5 **EMPLOYMENT TRIBUNALS (SCOTLAND)**

Case No: 4105270/2020

Heard by Cloud Video Platform (CVP) on the 9 and 10 March 2021

Employment Judge: L Wiseman

10 **Members: J Smillie**

A Shanahan

Mr Hisham Hassan — **Claimant**
15 **In Person**

Group Employment Services Ltd — **Respondent**
Represented by:
20 **Ms K Pattullo**
Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The Tribunal decided to dismiss the claim in its entirety.

REASONS

30 1. The claimant presented a claim to the Employment Tribunal on the 27 September 2020 alleging he had been unfairly dismissed, discriminated against because of race and sex and owed payments in respect of notice, holiday pay and wages.

2. The respondent entered a response denying the claimant had been dismissed
35 and asserting he had resigned. The respondent denied the complaints of

discrimination and their position was that no further payments were due to the claimant.

3. The parties clarified, at the commencement of the hearing, that the following claims had to be determined by the Tribunal:

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- ***Unfair dismissal*** The claimant maintained he told the respondent that he “intended to resign” but had not actually done so, and that the respondent by purporting to accept his resignation had, in effect, dismissed him. The respondent’s position was that the letter of resignation was clear and that there had been no dismissal.

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- ***Breach of contract*** (notice pay). The respondent conceded that if the claimant was successful in his unfair dismissal claim, then 8 weeks’ notice was payable.

- ***Sex and race discrimination*** Claims of direct discrimination (section 13 Equality Act) and victimisation (section 27 Equality Act) were pursued by the claimant. The less favourable treatment was said to be (i) the fact the claimant was not furloughed whereas his colleagues (two white females) were and (ii) dismissal. The protected act was said to be the raising of the grievance and the detriments were as above.

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- ***Equal Pay*** The claimant’s position was that he had been paid less than his two white female colleagues for doing the same work. The respondent accepted the claimant had been paid less, but maintained the work had not been like work.

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- ***Holiday pay*** This claim was settled and withdrawn prior to the hearing.

- ***Wages*** This related to the pay the claimant believed he should have been paid if he had been furloughed.

4. We heard evidence from Mr Bolton, the claimant's line manager; Mr Finney, who heard the claimant's grievance appeal and from the claimant. We were referred to a folder of jointly produced documents. The witnesses gave their evidence in chief by way of witness statement. We, on the basis of the evidence before us, made the following material findings of fact.

Findings of fact

5. The respondent specialises in providing security and facilities management to third party clients.

6. The claimant was employed as a Security Officer from the 3 February 2004 until the termination of his employment on the 6 July 2020.

7. The claimant commenced employment in February 2004 with Initial and his contract of employment was produced at pages 129 – 144. The claimant's employment transferred to Mitie and he worked for them until the 7 August 2018 when the respondent took over the contract to provide security services to Historic Environment Scotland, where the claimant worked (at Longmore House).

8. The claimant initially worked 3.25 hours a day on a Monday, Tuesday, Wednesday and Thursday; and 3.75 hours on a Friday. In early February 2019 the claimant was offered, and accepted, an additional shift of two hours per day Monday to Friday to cover the receptionists' lunch breaks at Exchange Place.

9. The claimant telephoned Mr Bolton, his line manager, on the 24 March to advise he was feeling unwell and would not be able to attend work. Mr Bolton informed the claimant that Longmore House had closed due to the pandemic.

10. Mr Bolton sent a message to the claimant on the 25 March to enquire how he was feeling. The claimant responded to say that he was "*stable. Earache and cough, temp is a little bit high. I think it's just a normal cold. I hope so*". Mr Bolton followed this up with another text on the 29 March stating "*Hey hope*

all well. You any better for covering lunches at exchange please." The claimant responded to say "*I'm still coughing. GP isn't helpful nowadays. I'll let you know if I feel better*" (page 80).

11. The claimant did not submit a sick note for his absence and did not contact the company again until the 18 May.

12. The claimant learned, on the 3 April 2020, that Exchange Place 1 and 2 (where he provided lunch cover) had closed due to the pandemic, and that his colleagues (the receptionists who worked there) had been placed on furlough.

13. The claimant knew, from an email dated 28 March 2020 from the respondent to all employees, that they would contact employees who were eligible to be placed on furlough. The claimant was not contacted regarding furlough, but nonetheless assumed he, like the receptionists, would be placed on furlough.

14. Mr Bolton made various unsuccessful attempts to contact the claimant in the period between the end of March and the 18 May.

15. The claimant sent an email dated 18 May to Mr Douglas Wilson (page 92) which was copied to Mr Bolton. The email was an enquiry about the furlough scheme where the claimant noted he had not been paid since the 10 April and wondered whether he was eligible for the furlough scheme.

16. The matter was referred to Mr Bolton who made various attempts to contact the claimant by email (pages 88 – 92). The emails noted calls had been made by Mr Bolton and missed by the claimant. Mr Bolton emailed the claimant on the 29 May to say he had called on Tuesday but received no answer or call back.

17. Mr Bolton confirmed that the issue of furlough would be discussed when the claimant answered his call, because there were hours of work to be covered. Mr Bolton fixed a time for calling the following day. The claimant responded to this to say that he thought furlough started when Historic Scotland closed. He had been sick for 10 days and when he decided to come back on the 3

April, he discovered Exchange Place had closed. The claimant went on to mention that social distancing had not been in place there.

18. The claimant sent a grievance to HR on the 2 June (page 98) in which he stated he believed he should have been furloughed and wished clarification why he had not been furloughed.

19. The claimant also alleged there had not been social distancing measures in place when covering for lunches.

20. Ms Sarah Grant, HR Manager, responded to the claimant's letter on the 4 June (page 99) and invited him to attend a grievance hearing on the 10 June. The grievance was to be heard by Mr Bolton.

21. The claimant attended a grievance hearing with Mr Bolton on the 10 June, and Mr Bolton's notes of that hearing were produced at page 100.

22. The claimant's position was that following upon his two places of work being closed due to the pandemic, he had assumed he would automatically be placed on furlough.

23. The claimant referred to other staff having been furloughed but he was not prepared to tell Mr Bolton the names of those other staff. The claimant had not been paid for April and May.

24. Mr Bolton noted the claimant had initially been off sick and had not ever contacted the company to advise when he was fit for work.

25. The respondent's procedure, in respect of furlough, was that if someone was Security Industry Authority (SIA) registered, then they would not generally be placed on furlough because they could be moved to other sites to provide security services.

26. The respondent had acquired new contracts since the lockdown and needed SIA registered staff to cover the work available.

27. Mr Bolton informed the claimant of the outcome of his grievance by letter of the 12 June (page 104). Mr Bolton acknowledged the claimant's usual places of work were closed, but confirmed there was alternative work available for him and therefore the company considered he did not meet the requirements to be furloughed.

28. Mr Bolton referred to the claimant's period of absence and his text of the 29 March where the claimant had said that he was still poorly and would let Mr Bolton know when he was feeling better. The claimant had not ever contacted Mr Bolton after this to advise he was fit to return to work. The claimant had assumed he would be furloughed, but this was not correct. Mr Bolton acknowledged he should have been more pro-active in his communications with the claimant, but he had been caught up in dealing with site closures, new work, finding staff, and staff going off on sickness absence or isolating. Mr Bolton apologised for this.

29. Mr Bolton dealt with the issue raised by the claimant regarding lack of social distancing on the site where he had worked. Mr Bolton concluded the outcome letter by confirming there was work available within the region and that the claimant would be contacted directly to offer him shifts. Mr Bolton noted the claimant's position that he did not wish to return to work until these issues in his grievance had been addressed.

30. The claimant appealed against the grievance outcome on the basis that he believed he was entitled to be furloughed in circumstances where his places of work had closed and he had not ever worked anywhere else. The claimant referred to his two colleagues (the receptionists) having been furloughed and concluded that he felt he had been treated differently (page 106).

31. The claimant was invited to attend a grievance appeal hearing on the 26 June, which was heard by Mr Craig Finney. A note of the appeal hearing was produced at page 109. The claimant told Mr Finney he had been off sick for 5 days but had not submitted a sick note. The claimant had learned the two

sites where he had worked had closed and assumed he would be furloughed (as his two colleagues had been) as he had not ever worked anywhere else. Mr Finney enquired if the claimant had been offered any shifts. The claimant confirmed he wanted to wait for the outcome of the grievance.

32. Mr Finney informed the claimant of the outcome of the grievance appeal by letter of the 1 July (page 111). Mr Finney noted that during the pandemic the claimant had learned of the closure of his workplaces, but instead of contacting the respondent for advice, he had assumed he would automatically be furloughed. Further the claimant had not made contact with the respondent during or following his period of absence, and did not let them know he was fit for work. Mr Finney acknowledged Mr Bolton had apologised for not being more proactive regarding communication, but concluded that in uncertain times communication between the employee and the company was crucial and a simple phone call from either party could have eased the situation and avoided the subsequent consequences.

33. Mr Finney went on to say that employees did not have an automatic right to be furloughed. He noted the claimant's permanent place of work had closed, but the company needed security staff to be available for work to ensure they could continue to trade through the crisis. Mr Finney confirmed that given there was alternative work available that could have been done by the claimant, the company had taken the decision not to place him on furlough.

34. The two colleagues relied upon by the claimant as comparators for the purposes of this hearing, but who he refused to name during the grievance process, were the two female receptionists who worked at Exchange Place. They were furloughed when the place of work closed. The two receptionists were unlicensed, that is, they were not SIA registered. The respondent had no other unlicensed work available, and so when their place of work closed, the respondent had no option but to place them on furlough.

35. The claimant emailed Mr Bolton on the 5 July (page 113) in the following terms: "*Hi Peter, I have decided to resign from Securigroup. How many weeks' notice is required to give before leaving".* Mr Bolton responded on the

6 July to say "*Hi Hisham, I am sorry to hear this. 1 weeks' notice is required in writing…."* The respondent acknowledged the reference to one weeks' notice was incorrect.

36. The claimant emailed Mr Finney on the 6 July (page 115) regarding the appeal outcome. The email included the following paragraph: "*I understand that the decision is* final*, however, to me this is an obvious case of discrimination, therefore I have decided to resign from Securigroup due to the reasons mentioned above".*

37. Mr Bolton and Mr Finney each interpreted the email they received from the claimant as being a resignation. The claimant's employment with the respondent ended on the 6 July 2020. The P45 was produced at page 117.

38. The claimant, when covering the reception at Exchange Place, whilst each receptionist took her lunch, was paid 55 pence less than the two receptionists per hour. The rates of pay were set by the client.

39. A job description for Front of House Receptionist was produced at page 165. The receptionists undertook the full range of duties set out in the job description. They were proactive in arranging contractor visits and undertaking their work.

40. The claimant did not undertake the full range of duties whilst covering the lunch break. His role was to receive any visitors to the building and direct them to the correct floor, and to take telephone messages and pass them on to the receptionist upon her return after lunch. The claimant was not trained on all the specific duties which may be required of the receptionists.

41. The receptionists had a more wide ranging role and, in addition to the tasks covered by the claimant, they dealt with passes, tenant enquiries, contractors doing work in/on the building, organising a fire drill once a week, managing building information, contract site maintenance visits, helpdesk call outs and utilities consumption. They also dealt with work permits for contractors,

compliance documentation, maintaining records, arranging mail deliveries and ensuring the key register was up to date and all keys returned by the end of each day.

42. The claimant, following the termination of his employment, obtained employment with Mitie on the 29 September 2020. He was employed initially as a Security Relief Worker, with an offer of a full-time contract working a 4 on 4 off shift pattern of 12 hour shifts as soon as his security clearance was confirmed.

Credibility and notes on the evidence

43. There were no issues of credibility in this case: all witnesses gave their evidence in a straightforward manner and answered the questions put to them as fully as possible.

44. Mr Bolton accepted his communication with the claimant had not been as good as it should have been, but he explained that at the beginning of the lockdown the respondent company was having to "firefight" and juggle a significantly increased workload. Some members of staff and the management team had gone off sick with Covid or were shielding or isolating. We accepted Mr Bolton's evidence (which was not challenged) regarding these matters and we also accepted his evidence that "new contracts were mobilised at very short notice" and that there was a demand for staff to work on those contracts.

45. Mr Bolton acknowledged not all SIA registered staff had been given alternative work because in some instances this had not been possible. Mr Bolton gave as an example staff on a contract in Inverness. If that site closed there were only two other sites in the area and if it was not suitable for staff to travel then they would be furloughed. We accepted Mr Bolton's evidence that no SIA registered staff other than those shielding or at high risk, were placed on furlough.

46. There was a dispute between the parties regarding access to the electronic site where the Absence Reporting Procedure could be located. The claimant's

position was that he did not have a code to access the site. Mr Bolton could not comment on that position but referred to there being a folder of company documents on each site which the claimant could have accessed. We did not consider this to be a material fact because it was clear from the claimant's texts to Mr Bolton, and his previous actings, that he knew to contact Mr Bolton regarding absence and fitness to return to work. The reason the claimant did not contact Mr Bolton regarding a return to work on this occasion was not because he did not know the procedure, but because he assumed he had been, or would be, placed on furlough.

47. The claimant accepted, in cross examination, that the reason for the difference in pay between him and the two receptionists, was not because of race or sex.

Claimant's submissions

48. Mr Hassan invited the Tribunal to find that the emails sent to the respondent on the 6 and 7 July showed an intention to resign. The email to Mr Bolton had been an enquiry regarding the amount of notice to be given. The email to Mr Finney contested the outcome of the appeal and repeated the intention to resign. Mr Hassan considered it was not unusual for the Tribunal process to be used to resolve issues whilst an employee was still at work. The respondent had not been certain which email was the resignation.

49. The claimant submitted that when he had been transferred to the employment of the respondent he had told the manager he could not work elsewhere other than Longmore House, and the manager had agreed. This had subsequently been varied by the claimant when he agreed to work at Exchange Place. The claimant learned Longmore House had closed on the day he went off sick. Mr Bolton had contacted him on the 25 and 29 March to enquire how he was. The claimant had expected to be contacted regarding furlough, or paid his usual pay. When he discovered in May that he had not been paid, he emailed Mr Bolton who did not reply. This is why he had complained to HR.

50. The claimant considered the grievance outcome did not answer the points he had raised, and he was not offered any work. In fact, the claimant was not ever offered any work again. The receptionists had been furloughed and he should have been too. He sought payment for 16.75 hours per week from the 18 May until the termination of his employment.

51. The claimant believed that he carried out the same job as the receptionists and invited the Tribunal to prefer his evidence rather than Mr Bolton's because Mr Bolton did not have any knowledge of what the claimant did whilst providing lunch cover. He had not received instructions about what to do and the job descriptions referred to were very general. The receptionists were paid £9 per hour and he was paid £8.45 per hour.

52. The claimant argued he had not been offered any work from the 11 May onwards because he had raised a grievance and appeal and complained of discrimination.

Respondent's submissions

53. Ms Pattullo invited the Tribunal to accept the evidence of Mr Bolton and Mr Finney whom she described as having been straightforward in giving their evidence. Mr Bolton had made concessions were appropriate, for example, that he could have been in touch with the claimant.

54. Ms Pattullo submitted the emails to Mr Bolton on the 5 July and Mr Finney on the 6 July had used unequivocal words of resignation, and that's how those emails had been understood by both Mr Bolton and Mr Finney. Neither had contact with the claimant after Mr Bolton's email of the 6 July, and Mr Finney's email of the 7 July accepting the claimant's resignation. The emails, taken together with the claimant's reference to seeing the respondent in court, there was an unambiguous and unequivocal resignation. This was supported by the claimant's own email at page 177, where he wrote to Mr Bolton saying he had been in touch with ACAS and Citizens Advice and that he had claims for

"victimisation and constructive unfair dismissal (check your last email with regard to my resignation).

55. Ms Pattullo acknowledged the claimant's reference to English not being his first language, and to there having been a grammatical use of intended action. Ms Pattullo invited the Tribunal not to accept that argument on the basis the wording of the emails had been clear.

56. The unfair dismissal claim should be dismissed because there was no dismissal. The breach of contract claim would also then be dismissed. However, if the Tribunal found the claimant had been dismissed, the respondent conceded 8 weeks' notice would be payable to the claimant.

57. The claimant brought claims of direct discrimination and victimisation because of the protected characteristics of race and sex. The first question for the Tribunal to determine is whether the claimant has discharged the burden of proof by showing a prima facie case. Ms Pattullo referred to the cases of ***Madarrasay v Nomura International plc 2007 ICR 867; Igen Ltd v Wong 2005 ICR 931 and Hewage v Grampian Health Board 2012 ICR 1054*** and submitted there must be something to show the link to the protected characteristic. It was not enough for the claimant to show his race/sex, there must be something more. The claimant was not placed on furlough: the receptionists were. The something more element was missing.

58. The Tribunal next had to consider whether the comparators relied on the by the claimant were in the same or similar circumstances and whether the reason for the treatment was because of race or sex. The respondent's position was that there was a non-discriminatory reason for not being placed on furlough and that was because those employees who were SIA registered could be redeployed (unless they were shielding or unless there was no viable alternative). The claimant was SIA registered and could be redeployed: the receptionists were not SIA registered and could not be offered alternative work.

59. Ms Pattullo acknowledged the claimant had raised a grievance, but she submitted this was not a protected act because there had been no reference in the grievance to the receptionists or to discrimination. In any event there had not been any detriment to the claimant because he could have been redeployed to alternative work.

60. Ms Pattullo, with regard to the claim in respect of wages, submitted the claimant had no entitlement to be furloughed. The respondent had other work available for the claimant when he was fit to return to work.

61. The equal pay claim brought by the claimant under sections 65(1)(a), (2) and (3) of the Equality Act was in terms of a "like work" argument. Ms Pattullo submitted the claim must fail because the claimant had not been doing like work to the receptionists. Further, the claimant had accepted in cross examination that the difference in pay was not due to sex.

62. The receptionists did a wider range of duties. The different rates of pay were set by the client and the lower rate of pay was an indicator they viewed the job as lunch cover only and not carrying out the wider range of duties performed by the receptionists.

63. Ms Pattullo invited the Tribunal to dismiss the claim.

Discussion and Decision

Unfair Dismissal

64. An employee seeking to argue unfair dismissal must show they have been dismissed. The burden falls on the claimant to show, on the balance of probabilities, that there was a dismissal.

65. Section 95 Employment Rights Act provides that an employee will be treated as dismissed if:

    - his/her contract is terminated by the employer with or without notice;
    - s/he is employed under a limited term contract and the contract expires by virtue of the limiting event without being renewed under the same terms and
    - s/he is constructively dismissed – this occurs when an employee resigns, with or without notice, because of a repudiatory breach of contract by the employer.

66. The claimant in this case argued that his emails of the 5th and 6th July to Mr Bolton and Mr Finney respectively evidenced an "intention to resign" rather than a resignation, and the respondent's acceptance of his email/s as a resignation amounted to a dismissal. The respondent disputed this on the basis the wording of the emails had been clear.

67. The email to Mr Bolton on the 5 July (page 113) stated "*Hi Peter, I have decided to resign from Securigroup. How many weeks' notice is required to give before leaving*?".

68. The email to Mr Finney on the 6 July (page 115) stated "*Hi Mr Finney, Thanks for the appeal response. I just want to point out that the report evaded mentioning my initial contact with Mr Peter Bolton and how he failed to inform myself about any work, and when I was informed (two weeks later via emails) the offer was almost half the hours I usually do. Secondly, the report left out one crucial point that more than 2 people who work at permanent buildings with the company have been furloughed due to the closure of their building in Edinburgh and other cities in Scotland, and I have written testimonies of those people. I understand that the decision is final. However, to me this is an obvious case of discrimination, therefore I have decided to resign from Securigroup due to reasons mentioned above. I did not what [sic] to escalate the issue to a necessary degree, but the company has left me to alternative but to resolve this issue in court*."

69. We acknowledged that doubt as to whether a dismissal has taken place may arise when the words or actions of the employer or employee give rise to ambiguity, either by their nature or because of the circumstances in which they took place. The general rule is that unambiguous words of dismissal or resignation may be taken at their face value without the need for any analysis of the surrounding circumstances (***Sothern v Franks Charlesly and Co 1981 IRLR 278***).

70. There are, however, exceptions to this general rule: for example, words spoken in the heat of the moment; or an employee being jostled into a decision by the employer or words which the employer knew were not meant to be taken seriously or where an employer, anxious to get rid of an employee, seizes on words to give them a meaning not intended. In those circumstances it may be appropriate to investigate the context in which the words were spoken in order to ascertain what was really intended and understood.

71. We had regard to the emails sent by the claimant to Mr Bolton on the 5 July and Mr Finney on the 6 July. We considered the wording used in the emails, with regard to resignation, to be clear and unambiguous: "*I have decided to resign".* We considered the respondent was entitled to take those clear, unambiguous words at face value.

72. We could not accept the claimant's explanation that the emails should be construed as noting an intention to resign. The clear wording indicated he <u>had decided</u> to resign (our emphasis).

73. This was not a case where the claimant sought to argue that his resignation had been given in the heat of the moment or that his words were not meant to be taken seriously. The claimant was not under any pressure to write to Mr Bolton or Mr Finney to give his resignation: in fact it had been agreed, and understood, that he would be offered work at a suitable alternative site following conclusion of the grievance and grievance appeal process, in circumstances where the claimant had made it clear he did not want to be offered shifts until he had exhausted the grievance process.

74. We should state that even if we had been required to consider the context in which the resignation had been given, there was nothing in the context which would have suggested the emails should have been given a different interpretation by the respondent.

75. We, having had regard to all of these points, decided the claimant resigned from his employment and his employment terminated on the 6 July 2020. The claimant has been unable to show there was a dismissal and accordingly his claim of unfair dismissal is dismissed.

Breach of contract (notice)

76. The respondent acknowledged the claimant had mistakenly been informed that he required to give one weeks' notice in terms of his contract. The respondent subsequently confirmed the claimant was required to give four weeks' notice in terms of his contract, and this sum had been paid to the claimant.

77. The claimant sought to argue that as an employee with more than 12 years' continuous employment he was entitled to 12 weeks' notice or pay in lieu thereof. His claim was therefore for an additional 8 weeks' notice pay.

78. The Tribunal acknowledged that in terms of section 86 Employment Rights Act the notice to be given by an <u>employer</u> (our emphasis) to terminate the contract of employment of a person who has been continuously employed for one month or more, is not less than 12 weeks' notice if the period of employment is twelve years or more. The respondent would have been required to give (or pay) the claimant 12 weeks' notice if they had terminated the claimant's contract of employment.

79. The notice required to be given by an employee who has been continuously employed for one month or more, to terminate his contract of employment, is not less than one week (section 86(2)). The claimant's contract of employment however provided for a longer period of notice (4 weeks) to be given by him to terminate his contract of employment.

80. The claimant has been paid for the four weeks' notice he was required to give to the employer when he resigned. The claimant has been correctly paid for the period of notice. He is not entitled to 12 weeks' notice of termination of employment in circumstances where the employer did not terminate his contract of employment. We decided to dismiss this complaint.

Wages

81. The claimant sought payment of wages for the period when (he says) he should have been placed on furlough. The respondent had very helpfully calculated this to be the sum of £3236.80 gross if this aspect of the claim was successful.

82. We had regard to section 13 Employment Rights Act which sets out the right not to suffer unauthorised deductions from wages. The section provides that where the total amount of wages paid on any occasion by an employer to a worker is less than the total amount of the wages properly payable by him to the worker on that occasion, the amount of the deficiency shall be treated as a deduction made by the employer.

83. We must determine the wages properly payable to the claimant in the period from the date he went off sick until the end of his employment. The claimant did not carry out any work in that period because he had initially been sick (5 days), then assumed he was furloughed and then refused the offer of shifts until his grievance had been resolved.

84. We noted there was no suggestion the claimant was entitled to sick pay for the five days of his absence. The issue in dispute related to furlough pay for the period when the claimant assumed he had been placed on furlough or argued that he should have been placed on furlough.

85. There was no dispute regarding the fact the claimant was not placed on furlough during his employment with the respondent. The claimant did not have an automatic right to be placed on furlough: that was a decision for the employer. The clear evidence in this case, which we accepted, was that this employer had work available for its employees who were SIA registered. The

claimant was SIA registered and the respondent had suitable work available for him. The claimant did not carry out any work in the period concerned and therefore no wages were "properly payable". The claimant was not placed on furlough and had no automatic right to be placed on furlough, and therefore no furlough pay was "properly payable". We decided the claimant was paid the sum which was properly payable and accordingly no deduction was made for the claimant's wages. We decided to dismiss this complaint.

Discrimination

86. Section 13 Equality Act provides that 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. The claimant argued that he had been treated less favourably by his employer because of his (i) race and (ii) sex, and that he had been treated less favourably than others, being the two white female receptionists. The less favourable treatment was said to be the fact the receptionists were furloughed and not dismissed.

87. We had regard to the cases to which we were referred by the respondent's representative. In ***Igen Ltd v Wong*** (above) the Court of Appeal confirmed the correct approach for a Tribunal to take regarding the burden of proof in cases of discrimination. It was said that the correct approach involves two stages: at the first stage, the claimant has to prove facts from which the Tribunal could infer that discrimination has taken place. Only if such facts have been made out to the Tribunal's satisfaction is the second stage engaged, whereby the burden shifts to the respondent to prove that the treatment in question was in no sense whatsoever on the protected ground. The claimant is required to prove, on the balance of probabilities, facts from which the Tribunal could infer that the respondent has committed an act of discrimination – that is, that the respondent has committed less favourable treatment because of a protected characteristic.

88. In the case of ***Madarassay v Nomura International plc*** (above) it was emphasised that the burden of proof does not shift to the respondent merely

by virtue of the fact that there is a difference in status between the claimant and his comparator.

89. The Supreme Court, in the case of ***Hewage v Grampian Health Board*** (above) approved of the judgments in the above cases.

5 90. In this case, the claimant, a black man compared his treatment with that of the two receptionists who are white females. There was no dispute regarding the fact the receptionists were furloughed, and the claimant was not. The claimant argued the reason for the different (less favourable) treatment was because he was black and/or male. The claimant led no other evidence in
10 support of his argument. There was no information before the Tribunal, for example, of the number of male/female employees, or the number of black employees, or the number of employees furloughed.

91. There was no dispute regarding the fact the claimant was SIA registered. The two receptionists were not SIA registered. Section 23 Equality Act provides
15 that there must be "no material difference between the circumstances relating to each case" when determining whether the claimant has been treated less favourably than a comparator. This means that in order for the comparison to be valid, "like must be compared with like". In other words, the comparator must be someone who does not share the claimant's protected characteristic
20 and is not in materially different circumstances from the claimant.

92. We concluded the two female receptionists were in materially different circumstances to the claimant because they were not SIA registered. This was a material difference because it affected the extent to which they could be offered alternative work when Exchange Place closed. The clear evidence,
25 accepted by the Tribunal and not contested by the claimant, was that there were no alternative sites (which had remained open) where the receptionists could be placed. This was in contrast to employees who, like the claimant, were SIA registered, and who could be placed on alternative sites where work was available.

93. We concluded, for the reason set out above, that the comparison with the receptionists was not valid because it did not compare like with like.

94. The Tribunal may consider the circumstances of a hypothetical comparator, whom we considered would have been a white, female SIA registered employee. The respondent provided general evidence regarding SIA registered employees being offered alternative work unless they were shielding or high risk, or were located in a more remote location. We inferred from this evidence that a hypothetical white, female SIA registered employee, working in the same area as the claimant, would not have been furloughed because there would have been alternative work available which would have been offered. The claimant was not treated less favourably than the hypothetical comparator would have been. We concluded from this that the claimant had not been able to prove facts from which the Tribunal could infer that discrimination would have taken place. The reason the claimant was not placed on furlough was because he was SIA registered and could be offered alternative work, of which there was plenty.

95. We decided, above, that the claimant was not dismissed but resigned from his employment. The claimant was unable to prove the less favourable treatment of dismissal occurred, and for this reason we dismissed this aspect of the complaint.

96. We decided, for the reasons set out above, to dismiss the complaint of direct discrimination.

97. We next considered the complaint of victimisation and had regard to section 27 Equality Act which provides that a person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act or A believes B has done, or may do, a protected act. A protected act includes making an allegation that A or another person has contravened this Act.

98. The claimant sought to argue that he had done a protected act when he had raised his grievance and grievance appeal. We noted the claimant's email raising the grievance made no reference to any contravention of the Equality

Act. The grievance concerned the claimant's belief that he should have been furloughed. We further noted (from the notes of the grievance hearing at page 101) that the claimant did, during the grievance hearing, suggest that he knew staff who had been furloughed, but he did provide any other information to Mr Bolton. We concluded from this that the claimant had not, in raising the grievance, done a protected act.

99. We next considered the grievance appeal and hearing. The claimant, in his email making an appeal, referred to his belief that he should be entitled to be furloughed and to two of his colleagues at Exchange Place being furloughed and other colleagues at a different city north of Scotland. Mr Finney made clear to the claimant, during the appeal hearing, that furlough was not automatic if a place of work closed: it was a decision for the company. The claimant, in response to this, stated the company "should be very careful about who they offer furlough as this can amount to discrimination".

100. There was a lack of clarity in the evidence of Mr Finney regarding what had been discussed with the claimant during the appeal hearing with regard to others who had been furloughed. Mr Finney appeared on the one hand to believe he could not discuss details of colleagues' employment because of confidentiality, but on the other hand he had made clear to the claimant that he had not been furloughed because there was work available for him.

101. We concluded, on balance, that the reference to colleagues at Exchange Place, and the reference by the claimant to discrimination, was sufficient to render the grievance appeal hearing a protected act.

102. We next asked whether the claimant had been subjected to a detriment insofar as he was not furloughed and was dismissed. There was no dispute, as stated above, that the claimant was not furloughed. We have also set out above our conclusion the claimant was not dismissed.

103. The next question for the Tribunal is was the claimant subjected to the detriment of not being furloughed because of having done the protected act. The period during which the claimant was not furloughed predated the

grievance appeal hearing, and accordingly the protected act could not have been the reason for the claimant not being furloughed.

104. The claimant, in his submissions, invited the Tribunal to find that he was not offered work from the 11 May because he had done a protected act. We dismissed this complaint for three reasons: (i) this was not part of the claimant's claim; (ii) the 11 May predated the protected act and (iii) the claimant clearly told Mr Bolton and Mr Finney that he did not want to be offered work until the grievance had been resolved.

105. We, having had regard to all of the above, decided to dismiss the complaint of victimisation.

Equal Pay

106. The claimant sought to argue that he performed like work (in terms of section 65(1)(a) of the Equality Act) to the receptionists when he covered for each of them for one hour over lunch. He claimed an entitlement to be paid at the same rate of pay. There was no dispute regarding the fact the claimant was paid 55 pence less than the receptionists. We also accepted the client set the rates of pay.

107. We formed the view, based on the claimant's evidence and his cross examination, that there was a difference between the tasks the claimant was capable of doing and what he was required to do. We say that because in response to many questions the claimant told the Tribunal he knew how to do a particular task. The issue was not however whether the claimant could do a task, but whether, in providing lunch time cover he actually performed that task. An example of this was "ensuring that the key register is up to date and all keys are returned by the end of each day". The claimant, when asked about this confirmed this was a task he could perform, and that there were only three keys to give out. The claimant, when asked again about this task, accepted he could not perform the task of ensuring all keys were returned by the end of each day, because he was not there.

108. The claimant, when referred to the job description, insisted he not only could do all of the tasks, but did so when providing lunch cover. The only duties the claimant accepted he did not do were utility consumption, tenant handbook and working on the excel spreadsheet. We could not accept the claimant's evidence that he carried out a full range of duties because it was not credible to suggest that all duties in the job description would arise to be carried out over the lunch hour.

109. We also accepted the receptionists were proactive in their duties. For example, they would contact and make arrangements with contractors to come on site, and prepare the necessary paperwork or authority; whereas the claimant did not do this. His role was reactive in that he reacted to those who attended on site during lunch hour, which tended to be a quieter time of the day. The claimant told the Tribunal "if I'd been there the whole shift I would have done everything".

110. We were satisfied the receptionists and the claimant were not employed on like work in terms of section 65 Equality Act. We say that because the receptionists covered a wider range of duties and were proactive in their role, whereas the claimant provided lunch time cover which was primarily reactive and limited to dealing with people who attended the site and taking phone calls.

111. We, in addition to the above, considered the claim brought by the claimant could not succeed because he accepted the difference in the rates of pay was not to do with race or sex.

112. We decided, for these reasons, to dismiss this complaint.

113. We, in conclusion, decided to dismiss the claim in its entirety.

Employment Judge: Lucy Wiseman
Date of Judgment: 29 April 2021
5 Entered in register: 01 May 2021
and copied to parties

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