



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Respondent

AND

Mr G Madawho

Gen2 Properties Limited (1)
Mr P Jones (2)

RESERVED JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Croydon (by video)

ON: 17th, 18th, 19th May 2021
and 22nd June 2021 in
chambers

EMPLOYMENT JUDGE: A Richardson **MEMBERS:** Ms M Oates-Hinds
Mr M Walton

Representation

For the Claimant: in person

For the Respondent: Mr S Harding, Counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that

- (1) The claimant's claims of race discrimination and harassment under S13 and S26 Equality Act 2010 respectively are not well founded and are dismissed.
- (2) The claimant's claims of wrongful dismissal and unlawful deduction from wages are not well founded and are dismissed.

REASONS

Background and issues

1. The claimant is Black African of Nigerian ethnicity. The protected characteristic for the purposes of S4 and S9 Equality Act 2010 is race.

2. The claimant was employed for 7 days before his employment suddenly terminated on 6th June 2019. The claimant claims that he was dismissed because of his protected characteristic. The respondent claims that the claimant voluntarily resigned and denies discrimination. The claimant brings complaints of direct race discrimination and harassment, wrongful dismissal and a claim for unlawful deduction from salary based on the calculation of his day rate which is in dispute.

Proceedings and Evidence

3. This case has had a long and difficult journey to a final hearing. Documents have proliferated and despite directions given at three case management preliminary hearings, the Tribunal were nevertheless presented with separate files of evidence for the claimant and respondent, relating to the dismissal and discrimination issues. This is because the claimant refused to engage with the Respondent in preparation and filing of an agreed documents file for the hearing, mitigation bundle or witness statements. He pursued an agenda of his own, inter alia, inappropriately appealing a case management order to the EAT, alleging fraud by the respondent's legal representatives to the SRA, alleging that one of the tribunal members previously worked for the respondent company's holding company and bombarding the Tribunal administration with correspondence, instead of focussing on compliance with the case management directions given on 20th January 2021 or the preceding case management directions of 14th October 2019 and 21st April 2020 .

4. In failing to comply with case management directions, the claimant put the Tribunal to inconvenience, the more so because the hearing was held remotely using electronic bundles of documents.

5. Given the number of documents to be downloaded by the panel members it proved difficult initially to ensure that everyone had a complete set of documents. That difficulty was fortunately remedied by Mr Harding setting up a document data room and agreeing with the claimant which files of documents the claimant wanted to place in the document room. From that point the Tribunal panel could confidently access all the documents both parties wished to place before the Tribunal and we did so.

6. The claimant claimed that the respondent's legal representatives had committed fraud by tampering with evidence. This was a matter so vehemently pursued by the claimant at the case management preliminary hearing on 20th

January 2021 that directions were given for the claimant to produce a file of evidence and a witness statement relating to this allegation. Our conclusions on the allegation of fraud are set out below in our conclusions.

7. There was very little documentary evidence in the case relating to the claimant's employment, its termination and the payment of wages and notice.

8. The claimant made an application for Ms Cooper's witness statement to be disallowed as it had been served a month after the date for exchange of witness statements given in case management order. The claimant objected because it enabled the respondent to respond with Ms Cooper's statement after having seen his witness statement. We heard submissions from both parties and after deliberation, the application was rejected. The claimant had been in default himself on serving documents on a timely basis. He had Ms Cooper's witness statement in his possession for about 4 months prior to the Hearing and in fact had submitted a "reply" to her statement. He was therefore fully aware of its content and was able to cross examine Ms Cooper on her statement. We determined it was not proportionate to disallow her evidence as the claimant had suffered no prejudice by its late service.

9. We heard evidence from the claimant, Mr Paul Jones, the respondent's Executive Chairman at the relevant time; Ms Joanne Tayler, Head of Projects, Capital and Minor Works; Ms Danielle Huxter, at the relevant time, Assistant Quantity Surveyor and Ms Olivia Cooper, Principal Recruitment Consultant. The witnesses were cross examined. We had access to a data room which contained the following:

- a. The core bundle – 313 pages
- b. The compliance bundle – 136 pages
- c. The witness bundle - 33 pages
- d. Allegations of fraud bundle – 9 pages
- e. Allegations of fraud spread sheet
- f. Allegations of fraud witness statement- 4 pages
- g. Claimant's fraud {core} bundle – 253 pages
- h. Index to Claimant's fraud bundle – 4 pages
- i. Claimant's correspondence with Respondent's pay roll provider re termination date – 9 pages
- j. Respondent's skeleton argument
- k. A chronology of events cross referencing documents

- I. Claimant's mitigation bundle (not referred to) as duplicated in the core bundle

The claims and issues

10. The correct respondents were identified at the previous case management order of 14th October 2019 – Gen2 Property Limited (1) and Mr Paul Jones (2).

11. By the same order, the following claims were struck out, struck out on withdrawal or not permitted to go forward:

- a. complaints in relation to the Unfair Contract Terms Act, the Misrepresentation Act and negligence, as the Tribunal had no power to consider such claims;
- b. failure to provide written particulars of employment.
- c. application for an order to provide wage slips or P45;
- d. constructive unfair dismissal.

12. On 11th June 2020 at a preliminary hearing the following decisions were made:

- a. the claim for automatic unfair dismissal under S103A Employment Rights Act 1996 was dismissed on withdrawal;
- b. the respondent's applications for striking out the claimant's claims, alternatively a deposit order were dismissed

13. At that hearing the claimant identified his claims as:

- a. Wrongful dismissal;
- b. Unlawful deduction from wages contract to S13 ERA 1996;
- c. Harassment relating to race contrary to S26 EQuA 2010;
- d. Direct discrimination relating to race contrary to S13 EQuA 2010.

14. The claimant confirmed that he was not pursuing an indirect discrimination complaint. The complaints at 13 (a) – (d) above were confirmed as the 'live' claims.

15. At the case management preliminary hearing on 20th January 2021 the claimant stated that the allegations of race discrimination were:

- a. On Thursday 6th June 2019 at 19 5.15 pm the claimant was 'sacked';

- b. On Tuesday 4th June 2019 4.25pm Mr Paul Jones gave the Claimant feedback that was not good; stating that he needed to recover, asking where were his 'soft skills', that there had been three complaints about the Claimant's conduct; that he should be a sponge to observe information and observe;
- c. On Wednesday 5th June 2019 between 9.30am and 10am at a meeting with Mr Jones, the Claimant asked Mr Jones for his support in dealing with free lance Quantity Surveyors. Mr Jones shouted at the Claimant;
- d. On Wednesday 5th June 2019 Mr Jones accused the Claimant of bullying Ms D Huxter.

16. At the commencement of the final hearing on 17th May 2021, the claimant confirmed the following issues in respect of direct discrimination:

- a. the dismissal by Mr Jones on 6/6/19 at 5pm- 5.25pm;
- b. failure to pay money owed;
- c. failure to reinstate the claimant to his role;
- d. being accused of bullying on 6th June 2019;
- e. failure to accept the claimant's bank details during course of employment;
- f. failure to support claimant;
- g. being instructed/expected to terminate a freelancer's contract;
- h. Olivia Cooper's witness statement was untrue.

17. The allegations of harassment related to the meetings with Mr Jones on 5th and 6th June 2019.

Findings of Fact

18. We make my findings of fact on the basis of the evidence before us taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. We have resolved such conflicts of evidence as arose on balance of probabilities. We have taken into account our assessment of the credibility of witnesses and the consistency of their evidence with surrounding facts and documents.

18.1 It is not the function of the Tribunal to resolve each and every disputed issue of fact. What follows are the relevant factual findings in relation to these issues.

18.2 There were two main areas of dispute. The first is whether the claimant was subjected to discriminatory conduct because of his race and second, was he dismissed or did he voluntarily resigned. With regard to the respondent's alleged discriminatory conduct leading up to the meeting in the late afternoon of 6th June 2019 between the claimant and Mr Jones, the respondent's evidence is that the claimant was rude and abrupt with staff, that he upset the team and failed to show leadership and diplomacy; essentially from the start of employment he was like "a bull in a china shop" and had failed to understand that as a new manager he should first observe and understand the business and the internal dynamics of working with his team and external parties. The claimant denies the comments, metaphors and conduct attributed to him. We have preferred the respondent's evidence on the question of whether the claimant had conducted himself as the respondent described and used the language that the respondent described because throughout the hearing the claimant used language very similar to the language about which the respondent complained.

18.3 The claimant is a chartered quantity surveyor, highly qualified with over 20 years' experience in the construction industry. The claimant is of black African Nigerian heritage.

18.4 The claimant applied for a role with the respondent, an operational company wholly owned by Kent County Council (KCC). Ms Cooper worked in commercial recruitment services division within KCC and sent Mr Jones a copy of the claimant's CV as a potential candidate to fill a vacancy. Mr Jones requested an interview with the claimant for the position of Associate Quantity Surveyor.

18.5 The first interview took place on 22nd May 2019. The interview went well and on 24th May 2019, the claimant attended a second interview with Mr Jones and another colleague. The interview again went well; a decision was taken to hire the claimant on the basis of his experience and qualifications. He was appointed Associate Quantity Surveyor, leading the Commercial Team. This was a senior management position with a salary of £83,000 per annum. The claimant asked for a couple of days to review the contract, however he was not given a contract on commencement of employment as the respondent's administrative systems could not respond so quickly. The claimant was sent an email on 24th May 2019 by Ms Cooper providing him the principal particulars of employment. The relevant sections were:

- The position was permanent

- The type of work was Quantity Surveyor
- Location – Maidstone
- Hours of work – 37 hours
- Experience, qualifications etc. – these were listed
- Expenses – business expenses to be agreed with line manager
- the benefits – pension contribution, holiday entitlement, sick pay
- Intervals of payment – monthly
- Length of period of notice to be given, or received to terminate employment: 3 months after completion of 6 months' probation.

18.6 The claimant was provided with a job description and personal specification. The job description stated that the purpose of the job was to lead and direct the delivery of commercial activities, processes and systems in relation to delivery of works (programmes and projects) and maintenance relating to KCC's property assets. Additionally, to manage and orchestrate all the commercial stakeholder parties to develop and maintain commercial control of such programmes and projects; lead and direct budget planning and management control, cost control and cost reporting and forecasting. Finally, the purpose of the job was stated to be management of all procurement activities including supply-chain analysis, development and implementation of sourcing and procurement strategies, estimating and cost planning, prequalification, tender and negotiation of Frameworks and contracts and Framework and contract award recommendations, contract administration, cost management and claims management.

18.7 Key interfaces included supervision of people including a procurement manager and a senior commercial manager as direct reports and their teams of procurement/commercial managers and/or cost managers. The claimant reported to the Gen2 CEO but would work within an integrated Commercial Team with KCC and as part of the service provision and will work closely and collaboratively within the agreed governance and control systems.

18.8 In the personal specification inter alia it was required that the successful candidate held not just the experience skills & abilities including strong oral and written communication skills; strong people leadership and management skills, well developed listening skills, tact and diplomacy and the ability to manage stake holders.

18.9 Under core attributes and competencies the person specification refers to leading others and to develop a culture of trust, openness and engagement to

ensure the team is willing to continuously improve performance and professional standards.

18.10 Under accountability the behaviours required included being self-sufficient, taking personal and professional responsibility for actions, looking for ways to save money, looking for commercial opportunities, being outcome focused.

18.11 The claimant believed that his new position with the respondent was a once in a lifetime opportunity for him - a high salary in a management position. He was very keen to do a good job and prove himself to Mr Jones. He told the Tribunal he felt like "*John Wayne*", and also likened himself to "*Tom Cruise in Mission Impossible*". He said "*I want to hit the ground running no parachute*" that he was passionate about being a Chartered surveyor and thought he had found a company who had appreciated that.

18.12 The claimant commenced employment with the respondent on Wednesday 29th May 2019. Mr Jones introduced the claimant to Ms Taylor as the new Commercial Manager who would be managing the quantity surveying team. Ms Taylor was the Head of Projects at KCC and moved across to the respondent to continue in that role when the respondent became a spin off company from KCC in May 2016. Ms Taylor had been with KCC and subsequently respondent for about 18 years. Mr Jones asked Ms Taylor to work with and assist the claimant where he needed support.

18.13 The claimant was also introduced to Ms Huxter as her line manager the day after he started work with the respondent.

18.14 The claimant did 'hit the ground running'. With two or three days of the claimant's arrival at the respondent, members of staff told Ms Taylor they were worried by the claimant's reference to him being there to deal with the "*mess*" that the company was in and that he had made a comment as he "*was the new sheriff in town.*" Staff in both the Commercial and Project Management teams raised concerns with Ms Taylor about the claimant telling colleagues how to do everything despite having just joined the business. The complaints were that his manner was bullish, rude or aggressive.

18.15 As a result of the surveying team's concerns, Ms Taylor had a one-to-one meeting privately with the claimant in which she suggested that he tone down his approach to members of staff.

18.16 Ms Huxter then reported to Ms Taylor that she found his conduct bullish, that he had a negative attitude towards the team and was rude about colleagues that he had never worked with. The claimant had used metaphors which she found inappropriate. On one occasion he likened the respondent to having HIV and he had been *“brought in to stop it before it became full blown AIDS”*.

18.17 Ms Huxter found the claimant aggressive and dismissive in his manner and tone. She found his language inappropriate language and she was frequently upset and intimidated by the claimant. Ms Huxter was also upset that the claimant had made an insensitive comment regarding her medical condition.

18.18 Ms Taylor reported her concerns to Mr Jones. She informed the claimant that she had been working for KCC and the respondent for a long time and how he was approaching his work was not the best way forward.

18.19 Ms Huxter told Ms Taylor that she found the claimant bullish and intimidating in his behaviour towards her. She complained about the way he spoke to her and that it was starting to affect her health. Ms Huxter had a chronic medical condition which is affected by stress. [she had been off work for some time with ill health and had recently returned to work]. The claimant had made an insensitive reference to Ms Huxter’s medical condition. Ms Huxter also reported the HIV comment. Ms Taylor raised Ms Huxter’s complaint with Mr Jones.

18.20 Ms Taylor had also personal experience of comments made to her by the claimant. Following her report to Mr Jones, the claimant asked to speak to her. They met in private again in the office. She counselled him on toning down his approach to staff and informed the claimant that she had been with KCC since 2001 and that this approach would not work. He had commented: *“you’ve been in post a very long time. In fact, I was sucking on my mum’s tits still when you must have started here”*. The claimant noticed Ms Taylor affronted by the comment and replied that he was sorry if his language had upset Ms Taylor, quote: *“but that it was our culture and this is how we speak.”*

18.21 Ms Huxter told Ms Taylor that she found the claimant bullish and intimidating in his behaviour towards her. She complained about the way he spoke to her and that it was starting to affect her health. The claimant had made an insensitive reference to Ms Huxter’s medical condition. Ms Huxter also

reported the HIV comment. Ms Taylor raised Ms Huxter's complaint with Mr Jones.

18.22 At a senior management meeting on Friday 31st May 2019 Mr Jones saw the claimant's interaction with the team with whom he was abrupt and told them how they had been doing things wrong. After the meeting he asked the claimant to "*tone things down*" with members of staff. Mr Jones asked the claimant to "*act like a sponge*" and absorb information. Mr Jones asked the claimant to focus the Quantity Surveyors and to pull together all of the freelance contracts for which he would be responsible, and to review them with a view to assessing what the company's financial exposure was. These freelance contractors were under the claimant's supervision. Mr Jones wanted to bring these freelance quantity surveyors onto the payroll rather than pay what he considered to be exorbitant day rates.

18.23 On Tuesday 4th June 2019 the claimant reviewed the freelance contracts and arranged a meeting with the most senior freelance contractor. The claimant explained to him that there was an opportunity to come onto the books at a salary of £60k - £70k. At time the senior contractor was earning as a freelance surveyor nearer to £130k per annum; he was not interested in taking a 50% pay cut.

18.24 The claimant recognised that the Quantity Surveying team, both freelance and employed, had worked together for many years and were a cohesive team. He described it as "*it was like being a family. East Enders. If you mess with one of them you mess with all of them. Some would say that [the freelance contractor he had spoken to] was "connected or even "untouchable".*" The claimant reached the conclusion that as the person who was tasked with terminating the long standing freelance contracts he would be very unpopular and that it would have a detrimental effect on his career. The claimant was concerned that he had "*ruffled [the senior freelance contractor's] feathers, rocked the boat and created waves.*"

18.25 Later in the afternoon on Tuesday 4th June 2019 the claimant and the senior freelance surveyor in question had a meeting. The freelance surveyor confirmed that he did not want to come onto the books.

18.26 Later in the afternoon Mr Jones had an informal chat with the claimant – Mr Jones called it a 'Catch-up meeting'. He said that the feedback he was

getting from the team was not good and that he was disappointed that he had heard complaints from staff about the claimant. He asked the claimant to apply the leadership skills and the soft skills they had talked about at interview. Mr Jones reminded the claimant that he was part of the senior management team and was going to have to recover the situation. Mr Jones asked the claimant to focus on his duties.

18.27 On Wednesday 5th June 2019 Mr Jones, the senior surveyor and the claimant met briefly in the morning to discuss the senior surveyors role. The claimant had already told the senior surveyor that the claimant was just following orders. Following this meeting the claimant had a meeting with Mr Jones alone. Mr Jones asked him how he was getting on with the team. Mr Jones asked the claimant to change his approach to the team and asked him to support Ms Huxter in her trainee role. He asked the claimant to maintain a good working relationship with Ms Taylor and to use appropriate language. They had a further discussion about bringing the contractors onto the books and the claimant expressed his concern about the proposal to bring freelance contractors onto the payroll. Mr Jones told the claimant to "*just do it*".

18.28 On 6th June 2019 the claimant forwarded his bank details to the business manager.

18.29 Mr Jones was at a hotel in Maidstone with Ms Cooper conducting interviews all day . He was informed by telephone during the day that the claimant had upset Ms Huxter to the point that she was crying and wanted to leave. Mr Jones wanted to speak to the claimant at the hotel later in the afternoon after the interviews had been concluded. Mr Jones's PA sent an email to the claimant asking him if he could attend a meeting at the hotel at 5pm for a quick catch up. The claimant replied at about 16.30, of course I am on my way now.

18.30 When the claimant arrived, Ms Cooper was in the room with Mr Jones. She was unaware of what had happened in the previous days and merely observed the exchange between the claimant and Mr Jones. Mr Jones asked the claimant how he was getting on? The claimant replied that both he and the team were good. It was evident to Mr Jones that the claimant was unaware of the impact he was having on the team. Mr Jones challenged the claimant, saying that he had heard things were not good with the team and asked the claimant if he had reflected on what they had spoken about previously, being a

sponge, observing. He said there are two sides to every story so asked the claimant for his.

18.31 The claimant complained about the team, the contracts, the contractor and the company. He complained about the project managers and the contractor; he complained about the staff not being there and not performing. Mr Jones informed the claimant that it was not acceptable to upset the people in his team. Mr Jones told the claimant that he had not made a good impression and would need to improve and be better toward the team. Mr Jones asked the claimant how he wanted to move this situation forward?

18.32 What happened next is in dispute. We have considered the evidence carefully and have decided that it was unlikely that Ms Cooper would fabricate evidence as there was no reason to do so. The claimant replied to Ms Jones that he was not stupid, he was not going to turn down any further work for this job. He said that he had turned down roles to take this position with Gen2. The claimant said words to the effect "*I knew you were going to sack me, so I'm going to resign*". The claimant put his key card, laptop and laptop charger and his badge on the table and told Mr Jones that he wanted to be paid for his work. Mr Jones confirmed that the claimant would be paid but the claimant did not believe him.

18.33 At this point the claimant had not been with the respondent for long enough for the payroll to have been set up with the claimant's details. The claimant refused to accept Mr Jones's assurances that he would be paid. The claimant wrote down a short 'contract' on a piece of paper which included the details of his notice period and the money that he was owed. After some to-ing and fro-ing as to whether the claimant could accept Mr Jones' assurances that he would be, that Mr Jones agreed the details and signed the piece of paper.

18.34 The 'contract' confirmed that on Thursday 6th June 2019 at 5.15pm at the Village Hotel Maidstone that respondent would pay a pro-rated rate of £83,000 for each day, listing the days which were Wed 29th May to Thursday 6th June 2019. That amounted to 7 days plus 5 days' notice, a total of 12 days.

18.35 Later that evening the claimant emailed Mr Jones and Ms Cooper to confirm his bank details. He set out the sum due as £83,000 divided by 236 days giving a day rate of £351.70, which multiplied by 12 amounted to £4,220.40. The claimant confirmed as Mr Jones had advised him in the presence of Olivia

Cooper that the payment would be released immediately (tomorrow) or Monday 10th June 2019 at the very latest.

18.36 On 11th June 2019 the claimant received a gross payment of £2,744.34. He wrote to Mr Jones to complain, challenging the day rate and the respondent's arithmetic.

18.37 Mr Jones replied to the claimant by email on 12th June 2019 that a total payment would be made for 16 days as a gesture of good will. Mr Jones set out the calculation for the sum of £3,666.50 gross. As the claimant had already received £2,744.34 a further payment of £922.16 gross would be paid on 13th June 2019.

18.38 The parties could not agree on what the correct calculation of arrears of pay and notice pay should be.

18.39 The claimant commenced early conciliation through ACAS on 13th June 2019.

18.40 On 16th June 2019 the claimant emailed Mr Jones to appeal against his summary dismissal . No grounds were given.

18.41 The Early Conciliation Certificate is dated 21st June 2019.

18.42 Between the 16th June 2021 and 21st June there was a series of communications via ACAS in which the claimant argued that he had been dismissed and Mr Jones stated that the claimant had resigned. On 21 June 2019 ACAS officer wrote to Mr Jones to convey that she had had a call from the claimant asking her to convey to Mr Jones that he would like to be reinstated in his post. She invited Mr Jones to call her if he wanted to discuss it further.

18.43 The claimant had said that unless he was reinstated he would be seeking damages for compensation under PIDA 2998, EqA 2010 and the ERA 1996. Mr Jones informed ACAS that he could no longer offer the claimant his former role has it had been filled by another person. He did however refer the claimant (via ACAS) to other posts within the organisation which the claimant could apply for all available on the company website.

Submissions

19. We read written submissions and heard oral submissions from both parties. We have considered all of the submissions in reaching our conclusions below.

The Relevant Law

Direct Discrimination

20. Section 13(1) of the Equality Act 2010 defines direct discrimination 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.'

21. In this case the protected characteristic is race. It requires a comparison between the claimant and either an actual or a hypothetical comparator. A comparator be it actual or hypothetical should be the same in all material respects other than the protected characteristic.

Burden of proof

22. Section 136 of the Equality Act provides:

(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.'

23. **Igen v Wong** sets out a two stage process in cases where unlawful direct discrimination is alleged. The first stage requires the claimant to prove facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed, or is to be treated as having committed, the unlawful act of discrimination against the claimant.

24. The second stage which only comes into effect if the claimant has proved those facts, requires the respondent to prove that it did not commit, or was not to be treated as having committed the unlawful act. If the second state is reached and the respondent's explanation is inadequate, it will not be merely legitimate but also necessary for the tribunal to conclude that the complainant should be upheld.

25. In **Madarassy** it was established that the respondent may adduce evidence at the first stage of **Igen** to show that the acts which are alleged to be discriminatory never happened; or that, if they did, they were not less favourable treatment of the complainant; or that the comparators chosen by the complainant or the situations with which comparisons are made are not truly like the complainant or the situation of the complainant; or that, even if there has been less favourable treatment of the complainant, it was not on the ground of a protected characteristic.

Harassment

26. Section 26 of the Equality Act 2010 provides:

(1) A person (A) harasses another (B) if –

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) The conduct has the purpose or effect of –

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account–

(a) the perception of B;

(b) the other circumstance of the case;

(c) whether it is reasonable for the conduct to have that effect.

Apportionment Act 1870

27. The Apportionment Act 1870 provides:

Section 2 Rents, &c. to accrue from day to day and be apportionable in respect of time.

All rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly.

Section 7 where stipulation made to the contrary.

The provisions of this Act shall not extend to any case in which it is shall be expressly stipulated that no apportionment shall take place.

CONCLUSIONS

Allegations of fraud

28. The allegations of fraud appeared to relate to the difference in time on emails of which two copies were in the bundle. For example, an email timed at, say, 17.59 and an identical email received at 18.00 but otherwise with identical content. The time difference was due to the time taken for an email having left one server to reach the recipient server. Similarly for two identical emails with an hour difference between the time of the sent email and the time of receipt where one computer is on European time.

29. The claimant also referred to a poorly photocopied manuscript document in R1 relating to his bank details. It was of no consequence as the original evidence relating to the agreement on 6th June 2019 was in any event in the bundle and there was no consequence resulting from the document that the claimant insisted had been “faked”. There was no logical purpose for the respondent to “fake” the document and we find that the respondent nor its legal representatives did so.

30. The claimant claimed that the P45 issued at the end of June 2020 by the respondent’s outsourced pay roll service, showing a termination date of 30th June 2020 (instead of 6th June 2020) was “fraudulent” as it enabled the respondent to fabricate a disciplinary process of a first and final written warnings, ending with dismissal on 30th June. The claimant’s employment terminated on 6th June. There was no need to fabricate a dismissal procedure. The allegation was

fantasy. The issue at the core of this claim is whether the claimant was subjected to discriminatory conduct.

31. The allegations of fraud were baseless and had no relevance to the issues before the Tribunal which was to consider and decide what happened on 6th June 2020.

Direct Discrimination

32. The burden of proof is initially on the claimant to establish from primary facts that inference could be drawn of discriminatory conduct by Mr Jones. By 5th and 6th June 2019, and within four days of the claimant taking up his new role with the respondent, Mr Jones had received adverse feedback from several members of staff about the claimant's conduct towards them and his abrupt style of leadership. The complaints were that the claimant was bullish, intimidating, aggressive, overly critical of staff, and that he used inappropriate or at times wholly offensive language.

33. We observed that the language the claimant used throughout the Hearing when cross examining and in his submissions, was highly colourful. He used phrases like:

"I was John Wayne, Tom Cruise in Mission Impossible"

"I swung into action in the first 48 hours"

"I said that I am the new sheriff in town to stop the contractors robbing Gen2"

"I wanted to do the best I could, I was in the Lewis Hamilton mode..."

"her witness statement has less credibility than a frog on crack."

These comments were consistent with the type of reported language the claimant had used when speaking to his work colleagues and about which they had complained as offensive or concerning.

34. We observed how the claimant conducted himself during the Hearing; we noted the tone of his interaction with the respondent and the tribunal; we note the comments of an Employment Judge in an earlier preliminary hearing who recorded in the case management summary *"The claimant was quite strident in his approach to this hearing. I had to tell him firmly on several occasions that it*

was important that the parties cooperated with each and the Tribunal and at one stage I told him that it was not a war.”

35. The claimant was described as aggressive by one of his former colleagues. It is important to note when a person is being assertive, over confident, it is understandable that some of those reporting to the claimant as their new manager in the first few days before he got to know the team, interpreted his robust and direct style of communication and lack of diplomacy as aggression when it was in fact assertiveness and on occasions over assertiveness. In the circumstances we do not find that the claimant was aggressive towards his former work colleagues but we do find that he used the highly descriptive, colourful and in the circumstances, insensitive words complained of.

36. When the claimant's over assertive and concerning behaviour was reported to Mr Jones, Mr Jones had no alternative but to ask the claimant to tone down his approach. Ms Taylor had already made that suggestion to the claimant without any effect. Mr Jones spoke to the claimant on at least two occasions asking him to tone down his approach to his team in these first few days of employment; Mr Jones asked him to observe, to be a “sponge” and to display the soft skills he and the claimant had discussed at the interview. Mr Jones wanted the claimant to show the leadership skills the claimant said he had.

37. When Mr Jones was informed on 6th June 2019 that the claimant had so upset Ms Huxter that she was crying and said she wanted to leave the respondent's employment he had to act. He needed to tell the claimant that he was going about the things the wrong way.

38. We accept the respondent's witnesses evidence as nearer to the truth than the claimant's evidence. There is nothing racist in Mr Jones's conduct. It was the conduct of a concerned manager dealing with a newly recruited senior manager who seemed to have completely mis-understood his role and the appropriate way to lead his new team. Mr Jones would have treated in exactly the same way another recruit to the same post, holding the same qualifications and experience as the claimant, being similar to the claimant in all respects except for being white, and who had acted in the same way as the claimant.

39. The purpose of the meetings with Mr Jones was to put to the claimant that his conduct was not conducive to team work and was causing consternation amongst the staff that the claimant was supposed to be leading. Mr Jones asked

the claimant to exercise soft skills. Throughout the evidence and the documents, the claimant did not point to any conduct or spoken words which suggested a racist undertone. We find that he has exaggerated being asked to meet Mr Jones by describing it as being “hailed” into meetings. The claimant’s own evidence was that he was invited to a “catch up” meeting by Mr Jones. The documentary evidence also shows that the claimant was politely invited by email by Mr Jones’ PA to what turned out to be their final meeting at 5pm on 6th June and that the claimant had politely responded he would attend and was on his way. There is no evidence to support the suggestion that the claimant was “hailed” into any meeting and the use of the word is indicative of the claimant’s tendency to exaggerate

40. The fact that Mr Jones may have been robust in his feedback, although that did not appear to be the case on the first couple of occasions he raised concerns with the claimant, does not mean that he was being racist or racially harassing the claimant. We accept the respondent had good reason to discuss the claimant’s conduct with him and that Mr Jones had shown a measured albeit firm response to the information he was receiving about the claimant’s conduct in asking the claimant in three meetings on 31st May, 4th and 5th June to moderate his behaviour.

41. The claimant claimed that he was instructed to undertake a task that was not in his job description and that this was a factor in Mr Jones’s motivation. The instruction by Mr Jones to the claimant to pull together the freelance contractors’ service contracts and review the expiry dates with a view to bringing subcontractors onto the respondent’s payroll, was a decision that any reasonable manager could make. It was an executive decision to save overheads. It was also a reasonable request to the claimant and fell within his broad remit described in the job description. We note that the claimant’s replacement successfully completed Mr Jones’s instructions to reduce the reliance on expensive sub-contract work.

42. The claimant claimed that he had been given the task of terminating the contracts of long standing, integrated and popular freelance contractors and that if he did so he would be deeply unpopular with his team and it would lead to his dismissal. Yet he also stated a more accurate description of Mr Jones’s instruction: *He didn’t tell me to sack him (the senior freelance surveyor), he explained that we would not be renewing existing consultants when they run out unless essential and I should hire permanent staff. It was my role to advertise and select potential candidates and interview on 7th and 10th June.*

43. The claimant repeatedly stated that terminating the freelance contractors was not in his job description. That was incorrect. It was part of his management role to manage costs on the projects he was to lead. The claimant persistently claimed that he had been recruited to do Mr Jones's "dirty work" and that he was the "fall guy" and that Mr Jones "would not be able to do it, he got me to do it, dirty Harry, Mission impossible". The claimant also stated: *Because white people aren't treated so unfavourable – it's easier to get a black person to do the dirty work and so I was the fall guy.*"

44. The position taken by the claimant was an example of him acting out what he has heard in TV court room dramas and lacks any credibility.

45. In the claimant's own words during the hearing he provided the reason for his treatment by the respondent:

"My problem was that I was passionate. That was the trouble – being passionate gets you chartered performance in exams. They are not used to that in these council jobs. In the real world in private practice I wanted to perform that is what Joanne Taylor called 'a bull in a china shop'. I wanted to deliver and perform - they are not used to that. I want to hit the ground running, no parachute. I was passionate, keen, I had zeal, highly motivated, up for the challenge, seized the day. Described aggressive by Daniel Huxter. If I have that opportunity again, I will be relaxed. I was enthusiastic and had zeal."

46. The claimant has failed to discharge the first step of **Igen v Wong** as amended by **Madarassy** in respect of both direct discrimination and harassment. The respondent has shown a good reason why they treated the claimant as they did. There was no racial harassment. We find that the treatment of the claimant by the respondent had nothing to do with race.

Dismissal or resignation

47. We then turn to the question of whether the claimant was dismissed or he resigned. In many respects it is irrelevant what occurred. The claimant has failed to establish any discriminatory conduct by the respondent and even if he was dismissed, the respondent did not have to provide a reason although it could have reasonably relied on the reason for dismissal being conduct and the fact that the claimant had not entitlement to notice.

48. Where there is a direct conflict in the oral evidence as in this case the tribunal must look at the broader context for an indication of which account lay closer to the truth. Mr Jones denies that he dismissed the claimant. He believed the claimant had attended the meeting on 6th June at 5pm intending to resign. He had brought his laptop, charger and swipe card and voluntarily placed them on the table. The claimant had said he resigned as he knew he was going to get dismissed. Ms Cooper's evidence was that the claimant spoke the words that he resigned.

49. The claimant says that he did not resign as he would not resign if he had unless he had another job to go to. Furthermore he would not leave his laptop in his car so he brought them with him into the meeting as he normally would. Reading all of the evidence around this, it appears that the claimant volunteered to hand these over. It is also the case that the claimant had already worked out what he was entitled to be paid which suggests some forethought on the subject.

50. The claimant had been very anxious during the day on 6th June to ensure that the respondent's account office had his pay roll details and made attempts to lodge his bank details with the accounts office. Unless he feared that his employment might be terminated by Mr Jones and that he intended to resign, there would no reason for his sudden anxiety to ensure the accounts office had his payroll details on 6th June rather than at some point before the payroll was prepared and then rolled out at the end of the month.

51. However none of the above are conclusive points on their own. Overall we considered the reliability of the claimant's evidence and we prefer the evidence of the respondent's two witnesses that the claimant orally resigned. We do not find that there was any written resignation. What the claimant wrote out was what he believed his entitlement to pay was.

52. However, if we were to be wrong on the decision that the claimant resigned and he was in fact dismissed, it would make no difference to his position for the reasons in paragraph 47 above. In the absence of any discrimination, the respondent was entitled to dismiss the claimant without notice as he had worked less than a month and it was not wrongful to do so.

53. The particulars of employment sent to the claimant by email by Ms Cooper on 24th May 2019 did not refer to any notice provision prior to six months service. The claimant was entitled to be paid for the days he had worked 20th May – 6th June 2019 and not to notice pay.

54. We then address the amount of money the claimant was entitled to and what he was actually paid. The claimant claims that the respondent has not paid his whole entitlement.

55. The claimant had calculated that he was entitled to 7 working days' arrears of pay and 5 working days' notice, that is 12 days' pay. Mr Jones agreed on 6th June 2019 that the claimant would be paid for 12 days.

56. In his calculation of entitlement, the claimant used the divisor of 260 days and his annual salary of £83,000.

57. The respondent used a different method of calculation which gave a lower figure. The respondent paid the claimant a total of £3638.38 by 13th June 2019.

58. In the absence of an express provision in the employment contract stating that Section 2 of the Apportionment Act 1870 is excluded, the claimant's day rate for the payment of notice pay and arrears of pay is his annual salary with a divisor of 365 days. There was no express provision in the particulars provided to the claimant on 24th May 2019.

59. The claimant was entitled to £83,000 divided by 365, giving a day rate of £227.40 x 12 days. The claimant was entitled to £2728.80 and was therefore paid £909.58 in excess of this figure. The claimant has no claim to an additional sum.

60. In summary the claimant's claims of race discrimination, racial harassment, wrongful dismissal and unlawful deduction from wages are not well founded. They are dismissed in their entirety.

Signed by _____

Employment Judge Richardson
Signed on 28th June 2021

