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EMPLOYMENT TRIBUNALS

Claimant: Mr L Mbuisa

Respondent: Care AK Ltd. trading as Kare Plus Huddersfield

Heard : by CVP video link

On: 17 and 18 June 2021
Deliberations in chambers: 17 August 2021

Before: Employment Judge Shepherd

Members: Ms Y Fisher
Mr M Brewer

Appearances:
For the Claimant: In person
For the Respondent: Ms Rumble

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claims brought by the claimant of race discrimination are not well-founded and dismissed.

2. The claims of detriment by reason of making a protected disclosure are not well-founded and dismissed.

3. The claim of unauthorised deduction from wages is not well-founded and is dismissed.

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REASONS

1. The claimant represented himself and the respondent was represented by Ms. Rumble.

During the course of this video hearing there were a substantial number of technical difficulties which meant that the Tribunal was unable to complete the case and provide an extempore judgment. However, it was possible to complete the evidence and hear submissions from both parties although there was a relatively lengthy gap before the Tribunal could meet for the purposes of deliberations.

2. The Tribunal heard evidence from:

Lee Mbuisa, the claimant;
Abdul Khader, director of the respondent company;
John Auckland, Office Manager.

3. The Tribunal had sight of a bundle of documents numbered up to page 458.

4. The issues to be determined by the Tribunal were discussed at the commencement of the hearing. There were issues that had been agreed between the parties. There were some that were not agreed which the claimant had included as Protection under Health and Safety laws and a claim pursuant to the Agency Workers Regulations. However, this was not a claim that had been brought by the claimant or identified during the numerous Preliminary Hearings.

The agreed list of issues was as follows:

1 **Direct Race Discrimination**

1.1. Did the respondent treat the claimant as follows:

1.1.1 Failure to deal with his complaint of race discrimination when working for HC One made on 29 October 2018;

1.1.2 Failure to deal with his complaint about events that took place when he was working for Red Laithes made on 22 January 2019?

1.2. Was that less favourable treatment?

1.3. If so, was it because of race?

1.4 If so, has the claim been brought in time?

1.5. If not, does the complaint form part of a course of conduct extending over a period with a last act occurring within the statutory time limit?

1.6. If not has the claim been brought within such other period as the Employment Tribunal thinks just and equitable?

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2. Race related harassment

2.1 Did the respondent do the following:

2.1.1. The respondent not investigating his HC One complaint dated 29 October 2018.

2.2. If so, was that unwanted conduct and did it relate to race.

2.3. If so did it have the purpose of violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him?

2.4. If not, did it have that effect?

2.5. If so, has the claim been brought in time?

2.6. If not, does the complaint form part of a course of conduct extending over a period with a last act occurring within the statutory time limit?

2.7. If not has the claim been brought within such other period as the Employment Tribunal thinks just and equitable?

3. Protected disclosure detriment

3.1. Did the claimant make a protected disclosure:

3.1.1.In his HC One complaint of 29 October 2018, which he says disclosed information that, in his reasonable belief, tended to show the breach of a legal obligation and/or danger to health and safety;

3.1.2. In his Red Laithes complaint of 22 January 2019, which he says disclosed information that, in his reasonable belief, tended to show a danger to health and safety;

3.1.3. In a conversation with Mr Khader on 4 March 2019, in which he says he told Mr Khader that HC One did not want him to work there again because he was highlighting medication errors they made. He says in his reasonable belief this tended to show a danger to health and safety?

3.2. The Tribunal must decide:

3.2.1. What the claimant said or wrote?

3.2.2. Did he disclose information?

3.2.3. Did he believe the disclosure of information was made in the public interest?

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3.2.4. Was that belief reasonable?

3.2.5. Did he believe it tended to show that:

3.2.5.1. A person had failed, was failing, or was likely to fail to comply with any legal obligation;

3.2.5.2 The health or safety of an individual had been, was being or was likely to be endangered?

3.2.6. Was that belief reasonable?

3.3. Did the respondent do the following things:

3.3.1.Terminate the claimant's contract or refuse to offer him more shifts;

3.3.2. Not pay the claimant his holiday pay or wages?

3.4. If so, was that done on the ground that the claimant made a protected disclosure?

4. **Remedy**

4.1. What financial loss has the discrimination or detrimental treatment caused the claimant?

4.2. Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

4.3. If not, for what period of loss should the claimant be compensated?

4.4. What injury to feelings has the discrimination or detrimental treatment caused the claimant and how much compensation should be awarded for that?

4.5. Should interest be awarded? If so, how much?

5. The following issues put forward by the climant were not agreed by the respondent:

1. **Protection under health and safety laws**; Kare Plus had a duty to protect the claimant under health and safety laws. All workers are entitled to work in an environment where the risks to their health and safety are properly controlled. if you are an agency or temporary worker then your health and safety is protected by law and employment businesses (agencies) have a duty to make sure that they follow it. This means making sure that workers are protected from anything that may cause harm, effectively controlling any risks to health that could arise in the work place.

This was not an issue within the jurisdiction of this Tribunal.

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2. **Unlawful deductions** - pay arrears and admin fees.

3. **Non payment of Holiday pay**

6. In a Case Management Order dated 1 June 2021 Employment Judge Davies refused the respondent's application to strike out the claims of wages of £58 and holiday pay of £488.96. They had not been listed in the claims and issues but they were in the claim form and a fair hearing of these claims remained possible.

The respondent's consented to judgment in respect of the holiday pay but the claim of unauthorised deduction from wages remained extant.

Agency Workers Regulations 2010

7. The Respondent argued that the above claims are outside the jurisdiction of the Tribunal, insufficiently particularised and/or were subject to an unless order in the following terms from Employment Judge Davies dated 14 October 2020:

> *I will issue a judgment dismissing any other complaints referred to directly or indirectly in these proceedings apart from those identified above unless the claimant writes to the Tribunal by 2 November 2020 objecting and explaining why.*

There was no claim brought under the Agency Workers Regulations by the claimant and that was not an issue before this Tribunal.

8. When the issues were discussed, the claimant was under the misapprehension that there was an ongoing claim of disability discrimination. However, all the disability discrimination claims had been struck out, together with a number of other claims, in the judgment of Employment Judge Lancaster on, 16 December 2020, following the claimant's failure to pay deposits that the claimant had been ordered to pay as a condition of proceeding with those allegations.

Findings of fact

9. Having considered all the evidence, both oral and documentary, the Tribunal makes the following findings of fact on the balance of probabilities. These written findings are not intended to cover every point of evidence given. These findings are a summary of the principal findings that the Tribunal made from which it drew its conclusions.

Where the Tribunal heard evidence on matters for which it makes no finding, or does not make a finding to the same level of detail as the evidence presented, that reflects the extent to which the Tribunal considers that the particular matter assists in determining the issues. Some of the Tribunal's findings are also set out in its conclusions, to avoid unnecessary repetition, and some of the conclusions are set out within the findings of fact. The identity of those mentioned who did not appear before the Tribunal or provide a witness statement have been anonymised.

9 .1. The claimant was an agency worker engaged by the respondent from 7 August 2018.

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9.2. The respondent is a staffing agency providing temporary agency workers to care homes in the Huddersfield area as a franchise of the Kare Plus network which operates nationally.

9.3. The claimant was taken on as an agency worker and was provided with shifts at various care homes.

9.4. The claimant was offered shifts, usually by text message, and he would then send a text confirmation or provide a telephone confirmation.

9.5. On or around 29 October 2018 the claimant sent a 'complaint report' to the respondent. This was stated to be for the attention of Kare Plus and HC-One, the operator of White Rose House. The claimant complained about an employee of HC-One who had verbally abused him and shouted at him that he was a "lazy black African". The complaint also made reference to the standard of care provided for residents and that the home was shortstaffed.

9.6. The respondent sent the complaint report to the manager at White Rose House on 29 October 2018.

9.7. On 22 November 2018 the respondent sent an email to the White Rose House Manager asking for an update regarding the complaint made by the claimant. In the email it said that the claimant "keeps asking us for an update."

9.8. Abdul Khader, the respondent's Managing Director, said that he provided updates, so far as he was able, to the claimant when he attended the office. The claimant did not seek an update in writing at any stage.

9.9. The claimant continued to work some shifts at White Rose House.

9.10. On 22 January 2019 the claimant provided an 'incident report' in respect of a shift that he had worked at Red Laithes Court, a care home run by Kirklees Council.

9.11. In the incident report the claimant referred to a staff member who had said to him that he must provide personal care for a resident. The claimant had explained that he should not do so until instructed by the Team Leader. The Team Leader had left the shift and the member of staff became verbally abusive. The claimant complained that she was talking down to him. He said that he raised concerns about doing personal care before being cleared to do so by the Team Leader.The claimant stated:

> "The staff member picks on me because am an agency staff and believe she would not do that to other staff members employed. Everything I do the staff member always has something to say about me. It will be very difficult for any agency staff to work there because of staff attitude towards agency staff how they treat agency staff as if they are not humans."

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9.12. The Tribunal had sight of numerous text messages between the respondent and the claimant. The system for booking was that a message would be sent to all the agency workers indicating that a shift was available on a certain date and asking that if they could cover it, they should get in touch with the respondent.

9.13. On 22 February 2019 at 15:49 the respondent sent a text message to the claimant stating:

> "Hi are you on the way to cherry trees as they have rung to say you haven't arrived for the shift which started at 3.30.

9.14. The claimant responded at 21:48 stating:

> " Am sorry just got back now from London and I totally forgot about the shift yesterday I would have cancelled it."

9.15. On 27 February 2019 there was an exchange of text messages between the respondent and the claimant as follows:

> Respondent:
>
> "Hi are you okay with a team leader shift at Tolson Grange on Monday 4th and Tuesday 5th and Saturday 9? If so please let us know urgent as the shift is online and will be booked on first come basis. Kare Plus Huddersfield."
>
> Claimant:
>
> "Yes it's ok"
>
> Respondent:
>
> "Ok submitted your name for those three shifts, if and when confirmed we will send you a confirmation text. Kare Plus Huddersfield."
>
> Respondent:
>
> "Could you senior carer shifts at White Rose on Thursday, Friday, Saturday and Sunday nights this week?"
>
> Claimant:
>
> "No not this week I am only available Saturday day. Thank you."
>
> Respondent:
>
> "Hi we still have your name put forward against the team leader orders for next week at Tolson Grange. Do you want us to withdraw them or leave it as it is until confirmed? Once confirmed it will be difficult for us to approach GRI to revoke those shifts so please let us know urgently if you want us to withdraw your name from those unconfirmed bookings. Kare Plus Huddersfield."

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Thursday 28 February 2019, 09:28

Respondent:

"Hi, your shifts at Tolson Grange as a team leader is confirmed for these nights from 21.30 – 7.30:4th, 5th and 9th March. Please acknowledge receipt of the text. Kare Plus Huddersfield."

Friday 1 March, 07:54

Respondent:

"Hello, we sent you a text yesterday confirming your shifts at Tolson Grange for next week. We have not received a receipt of text acknowledgement from you as normal and we rang you many times yesterday to make sure you have got the text but there was no answer nor you called back. If we don't hear from you by 12 noon today we will take it that you are not committed to covering them shifts as initially agreed therefore we will have no choice but to replace those shifts. Kare Plus Huddersfield."

Saturday 2 March, O8:06

Claimant:

"Look I just don't want to argue with you so please take me off. I have no one speak to me like that when I have a legitimate reason. After all I am paid little for a senior carer role. You even called after my daughter passed away showing how much little respect you have for me. Getting calls while in bereavement is just appalling. You have not paid me but still asked me to take shifts. You have left me with no choice but put claim for money you owe me and my holiday pay."

Monday 4 March, 07:57

Respondent:

"We suggest you check the facts before saying things that are incorrect. We have not offered you any new shifts since last Wednesday, instead, we were only checking on the shifts at Tolson Grange that you had agreed to cover prior to your last cancelled shift at White Rose.

We only rang you a week or so after your daughter's death, purely as a sympathetic gesture to see if you were coping okay and also to obtain the referee details which we had requested by text but upon not hearing from you for some days we were obliged to ring you as this was urgently required by the client. So clearly the call wasn't regarding shifts as stated in your last text. Again you should check the facts properly before pointing a finger at us.

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We rang you many times last week but when you didn't reply we had sent you an email on Friday stating "we will not be able to offer you any further shifts and that as per the contract you must ensure to return the uniform, badge and any unused timesheets following which your withheld payment will be released."

We have no intention of entering into a meaningless debate by text nor will we tolerate baseless accusations from you but you may give us a call if you would like to discuss your position sensibly or alternatively return the items provided by us by post or in person as per the contract so that we can release your payment and close your file. Kare Plus Huddersfield."

Claimant:

"I am taking my case to employment tribunals. I will meet you there. I raised several complaints which you didn't even bother to acknowledge receipt or respond I am making my claim. I will also approach my MP in regards to this and I will amplify this so the whole nation will know about you. You have no legal standing to withhold my wages whatsoever, after sending text that I have been paid. Fraudulent misrepresentation. You have messed up the wrong person. I will fight for my human rights for which you have disrespected and stripped me of. It's not about money but due process of law to prove that you don't treat people like animals. The fact that I am African does not give you any legal right to treat me in this way. Justice will prevail.

The ID card has my personal details which you are not authorised have as I have immediately withdrawn/revoked any legal rights to hold, process, possess or reproduce or print any personal details information that you hold under the data protection act 2018.

You better check text messages on 3,4,6,7,8,9,10,13,14,15 etc once again misrepresentation. I will contacting ACAS today and this serves as the final notice and no other notice will be served."

Respondent:

"Bearing in mind our contract and strict company policy with regard to safeguarding we trust that you will appreciate the importance of the uniform, badge, timesheets being returned without delay as indicated earlier. Once you have complied with that request your final payment will be released without delay. Kare Plus Huddersfield."

9.16. On 7 March 2019 Kirklees Council sent an email to the respondent in which it was indicated that the Team Manager for Social Care and Well-being for Adults had contacted her line manager who felt that the verbal feedback is sufficient and they would not be providing a written account. The respondent replied indicating that they would inform the claimant.

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9.17. On 11 March 2019 of the respondent sent an email to the manager of White Rose House asking for an update in respect of the statement of the claimant as it was indicated that he kept asking for an update.

9.18. On 7 May 2019 the claimant presented a claim to the Employment Tribunal. He brought claims of unfair dismissal, race and disability discrimination. Claims of notice pay, holiday pay, arrears of pay and other payments.

9.19. A number of those claims have been dismissed or withdrawn and the issues which remain to be determined by the Tribunal are as those as set out in paragraph 4 above.

The law

10. **Protected Disclosure Claim**

Section 43B (1) of the Employment Rights Act 1996

"(1) In this part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following –

(a) that a criminal offence has been committed, is being committed or is likely to yes it looks like tomorrow's be committed;
(b) obligation to which he is subject;
(c) that a miscarriage of justice has occurred, is occurring or is likely to occur;
(d) that the health or safety of an individual has been, is being or is likely to be endangered;
(e) that the environment has been, is being or is likely to be damaged; or
(f) that information tending to show any matter falling within any one the preceding paragraphs has been or is likely to be deliberately concealed".

The claimant in this case seeks to rely upon disclosures to the respondent and section 43C of the 1996 Act provides: -

> "A qualifying disclosure is made in accordance with this section if the worker makes the disclosure in good faith –
>
> (a) to his employer…..".

Section 47B (1)

"A worker has the right not to be subjected to any detriment by an act, or any deliberate failure to act, by his employer done on the ground that the workers made a protected disclosure."

Section 48(2) provides that on a complaint to an Employment Tribunal

> "… it is for the employer to show the ground on which any act, or deliberate failure to act, was done."

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Section 43K provides:

(1) For the purposes of this Part "worker" includes an individual who is not a worker as defined by section 230(3) but who –

> (a) works or worked for a person in circumstances in which –
>
> > (i) he is or was introduced supplied to do that work by a third person, and
> >
> > (ii) the terms on which he is or was engaged to do the work are or were in practice substantially determined not by him but by the person for whom he works or worked, by the third person or by both of them.
>
> (b) contracts or contracted with a person, for the purposes of that person's business, for the execution of work to be done in a place not under the control or management of that person and would fall under section 230 (3) (b) if for "personally" in that provision there were substituted "(whether personally or otherwise)"…

(2) For the purposes of this Part "employer" includes –

> (a) in relation to a worker falling within paragraph (a) of subsection (1), the person who substantially determines or determined the terms on which he is or was engaged…

11. Section 43K provides an extended definition of the meaning of "worker" in order to bring a claim of detriment on the ground that the worker has made a protected disclosure pursuant to section 47B.

12. Section 43K was considered by the Employment Appeal Tribunal in **Croke v Hydro Aluminium Worcester Ltd [2007] ICR1303.** The EAT reached the conclusion that, in construing the definition of "worker" in section 43K, it was appropriate to adopt a purposive approach. Accordingly, where an individual supplied his services to an employment agency through his own company and the employment agency, in turn, provided the services of that company to an end-user, it may be that in appropriate circumstances the individual is a "worker" of the end user for the purposes of section 43K.

13. Section 230(3) Employment Rights Act 1996 provides that an individual is a worker if he or she works under a contract of employment, or any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.

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14. The definition of a qualifying disclosure breaks down into several elements which the Tribunal must consider in turn in order to determine whether there was a qualifying disclosure. There are several appellate authorities which would normally be considered. However, in this case it is accepted by the respondents that the claimant had made qualifying disclosures. The Tribunal is satisfied that the disclosures made by the claimant were disclosures of information which, in the reasonable belief of the claimant, tended to show that the respondent had failed to comply with their legal obligations.

Race discrimination

Direct discrimination

15. Section 13 of the Equality Act 2010 states:

> (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.
>
> (2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.
>
> (3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.
>
> (4) If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.
>
> (5) If the protected characteristic is race, less favourable treatment includes segregating B from others.

16. **Harassment**

Section 26 of the Equality Act 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--

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(a) the perception of B;

(b) the other circumstances of the case;

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

Burden of Proof

17. Section 136 of the Equality Act 2010 states:

> "(1) This Section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court. There may be two employers for these purposes under s. 43K(2)(a) ERA 1996."

Guidance has been given to Tribunals in a number of cases. In **Igen v Wong [2005] IRLR 258** and approved again **in Madarassy v Normura International plc [2007] EWCA 33.**

To summarise, the claimant must prove, on the balance of probabilities, facts from which a Tribunal could conclude, in the absence of an adequate explanation that the respondent had discriminated against her. If the claimant does this, then the respondent must prove that it did not commit the act. This is known as the shifting burden of proof. Once the claimant has established a prima facie case (which will require the Tribunal to hear evidence from the claimant and the respondent, to see what proper inferences may be drawn), the burden of proof shifts to the respondent to disprove the allegations. This will require consideration of the subjective reasons that caused the employer to act as he did. The respondent will have to show a non-discriminatory reason for the difference in treatment. In the case of **Madarassy** the Court of Appeal made it clear that the bare facts of a difference in status and a difference in treatment indicate only 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".

A claimant cannot rely on unreasonable treatment by the employer as that does not infer that there has been unlawful direct discrimination; see **Glasgow City Council v Zafar** [1998] ICR 120. Unreasonable treatment of itself does not shift the burden of proof. It may in certain circumstances be evidence of discrimination so as to engage stage 2 of the burden of proof provisions and required the employer to provide an explanation. If no such explanation is provided there can be an inference of discrimination **Bahl v Law Society** [2004] IRLR 799.

18. In the case of **Qureshi v Victoria University of Manchester and another** [2001] ICR 863 Mummery J said:

> "There is a tendency, however, where many evidentiary incidents or items are introduced, to be carried away by them and to treat each of the allegations, incidents or items as if they were themselves the subject of a complaint. In the present case it was necessary for the Tribunal to find the primary facts about those allegations. It was not, however, necessary for the Tribunal to ask itself, in relation to each such incident or item, whether it was itself explicable on "racial grounds" or on other grounds. That is a misapprehension about the nature and purpose of evidentiary facts. The function of the Tribunal is to find the primary facts from which they will be asked to draw inferences and then for the Tribunal to look at the totality of those facts (including the respondent's explanations) in order to see whether it is legitimate to infer that the acts or decisions complained of in the originating applications were on "racial grounds". The fragmented approach adopted by the Tribunal in this case would inevitably have the effect of diminishing any eloquence that the cumulative effect of the primary facts might have on the issue of racial grounds. The process of inference is itself a matter of applying common sense and judgment to the facts, and assessing the probabilities on the issue whether racial grounds were an effective cause of the acts complained of or were not. The assessment of the parties and their witnesses when they give evidence also form an important part of the process of inference. The Tribunal may find that the force of the primary facts is insufficient to justify an inference of racial grounds. It may find that any inference that it might have made is negated by a satisfactory explanation from the respondent of non-racial grounds of action or decision."

19. Since the House of Lords' Judgment in **Shamoon v Chief Constable Royal Ulster Constabulary** [2003] IRLR 285 the Tribunal should approach the question of whether there is direct discrimination by asking the single question of the reason why. That case has been expanded on by **Chief Constable of West Yorkshire Police v Khan** [2001] IRLR 830, **Ladele, Amnesty International v Ahmed** [2009] IRLR 884, **Aylott v Stockton on Tees Borough Council** [2010] IRLR 994, **Martin v Devonshires Solicitors** [2011] ICR 352**, JP Morgan Europe Limited v Cheeidan** [2011] EWCA Civ 648, and **Cordell v Foreign and Commonwealth Office** [2012] ICR 280.

20. For a finding of direct discrimination it is not necessary for the discriminator to be consciously motivated in treating the complainant less favourably. It is sufficient if it can be inferred from the evidence that a significant cause of the discriminator to act in the way he has acted is because of the persons protected characteristic. As Lord Nicholls said in **Nagarajan v London Transport,**

> "Thus, in every case, it is necessary to enquire why the complainant received less favourable treatment. This is the crucial question. Was it on the grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job? Save in obvious cases, answering the crucial question, will call for some consideration of the mental process of the alleged discriminator. Treatment, favourable or unfavourable, is a consequence which follows from a decision."

21. Therefore, in most cases the question to be asked by the Tribunal requires some consideration of the mental process of the discriminator. Once established that the

reason for the act of the discriminator was on a prohibited ground the explanation for the discriminator doing that act is irrelevant. Liability has then been established.

22. In the case of **Qureshi v Victoria University of Manchester** Mummery J said, with regard to race discrimination:

> "As frequently observed in race discrimination cases, the applicant is often faced with the difficulty of discharging the burden of proof in the absence of direct evidence on the issue of racial grounds for the alleged discriminatory actions and decisions. The Applicant faces special difficulties in a case of alleged institutional discrimination which, if it exists, may be inadvertent and unintentional. The Tribunal …. must also consider what inferences may be drawn from all the primary facts. Those primary facts may include not only the acts which form the subject matter of the complaint but also other acts alleged by the applicant to constitute evidence pointing to a racial ground for the alleged discriminatory act or decision. It is this aspect of the evidence in race relations cases that seems to cause the greatest difficulties. Circumstantial evidence presents a serious practical problem for the Tribunal of fact. How can it be kept within reasonable limits?"

23. The Tribunal had the benefit of oral submissions from the claimant and Ms Rumble On behalf of the respondent. They are not set out in detail but both parties can be assured that the Tribunal has considered all the points made and all the authorities relied upon, even where no specific reference is made to them.

Conclusions

24. The claimant's evidence and submissions were extremely difficult to follow. He presented shifting claims. His evidence was vague and confused and his submissions continue to refer to matters that had been determined as being outside the Tribunal's jurisdiction or that have been struck out such as claims of disability discrimination.

25. The claimant made submissions with regard to the principle of benefit and burden. The case he referred to, **Halsall v Brizell [1957] Ch169** is a land law case concerning the enforceability of a covenant in which it was held that a party may not take the benefit of a right granted without accepting the corresponding burden which goes with that right.

26. He also referred to vicarious liability but that was not an issue that had been identified that required determination by the Tribunal. The Tribunal is not satisfied that the respondent could be held liable for actions of the employee of HC-One. In his statement the claimant makes reference to section 109 of the Equality Act 2010 but the respondent was not the employer or principal of an agent in this regard. They had no influence over the employees of their clients.

27. The Tribunal has carefully considered the agreed list of issues as follows:

1 **Direct Race Discrimination**

1.1. Did the respondent treat the claimant as follows:

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1.1.1 Failure to deal with his complaint of race discrimination when working for HC One made on 29 October 2018;

1.1.2 Failure to deal with his complaint about events that took place when he was working for Red Laithes made on 22 January 2019?

28. The Tribunal finds that the respondent did not carry out thorough investigations but it did pass the claimant's complaints onto the end users. It was said that this was in compliance with its procedures and the same way it would deal with any other such complaints. The respondent's case was that it did what it could in the circumstances. There was no evidence of less favourable treatment. The respondent would have treated anyone else in the same circumstances in the same way. There was no evidence that there was any treatment related to any treatment on the grounds of the claimant's race.

29. With regard to the HC-One complaint it is accepted that the respondent did not carry out an investigation but they maintained that they did what they could. The respondent said that it followed its own procedure. The claimant returned to work in the same place. No grievance was raised against the respondent and how it was dealt with.

1.2. Was that less favourable treatment?

1.3. If so, was it because of race?

30. There was no evidence that any failure to investigate further was because of the claimant's race. The claimant said that he could think of no other reason. However there was clear evidence from the respondent's witnesses that their actions bore no relation to race. They both made it clear that they felt there was little they could do in view of the commercial relationship with their clients. The Court of Appeal In the case of **Madarassy** made it clear that the bare facts of a difference in status and a difference in treatment indicate only 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".

31. In this case there was nothing more than the claimant's suspicion that the failure to investigate was because of his race. There was not something more that could lead to a reversal of the burden of proof.

32. If the burden of proof had shifted to the respondent, the Tribunal is satisfied that the respondent had established a non-discriminatory reason for the failure to investigate. That of the perception that there was little they could do in view of the commercial relationship with their clients.

1.4 If so, has the claim been brought in time?

1.5. If not, does the complaint form part of a course of conduct extending over a period with a last act occurring within the statutory time limit?

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1.6. If not has the claim been brought within such other period as the Employment Tribunal thinks just and equitable?

33. It was accepted by the respondent that the claims were in time or, if they were not then it was accepted that they would meet the requirements for just and equitable extension.

2. Race related harassment

2.1 Did the respondent do the following:

2.1.1. The respondent not investigating his HC One complaint dated 29 October 2018.

2.2. If so, was that unwanted conduct and did it relate to race.

34. As set out above with regard to direct discrimination the respondent reported the matter to HC-One. The respondent did not carry out any investigation by reason of its commercial relationship with its clients and not on grounds related to the claimant's race.

2.3. If so did it have the purpose of violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him?

35. The claimant continued to work as normal. He returned to the same care home on 7 January 2019 and did not raise any concerns about the way the respondent was dealing with matters until after the relationship had come to a end.

2.4. If not, did it have that effect?

2.5. If so, has the claim been brought in time?

2.6. If not, does the complaint form part of a course of conduct extending over a period with a last act occurring within the statutory time limit?

2.7. If not has the claim been brought within such other period as the Employment Tribunal thinks just and equitable?

36. It was accepted by the respondent that the claim was brought within time or within such other period as the Tribunal thinks just and equitable.

3. Protected disclosure detriment

3.1. Did the claimant make a protected disclosure:

3.1.1.In his HC- One complaint of 29 October 2018, which he says disclosed information that in his reasonable belief tended to show the breach of a legal obligation and/or danger to health and safety;

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3.1.2. In his Red Laithes complaint of 22 January 2019, which he says disclosed information that in his reasonable belief tended to show a danger to health and safety;

3.1.3. In a conversation with Mr Khader on 4 March 2019, in which he says he told Mr Khader that HC One did not want him to work there again because he was highlighting medication errors they made. He says in his reasonable belief this tended to show a danger to health and safety?

37. The claimant withdrew his allegation in respect of the conversation on 4 March 2019. The identified issue refers to Mr Kharder but he then said the conversation was with Mr Auckland. He did not ask Mr Auckland any questions in cross-examination. The claimant said that he withdrew that claim because he could not remember what had taken place in the telephone conversation. He was unable to tell the Tribunal what happened in the alleged telephone conversation with John Auckland.

3.2. The Tribunal must decide:

3.2.1. What the claimant said or wrote?

3.2.2. Did he disclose information?

3.2.3. Did he believe the disclosure of information was made in the public interest?

3.2.4. Was that belief reasonable?

3.2.5. Did he believe it tended to show that:

3.2.5.1. A person had failed, was failing, or was likely to fail to comply with any legal obligation;

3.2.5.2 The health or safety of an individual had been, was being or was likely to be endangered?

3.2.6. Was that belief reasonable?

38. There is no requirement to go through these steps because the respondent accepted that there were two protected disclosures made in the two complaints on 29 October 2018 and 22 January 2019.

3.3. Did the respondent do the following things:

3.3.1.Terminate the claimant's contract or refuse to offer him more shifts;

3.3.2. Not pay the claimant his holiday pay or wages?

3.4. If so, was that done on the ground that the claimant made a protected disclosure?

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39. The Tribunal is satisfied that the termination was as a result of the claimant failing to confirm that he would work shifts.The relationship then broke down**.** The content of the text messages showed that the respondent was concerned about the claimant having failed to attend a shift on 22 February and the respondent then pressed him with regard to information required. The respondent continued to offer shifts to the claimant

40. There was a dispute as to what happened at the end of the relationship. After both of the protected disclosures the claimant was offered and accepted work. The termination was as a direct result of a series of texts from 27 February requesting the claimant to confirm his attendance at shifts. It was understandable as the claimant had not responded when asked if he would attend. The Tribunal is satisfied that this is a step the respondent would take with any member of the respondant's agency workers. There was no evidence that the contract was terminated on the ground that the claimant had made protected disclosures.

41. There was a failure to pay the claimant's holiday pay but this was on the basis that the respondent was of the view that the claimant was not entitled to holiday pay. It was not on the ground that the claimant made protected disclosures.

42. The following were issues put forward by the claimant that were not agreed by the respondent:

Protection under health and safety laws; Kare Plus had a duty to protect the claimant under health and safety laws. All workers are entitled to work in an environment where the risks to their health and safety are properly controlled. if you are an agency or temporary worker then your health and safety is protected by law and employment businesses (agencies) have a duty to make sure that they follow it. This means making sure that workers are protected from anything that may cause harm, effectively controlling any risks to health that could arise in the work place.

43. This was not an issue within the jurisdiction of this Tribunal.

Unlawful deductions - pay arrears and admin fees.

44. The deduction from wages was authorised in a signed document headed induction checklist which stated:

"I also confirm that following the termination of employment by either myself or Kare Plus office that I am registered for work with. Should this not be returned to my local Kare Plus office within 5 days of termination, I hereby authorise Kare Plus to deduct the cost of the uniform and ID badge from my final wage payment, (unless the uniform has been purchased by myself initially)."

45. The Tribunal is satisfied that there was no unauthorised deduction from wages. Section 13 of the Employment Rights Act 1996 provides that an employer "shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant

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provision of the worker's contract, or the worker has previously signified in writing his agreement or consent to the making of the deduction."

46. The deduction was made following written consent included within the document signed by the claimant.

Non payment of Holiday pay.

47. This was agreed and is within the consent order.

48. In all the circumstances and, for the reasons set out above, the claims of race discrimination, detriment by reason of making a protected disclosure and unauthorised deduction from wages are not well-founded and are dismissed.

Employment Judge Shepherd
23 August 2021

Sent to the parties on:
26 August 2021