of the First Claimant and on the documents, that the Respondent had no concerns about the validity of the First Claimant's entitlement to work in the UK.

47. The First Claimant was unable to attend this meeting, but it was finally rescheduled for the 10 December and the First Claimant attended with his documentation and his suspension was lifted. The Respondent deducted pay from the Claimant for the period of 1-9 December 2018. It was put to the First Claimant in cross examination that if he could not show that he had a right to work in the UK the Respondent could not employ him and they did not have to pay him and he replied "*I gave them the documents in 2014, it was given to Mitie and they had had them for four and a half years".*

48. The Tribunal has not seen any clause in the contract of employment that entitled the Respondent to suspend the First Claimant without pay. Although it has been put to us in closing submissions that there was an implied term that allowed the Respondent to suspend without pay as if the Respondent continued to pay him without the documentation, they would be committing an offence. However, this was not the factual scenario that led to the decision to suspend without pay. The evidence of Mr Rauza was clear that the documents were on file, they just needed a clearer copy. The question for the Tribunal is whether there was an express or implied term that authorised the Respondent to suspend the First Claimant without pay for failing to produce his right to work documents for a further time (after 2014) because the photocopy taken by the manager at the time was

unclear as we have referred to above. We conclude that the contract and the documents we have seen in the bundle gave the Respondent no right to suspend without pay. The Tribunal also conclude that suspension without pay was a disciplinary sanction. No procedure was followed prior to carrying out the suspension.

Cases relied upon
By the Claimants:
Madarassy v Nomura International PLC [2007] EWVA Civ 33
Obi v Rice Shack [2018] All ER (D)
By the Respondent:
Amnesty International v Ahmed [2009] IRLR 884
Seide Gillette Industries Ltd [1980] IRLR 427

Closing submissions

These were oral and in writing and were read and considered by the Tribunal. These submissions will not be replicated in our decision but will be referred to in our decision where appropriate.

The Law

Employment Rights Act 1996
Section 13
Right not to suffer unauthorised deductions

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

> (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
> (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2) In this section “relevant provision”, in relation to a worker's contract, means a provision of the contract comprised—

> (a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or
> (b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the

wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

(4) Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.

(5) For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.

(6) For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.

(7) This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting “wages” within the meaning of this Part is not to be subject to a deduction at the instance of the employer.

Equality Act 2010

Section 13 Direct discrimination

(1) 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.

136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) 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.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

(5) This section does not apply to proceedings for an offence under this Act.

Decision

The unanimous decision of the Tribunal is as follows:

49. Turning first to our findings in respect of the first claim, we have found as a fact that the First Claimant was suspended, investigated and removed from the Sutton site due to complaints made by the client. Although the First Claimant stated that the treatment was less favourable and compared himself to Ms. Thaddens; we have concluded that this was not an appropriate comparator because we found as a fact and on the balance of probabilities that the difference between the two was that Ms. Thadden had agreed to apologise and did apologise but the First Claimant would not do so. The reason for the difference in treatment was not race but was due to the client requiring an apology, which Ms. Thaddens agreed to provide. The First Claimant would not apologise, therefore the client instructed the Respondent to remove him from site. The Tribunal accepted the evidence of the Respondent that they tried to convince the client to change their minds and take him back on site, but this was refused. The Respondent could do no more. There was no evidence that this was less favourable treatment because of race. This head of claim is therefore not well founded and is dismissed.

50. The Tribunal will now deal with claims 2 and 3 and we will firstly deal with whether there has been an unlawful deduction from wages. We have found as a fact that the contract of employment referred to above provided that the Claimants were only entitled to increments up to point 20 on the scale. There is no reference to the contract entitling the Claimants to move up beyond this pay increment. There was no evidence to show that there has been a contractual variation in the terms that entitled the Claimants to claim that there has been an unauthorised deduction from wages. The wages properly payable under the terms of the contract were paid. The Tribunal accepted the submission of the Respondent on this head of claim, that the Claimants were paid in accordance with the written terms which had not been varied. This head of claim must be dismissed.

51. Turning to the claim for race discrimination, we have been referred to section 136 of the Equality Act 2010 above and to the case of Igen v Wong and others and have been reminded that this is a case where we must apply the shifting burden of proof. We have found as a fact that the Claimants had identified Mr Garrood and he was an appropriate comparator. It was accepted by Mr Rauza that they both worked on the same terms and conditions, they did the same job for the same client, they worked the same hours at the relevant time in 2018. The Respondent concluded that the Claimants were not entitled to receive any further pay increments under their contract whereas their White comparator was.

52. It was accepted that at the relevant time the Claimants were no longer working on fixed term contracts and they continued in employment on an indefinite basis. At the relevant time the only difference between the

Claimants and Mr Garrood was the increment they were entitled to be paid. Mr Rauza concluded that Mr Garrood was entitled to be paid at point 25 but the Claimants were only entitled to be paid at point 20 on the salary scale. The Tribunal had also found as a fact (which was not challenged in cross examination) that the role was advertised as increasing up to a maximum point 25 and this rate was paid to all White British employees employed on the contract. The White British employees were all employed on permanent contracts. The only reason the Claimants contract stated that their salary would only increase to point 20 was due to the fixed term nature of their visa at the time of their recruitment by the London Borough of Sutton.

53. All employees were appointed at point 18 on the salary scale when they were first recruited but the Claimants could only rise to point 20 but their White British comparator was held to be entitled to progress up to point 25.

54. We have concluded that the reason for the treatment is on the grounds of race. The Claimants were provided with fixed term contracts due to the length of their visa at the time they were appointed by the London Borough of Sutton. This was the only reason that the pay scale referred to in their contracts was different to that offered to other White British employees. There was therefore a difference in race and when the Claimants complained about the disparity in their pay in 2018, it was accepted that they were employees employed on indefinite contracts and they also were not subject to time limited visas.

55. The Tribunal therefore conclude that the Claimants have shown less favourable treatment as compared with their White comparator. We conclude that the less favourable treatment is because of race. We accept that their pay was capped at point 20 and the reason for this was because of their Black/Nigerian nationality as compared to the more favourable treatment of a White British employee who was able to progress higher up the increment points to 25. The burden of proof therefore shifts to the Respondent to show that it was in no sense whatsoever on that ground.

56. The Tribunal have been taken to the case of *O'Neill v Governors of St Thomas More RCVA Upper School and others [1996]* IRLR 372 at paragraph 40 and we were reminded that we have to establish out of all the facts what was the effective and predominant cause for the acts complained of. We considered why Mr Rauza made the decision that Mr Garrood was 'entitled' to be paid up to point 25 but the Claimants were only entitled to be paid up to point 20; this was a significant difference in salary for those employed on the same terms and conditions carrying out the same role. He was unable to provide a credible non-discriminatory explanation for this or for any reasoning to support this conclusion.

57. Although in closing submissions the Respondent stated that Mr Rauza was not the decision maker, he was the only witness before us. We were told that he relied on HR and on Mr Rugg but we had no evidence before

us to suggest that a reasoned decision had been made by HR or by Mr Rugg apart from two letters dated 2015 which we found as a fact were never sent to the recipients. If a decision had been made in 2015 it was not communicated to anyone. The Respondent failed to respond to either grievance raised by the Claimants in relation to their comparator about the salary grade and we draw an adverse inference from this. It was unclear whether anyone considered the Claimants complaint about their pay grade at any time and we have not been taken to any outcome reached after their 2018 grievances. Mr Rauza has failed to provide a credible reason why he concluded in 2018 that the Claimants were not entitled to receive further increments, but their White colleague was. We conclude in the absence of an adequate explanation that this was less favourable treatment because of race.

58. The Tribunal conclude that the Respondent has failed to show that the reason for the disparity in pay rates was in no sense whatsoever on the grounds of race. The Claimants complaints succeed.

59. Turning to claim number 4 which is the First Claimant's claim for unauthorised deductions from pay on the 1-9 December 2018. The Respondent in closing submissions has put to us that this is a case where there is 'no valid document and no valid right to work and there is an implied term that there is no right to pay'. However, this submission does not accord with our findings of fact. This was not a case where the First Claimant had no valid documents and the correspondence from Mr Rauza confirmed this. The Respondent had in their possession since the TUPE transfer, copies of the First Claimant's right to work documents and they had been signed and verified by the Operations Manager. At that time the First Claimant was not subject to a time limited visa as suggested in the ET3, he had permanent residence. The only problem was that caused by the quality of the copies that had been taken at the time. This was the fault not of the First Claimant but of those responsible for checking and copying the documents.

60. This was a case where the Respondent needed to take a better copy of a page of a document due to the poor quality of the one they had on file. There was no evidence to suggest that the Respondent was entitled on the facts before us, to suspend the First Claimant without pay. We have not been taken to any clause in the contract or to any policy document that suggests that on these facts, it was appropriate to deduct pay for the period set out above. We therefore conclude on the balance of probabilities that there was no express or implied term that entitled the Respondent on these facts to suspend without pay.

61. We made a declaration that the Respondent had made an unauthorised deduction from the First Claimant's wages and order that a sum in respect of the pay deduction from 1-9 December be paid to the First Claimant.

62. The Tribunal considered what payment for injury to feeling should be awarded to each Claimant. The Tribunal have found in the Claimants'

favour in respect of claim numbers 2 and 3 only regarding the decision of the Respondent not to increase their pay as compared to their White British colleagues. There was no evidence of any aggravating factors and we found as a fact that in 2015 the failure to take corrective action over the disparity in pay grades was not due to less favourable treatment because of race as their comparator also failed to secure an increase in his pay. There was therefore only one decision made by the Respondent in 2018 which was found to be an act of discrimination.

63. We did not underestimate the seriousness of the act found to be discriminatory however as it was a one-off act (with continuing consequences) we believe that the award should be within the lower band of Vento.

64. We have looked at the closing submissions of the Claimants at paragraphs 62 and 63. Both refer to matters that were not found to be acts of discrimination for example the First Claimant referred to having his contract moved to a different site and the Second Claimant referred to subsequently losing his job. The Tribunal found that the First Claimant was moved to a different site, but this was not found to be an act of discrimination, the subsequent dismissal of the Second Claimant was not an issue before this Tribunal.

65. What we have is a single act of discrimination and we conclude that it should be placed in the lower part of the lower band of Vento. We therefore award to the First and Second Claimant the sum of £5,500 each.

66. The parties were unable in the time available to agree the figures for the loss of earnings suffered as a result of the discrimination. The parties were given 14 days to come to an agreement on the sums that are owed to the Claimants. The parties are ordered to inform the Tribunal after 14 days whether the figures have been agreed and if not whether the matter needs to be listed for a further remedy hearing for half a day. If a further hearing is required, the parties are to provide dates to avoid for a period of six months from the date of their communication.

Employment Judge **Sage**

Date 27 November 2020