THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **Employment Judge Truscott QC**
Ms L Lindsay
Mr A Peart

BETWEEN:

Mr C Eluma **Claimant**

AND

Fort Roche Security Group **Respondent**

ON: **13 and 14 January 2021**

Appearances:

For the Claimant: **In person**
For the Respondent: **Mr I Wheaton of Counsel**

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was fully video. A face to face hearing was not held because it was not practicable and specific issues could be determined in a remote hearing.

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claimant's claim of race discrimination in relation to his dismissal Is not well founded and is dismissed.

2. The claimant's claim of religious discrimination in relation to his dismissal Is not well founded and is dismissed.

3. The claimant's claim of unlawful deduction of wages is not well founded and is dismissed.

REASONS

PRELIMINARY

The respondent was represented by Mr I Wheaton barrister who led the evidence of Mr Osman Ali Zeeno, Security Supervisor and Robert Petrigh, Operations Director. The claimant represented himself and gave evidence on his own behalf. There was a bundle of documentary productions and a video recording to which reference will be made where necessary. There was a Preliminary Hearing on 18 December 2019 which identified the issues for this hearing.

THE ISSUES

The issues between the parties which potentially fall to be determined by the Tribunal are as follows:

EQA, section 13: direct discrimination because of race and religion or belief

(i) It is not in dispute that the respondent subjected the claimant to the following treatment:

a. Dismissing him on 1 April 2019.

(ii) Was that treatment "*less favourable treatment*", i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The claimant relies on hypothetical comparators.

(iii) If so, was this because of the claimant's race and/or religion or belief?

(iv) The claimant says the dismissing officer was motivated by the claimant's race (the claimant says because he is black). The claimant also says a photograph was taken of him by his supervisor purporting to show the claimant was sleeping on duty. This photograph was used by the dismissing officer to dismiss him. The claimant says the taking of the photograph by the supervisor to depict him sleeping on duty was motivated by the claimant's religion following a previous conversation between the two.

(v) The respondent says the clamant was dismissed for conduct/gross misconduct.

Unauthorised deductions

(vi) Did the respondent make unauthorised deductions from the claimant's wages in accordance with ERA section 13 by not paying the correct wages (properly payable) for March 2019 and subject to that, any loss because of the delay in receiving the wages until 18 April 2019?

FINDINGS OF FACT

1. The respondent provides guarding and security services to the public and private sector within the UK. The respondent employs approximately 160 employees. The number of employees fluctuate based on the number of contracts it is servicing. It has a diverse workforce which comprises 40% Muslims including Indians and Arabic; 10% Black African and 30% European.

2. Mr Petrigh is Operations Director of the respondent. He deals with all operational matters and daily issues within the business. He is based at the Head Office at 5 Alice Way, Hounslow, London. He organised the claimant's interview which was with another member of staff. Following this, he ratified the claimant's appointment. He never met the claimant either during his recruitment or during his short term of employment. He did see his Security Licence from which he observed he was Black African. He had no knowledge of his religion until receipt of his Claim Form.

3. The claimant commenced employment with the respondent on 5 March 2019 as a security officer. The claimant's duties were essentially to guard and secure the client premises at IBIS Hotel (Barking). He was responsible for guarding and controlling access to the hotel and was expected to take on additional duties where appropriate, including reception etc. Due to the nature of the role, rest breaks must have prior authorisation from the client. The timing of the breaks is after a certain time period and dependent on the client business requirements at that time and when it is suitable to take the break.

4. On 5 March, the claimant was trained by a security officer called Mohammed at the Ibis Budget Hotel, Barking [69].

5. On 6 March 2019, around 21:00 pm, he reported for work at the Ibis Budget Barking to be trained by Mr Zeeno, who was a supervisor, who explained his duties which additionally included preparing of pizza, lifting of bags to clients' rooms from the ground floor to other floors and removal of rubbish. There was discussion between them which was of a normal business like nature which might have become slightly more familiar because they both lived in Tottenham, Mr Zeeno did not ask if the claimant was a Muslim and his attitude did not change towards him as alleged by the claimant.

6. The claimant was rostered for duty on 8 March but for some reason he did not attend work that day and his shift was covered by Mr Zeeno [59].

7. On an occasion later in March, Mr Zeeno observed the claimant sleeping and spoke to him to the effect that it was not acceptable.

8. On 28 March 2019, Mr Petrigh received a phone call from Mr A Abed, a Director of the respondent. He told him that he had received a complaint from the Ibis Budget Hotel management that the claimant was again found sleeping whilst on duty [70A]. He instructed Mr Zeeno to go to the hotel and assess the situation and report back to him. When Mr Zeeno arrived at the hotel, at 1.32am on the morning of 29 March, he was informed by the night staff that the claimant was in the lobby area sleeping. Mr

Zenno went to the lobby area which is next to the kitchen area and found him sitting down on a chair resting his head against the wall. One side of his arm and hand was resting on the table. Mr Zeeno thought that he was asleep. He then took a video on his mobile of him sleeping. After taking this recording, he went up to him and woke him up by stamping his feet. He asked him what he was doing, the claimant replied, "it was his break time". Mr Zeeno did not discuss the matter further but, as he was leaving the hotel, the claimant became confrontational and started to raise his voice saying that he was on his rest break and that Mr Zeeno had not explained when he could take his breaks.

9. Mr Zeeno then telephoned Mr Petrigh and confirmed the incident. In the light of what he was told, Mr Petrigh emailed the claimant on 1 April 2019 and told him he was dismissed and reason for his dismissal [71].

10. On 2 April 2019, Mr Petrigh asked Mr Zenon to confirm his observations in writing. He did so by email [71A].

11. On 2 April 2019, the claimant responded to Mr Petrich's email by complaining and asking for the dismissal to be reversed [73]. He did not mention the issue of race or religious belief as a reason for this appeal. Mr Petrigh responded by email on 3 April 2019 and offered to discuss the reasons for his dismissal at a face-to-face meeting [73-74]. On 3 April 2019, he received a further email from the claimant outlining that unless the decision to dismiss him was reversed, he would not attend a meeting [74-75]. The meeting between the claimant and Mr Petrigh did not take place. Although the claimant makes reference to discrimination in the latter email, he does not specify race and/or religion and makes no reference to what he alleges Mr Zeeno asked him during training.

12. He received his pay for the hours he worked [81] based on timesheets of 19 entries making 152 hours [59].

SUBMISSIONS

13. The Tribunal received written submissions from both parties.

LAW

Discrimination

14. Section 13 of the Equality Act 2010 ("EqA") deals with direct discrimination. It states as follows:

> "(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."

11. Section 23 EqA deals with comparators. It states as follows:

> "(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case."

12. It is only if the Tribunal is satisfied that there is less favourable treatment when comparing the treatment of the claimant to what would have been received by the actual or hypothetical comparator, that the test of whether an alleged act was direct race discrimination arises and this requires a consideration of the reason for the treatment.

13. The Equality and Human Rights Commission: Code of Practice on Employment 2011 ('the Code of Practice') sets out helpful guidance for carrying out the comparator exercise. As to the identity of the comparator, paragraph 3.23 of the Code of Practice confirms:

> The Act says that, in comparing people for the purposes of direct discrimination, there must be no material difference between the circumstances relating to each case. However, it is not necessary for the circumstances of the two people (that is, the worker and the comparator) to be identical in every way; what matters is that the circumstances which are relevant to the treatment of the worker are the same or nearly the same for the worker and the comparator.

14. As to the comparison exercise for a hypothetical comparator, paragraph 3.27 of the Code of Practice confirms:

> Who could be a hypothetical comparator may also depend on the reason why the employer treated the Claimant as they did. In many cases, it may be more straightforward for the Employment Tribunal to establish the reason for the Claimant's treatment first. This could include considering the employer's treatment of a person whose circumstances are not the same as the Claimant to shed light on the reason why that person was treated in the way they were. If the reason for the treatment is found to be because of a protected characteristic, a comparison with the treatment of hypothetical comparator(s) can be found.

15. In **Amnesty International v. Ahmed** [2009] IRLR 884 Mr Justice Underhill (as he then was) (at para 34) confirmed that where the act complained of is not inherently discriminatory, it can be rendered discriminatory by motivation. This involves an investigation by the tribunal into the perpetrator's mindset at the time of the act. This is consistent with the line of authorities from **O'Neill v. Governors of St Thomas More Roman Catholic Voluntary Aided Upper School and anor** [1996] IRLR 372, the Tribunal should ask what is the 'effective and predominant cause' or the 'real and efficient cause' of the act complained about. In **Nagarajan v. London Regional Transport** [1999] IRLR 572, HL, it was stated that if the protected characteristic had a 'significant influence' on the outcome, discrimination would be made out.

16. The crucial question is why the claimant received the particular treatment of which he complains.

17. Paragraph 3.11 of the Code of Practice confirms:

> The characteristic needs to be a cause of the less favourable treatment but does not need to be the only or even the main cause.

18. Paragraph 3.13 of the Code of Practice confirms:
In other cases, the link between the protected characteristic and the treatment will be less clear and it will be necessary to look at why the employer treated the worker less favourably to determine whether this was because of a protected characteristic.

19. The burden of proof provisions in relation to discrimination claims are found in section 136.

20. The Court of Appeal, in **Igen Ltd v. Wong** [2005] ICR 931 CA, has authoritatively set out the position with regard to the drawing of inferences in discrimination cases in the light of the amendments implementing the EU Burden of Proof Directive.

21. In **Laing v. Manchester City Council** [2006] ICR 1519 EAT, the Employment Appeal Tribunal held that the drawing of the inference of *prima facie* discrimination should be drawn by consideration of all the evidence, i.e. looking at the primary facts without regard to whether they emanate from the claimant's or respondent's evidence page 1531 para 65. The question is a fundamentally simple one of asking why the employer acted as he did: **Laing** para 63. That interpretation was approved by the Court of Appeal in **Madarassy v Nomura International plc** [2007] ICR 867 CA at paragraph 69. The Court also found at paragraphs 56-58 that 'could conclude' must mean 'a reasonable tribunal could properly conclude' from all the evidence before it. That means that the claimant has to 'set up a *prima facie* case'. That done, the burden of proof shifts to the respondent (employer) who has to show that he did not commit (or is not to be treated as having committed) the unlawful act, at page 878.

22. Tribunals should be careful not to approach the **Igen** guidelines in too mechanistic a fashion (**Hewage v. Grampian Health Board** [2012] ICR 1054 SC para 32, **London Borough of Ealing v. Rihal** [2004] EWCA Civ 623 para 26).

23. The Court of Appeal has confirmed the foregoing approach under the EqA in **Ayodele v. Citylink** [2018] IRLR 114 CA.

Wages

24. Section 13 of the Employment Rights Act 1996 provides:
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.
…
(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.

DISCUSSION AND DECISION

25. The Tribunal was satisfied that Mr Zeeno did not ask the claimant if he was a Muslim. If he had, it is likely that the claimant would have referred to the comment in his emails. In any event, it is irrelevant to his dismissal as Mr Petrigh was unaware of whether the question had been asked or not.

26. Mr Petrigh dismissed the claimant because he was found sleeping at work not for any other reason and not race or religion.

27. The claimant contended that his wages were eight hours short. This was identified as wages for 8 March but the Tribunal was satisfied that he had not worked that day and his shift had been covered by Mr Zeeno. No wages are due as he has been paid for all hours he has worked. The issue passed to the Tribunal from the Preliminary Hearing also concerns delay to payment but the Tribunal does not consider that the statutory provisions support a claim based on delay particularly as in this case there was no sum due.

28. The Tribunal dismissed the claims.

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Employment Judge Truscott QC

Date 14 January 2021