EMPLOYMENT TRIBUNALS

Claimant: **Mr A Barrie**

Respondent: **Mitie Limited**

Heard at: **via CVP (Croydon)** **On: 7/7/2021**

Before: **Employment Judge Wright**
Ms N Christofi
Ms C Edwards

Representation:
Claimant: **In person**

Respondent: **Mr A Ohringer - counsel**

LIABILITY JUDGMENT

It is the unanimous Judgment of the Tribunal that the claimant's claims of race discrimination contrary to the Equality Act 2010 fail and are dismissed.

REASONS

1. The claimant was employed by the respondent from 2/9/2012 having transferred from the London Borough of Sutton. After a period of early conciliation between 26/7/2019 and 26/8/2019 the claimant presented his claim on 11/9/2019. At a preliminary hearing on 2/3/2020, the claims were identified as direct race discrimination and harassment under the Equality

Act 2010 (EQA). The claimant's protected characteristic is race and he describes himself as black African. The complaint is of a detriment per s. 39(2)(d) EQA.

2. Relying upon the Order following the preliminary hearing, the claimant's allegation relates to deductions from his pay in July 2019 following sickness absence in June 2019. It is recorded that the claimant's comparator is Mr Hill who is white.

3. The Tribunal heard evidence from the claimant and for the respondent, from: Anatolijs Rauza (the claimant's line manager in June 2019), Adam Rees (who took over the claimant's line management in late July 2019) and Katherine Goulding (the person responsible for making the deduction from the claimant's pay).

4. The Tribunal had before it a bundle of 162-pages. The bundle was not compliant with the Presidential Guidance; it also contained duplicated email strings and certain information which should have been redacted was not. As it was a short hearing, the Tribunal was however able to manage. Page references are to the electronic version of the bundle.

5. The hearing had been converted to a CVP hearing and that was not objected to. The final hearing of this case had been postponed on two previous occasions. Firstly in July 2020 as the Tribunal was not conducing final hearings at that point in time due to the pandemic and secondly in January 2021 when the claimant did not attend and the hearing was postponed.

6. The claimant was absent from work on 22/6/2019, 23/6/2019, 25/6/2019, 26/6/2019 and 27/6/2019. As a result of that and the claimant's failure to provide a sickness self-certificate, his pay was reduced in July 2019. He says that was an act of direct discrimination as Mr Hill was absent at the same time and he was paid. The claimant also says it amounted to harassment contrary to s. 26 EQA. The respondent's case is that it has a perfectly reasonable explanation for the reason why the claimant's pay was deducted. It says Mr Hill communicated with his manager (unlike the claimant) and he provided a self-certificate and then a note from his GP. The claimant did not, until much later, provide the required paperwork.

7. The claimant's witness statement ran to nine paragraphs. In respect of his allegation of race discrimination, he said:

> 'I contend the only reason I was not paid is because of my race. My comparator [Mr Hill] called sick previously and was paid.'

8. The claimant did not set out any evidence as to why he believed the deduction from wages amounted to harassment.

9. After the first period of absence, on 24/6/2019, Mr Rauza emailed the Regional Director to ask if he could deduct the two shifts the claimant had failed to attend. Mr Rauza described the claimant as having 'blown out' of his shifts. The Regional Director quite rightly said 'no' and to give the claimant the opportunity to submit a self-certificate and suggested that Mr Rauza wait until the end of the week (page 68).

10. Noting that the claimant could not have been aware of this email exchange until documents were exchanged, the Tribunal is surprised that at 10:42 the day after the claimant's absence, Mr Rauza was seeking to take such a step. The Tribunal suspects there was something underlying this request, of which it was not aware. Mr Rauza did say that he found it difficult to communicate with the claimant and that the claimant would not take his calls. It was stated however that the claimant's absence was accepted as genuine. The Tribunal was concerned to see that Mr Rauza was so 'quick off the mark' in requesting authorisation for the deduction.

11. The claimant was then absent for another three days. It is the claimant's case, that when he returned to work, he handed a sickness self-certificate to Mr Rauza in July 2019. Mr Rauza denied this happened. In cross-examination, the claimant said he had visited his GP, but did not see a doctor. He said he had attended to collect a sickness self-certificate from, which he completed and handed to Mr Rauza. The claimant also said he was 'down with flu'.

12. The Order following the preliminary hearing notes the claimant's case is that he did not considered he was required to provide self-certification to the respondent. In cross-examination the claimant said that he was not bound by the respondent's handbook in terms of its reporting requirements. He relied upon his original contract with the London Borough of Sutton and said that did not deal with sickness absence reporting. The claimant maintained that he was subject to the handbook of the London Borough of Sutton.

13. As the claimant's pay was deducted in July 2019, he raised a grievance in that regard on 31/7/2019 (page 76). In that grievance the claimant stated:

> 'The process goes like this, I have to call in sick if I am not feeling well. Which i did. I will have to bring in a sick note if i am off sick for more than seven working days.
>
> In this case i was off sick for less than the required number of days, that would warrant a GP to even consider signing a sick note.'

14. The claimant did not say that he had handed a self-certificate to Mr Rauza earlier in July 2019. The Tribunal finds that the first time the claimant mentioned handing a self-certificate to Mr Rauza was in his witness statement dated 26/6/2020.

15. The Tribunal finds that on the balance of probabilities, the claimant did not hand a self-certificate to Mr Rauza in July. The claimant may well have visited his GP and obtained a self-certificate form on another occasion, but he did not do so on this one. At no point did he refer to having handed a certificate he obtained from his GP to Mr Rauza until he made the comment in his witness statement and indeed, it was the claimant's view that he was not required to provide a self-certificate and he did not do so.

16. At that stage, the respondent was therefore entitled to make deductions from the claimant's pay as the absence was unathorised.

17. In contrast, Mr Hill was absent from 23/5/2019. He submitted a self-certificate to Mr Rauza via email on 4/6/2019 (page 153). There was an email exchange and Mr Rauza and Mr Hill had clearly been speaking to each other (page 157).

18. On 10/6/2019 Mr Hill emailed a GP fitness for work note to Mr Rauza which certified him as unfit for work from 5/6/2019 to 17/6/2019 (page 160).

19. Following the claimant's grievance, Mr Rees (who had taken over line managing the claimant) became involved. On the 10/8/2019 the claimant emailed Mr Rees about his sickness pay and Mr Rees made enquires of payroll. The end result was that on the 15/8/2019 (page 83) the claimant completed the respondent's self-certification form and sent it to Mr Rees (page 84).

20. It should be noted that at no point in the email exchange did the claimant say he had already completed a self-certificate and given it to Mr Rauza.

21. The following day, Mr Rees sent the form to payroll (page 86).

22. What then followed was quite extraordinary. The claimant should have been reimbursed the deductions made in July in August 2019. If for some reason that was not possible, an explanation should have been provided and the latest the claimant should have been reimbursed was September 2019. The claimant had already contacted Acas and early conciliation took place between 26/7/2019 and 26/8/2019. The pay date was 26/7/2019 and the claimant's payslip clearly showed a deduction of £652.20. By the end of that period of early conciliation, the claimant had

completed the self-certificate and Mr Rees had passed it to payroll for processing and so the claimant could be reimbursed.

23. On the 11/9/2019 the claimant presented his claim form to the Tribunal and stated one of his claims was (page 13):

> 'This is also a case of illegal deduction of wages. I am owed monies taken from my wages in July 2019 round of payment.'

24. The respondent's response was presented on 29/10/2019 and it defended the unlawful deduction from wages claim, stating (page 29):

> 'The Claimant has failed to particularise the alleged deduction from his July 2019 wages. As per paragraph 3 the Respondent reserves its right to provide further responses upon receipt of particulars of such a claim.'

25. As a result of the claimant's grievance, the respondent was clear what July 2019 deduction the claimant was referring to, yet still it did not ensure the monies were reimbursed.

26. The preliminary hearing took place on 2/3/2020 and still at that point, the claimant had not been reimbursed.

27. It took the respondent until the April 2020 payroll run to reimburse the claimant the sum of £652.20 (page 107).

28. The claimant was on an hourly rate of £10.87 and it really is quite unacceptable for it to have taken so long to reimburse him and the respondent was aware of the situation having had the matter drawn to its attention firstly from the grievance and the via the Tribunal proceedings. It is also objectionable for the Tribunal's scarce resources to be taken up with a claim which should have been quite simply and quickly resolved.

29. Mr Ohringer said the respondent had apologised to the claimant and repeated that apology in the public forum of the Tribunal. Notwithstanding that, the Tribunal was not taken to anything in writing and the reason for the delay was not satisfactorily explained.

30. The Tribunal is however aware that extremely poor treatment does not, of itself, amount to unlawful discrimination.

The Law

31. Mr Ohringer set out the law in his written submission.

32. S.13(1) of the EQA states:

> 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.

33. To succeed with a claim for direct discrimination, a claimant must show:

    a. that he has suffered a detriment;

    b. that in suffering that detriment he has been treated less favourably than a real or hypothetical comparator; and

    c. that he has suffered that less favourable treatment because of a protected characteristic.

34. If it is found that a claimant has been treated less favourably than a comparator, the Tribunal must determine whether that was because of the claimant's protected characteristic or for an unrelated reason.

35. To establish that the treatment was because of a protected characteristic it must be shown that a named individual (or a number of individuals) who subjected the claimant to a detriment was consciously or subconsciously influenced by the protected characteristic. Unless the claimant identifies the alleged discriminator(s), that exercise cannot be conducted and the claim will fail. (Reynolds v CLFIS (UK) Ltd [2015] IRLR 562)

36. In Igen Ltd v Wong [2005] ICR 931, the Court of Appeal gave practical guidance to Tribunals on applying the shifting burden of proof.

37. The burden of proof does not shift to the respondent unless the claimant has raised facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent committed an unlawful act of discrimination. In Madarassy v Nomura International plc [2007] IRLR 246, the Court of Appeal made clear that:

> The court in Igen v Wong expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent 'could have' committed an unlawful act of discrimination. The bare facts of a difference of status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

38. It has been stated repeatedly in the authorities, including Commissioner of the Police of the Metropolis v Osinaike (UKEAT/0373/09), para.47, that 'simply showing that conduct is unreasonable or unfair is not, by itself, enough to trigger the transfer of the burden of proof'.

39. Race harassment, Section 26(1) of the EQA 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.

40. The claimant must therefore show:

    a. unwanted conduct;

    b. that has the prescribed purpose or effect;

    c. which relates to a relevant protected characteristic.

41. Trivial acts will not constitute harassment and in considering whether any such harassment related to a protected characteristic context is all important. (Henderson v GMB [2015] IRLR 451)

42. The harassment need not be 'because of' the protected characteristic but the question of whether it is related to the protected characteristic is objective. (Hartley v Foreign and Commonwealth Office Services UKEAT/0033/15)

43. S. 23 EQA provides:

    Comparison by reference to circumstances

    (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.

Conclusions

44. The claimant has advanced no evidence in respect of his claim of unlawful harassment. At the preliminary hearing, the claimant said that the unwanted conduct was the deduction from his pay in July 2019. He has not however set out how that conduct was related to his race, nor how it had the purpose or effect of violating his dignity or created an intimidating, hostile, degrading, humiliating or offensive environment for him.

45. In view of the lack of evidence from the claimant, there is nothing which shifts the burden to the respondent for it to have to provide an explanation. A difference race and a difference in treatment is not enough to shift the burden.

46. In respect of the claim of direct discrimination, again the Tribunal finds that the claimant has done no more than to assert a difference in race and a difference in treatment. Notwithstanding that, in considering the reason why the claimant was treated as he was, the Tribunal is prepared to accept the respondent's explanation. Mr Hill engaged with Mr Rauza, which the claimant did not. More importantly, Mr Hill provided a self-certificate promptly, so that there was no reason for Mr Rauza to consider seeking authority to make a deduction from his pay. In contrast, the claimant did not provide a self-certificate and he took the view it was not required of him. As a result his pay was deducted.

47. Once the deduction was made, the claimant raised a grievance. That led to Mr Rees to look into the matter and initially, he responded quickly and asked the claimant to complete a self-certificate, which he did. Mr Rees then forwarded that to payroll and result should have been that the pay was reimbursed in August or at the latest September 2019.

48. Mr Hill was not an appropriate comparator. His circumstances were materially different to the claimant's. It is accepted they were both absent from work for health reasons, but that was as far as the similarities went. Mr Hill was in contact and engaging with his line manager; the claimant was not. Mr Hill asked what he needed to do with the self-certificate form and provided it promptly; the claimant did not.

49. The Tribunal did consider whether the delay in making the payment to the claimant was what his real complaint was. It finds that it cannot have been the case. When the claimant presented his claim, only the payroll run when the payment could have been reimbursed was August 2019. The claimant then presented his claim on 11/9/2019; as such, he did not wait until the September payroll run. Furthermore, the payment was outstanding at the time of the preliminary hearing and the claimant did not then complain or make the allegation that the delay in making the payment was an issue. He also did not make an application to amend his claim to include such a claim.

50. For those reasons, the claims of unlawful discrimination contrary to the EQA fail and are dismissed.

Employment Judge Wright

08 July 2021