EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		Respondent
MR S DZIOBEK	**AND**	**GENIECARE HOMES LTD**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: BRISTOL ON: 31ST AUGUST / 1ST / 2ND SEPTEMBER 2021

EMPLOYMENT JUDGE MR P CADNEY (SITTING ALONE)

MEMBERS: MS J LE VAILLANT MS E SMILLIE

APPEARANCES:-

FOR THE CLAIMANT:- **IN PERSON**
INTERPRETER : MS A BRZEZINSKA

FOR THE RESPONDENT:- **MR J ELLISON**

JUDGMENT

The judgment of the tribunal is that:-

The claimant's claims for ;

i) Direct Race discrimination (s13 Equality Act 2010);

ii) Direct Age discrimination (s13 Equality Act 2010)

are not well founded and are dismissed.

Reasons

1. By this claim the claimant brings claims of direct age and race discrimination. He originally also brought a claim of unfair dismissal. At a Preliminary hearing on 3rd February 2021 EJ Bax determined that the claim for unfair dismissal had been submitted out of time, and that time should not be extended, resulting in its dismissal by a judgment entered on 4th February 2021. In respect of the allegations of race and age discrimination, he determined that although submitted out of time that it was just and equitable to extend time in respect of the last alleged act of discrimination (in each case the claimant's dismissal) leaving the issues to be resolved of whether the earlier events formed part of a continuing act and/or if not whether it was just and equitable also to extend time in respect of them.

Summary

2. The respondent is a company which owns and runs a number of care homes for the elderly in and around Bristol. In 2016 it acquired the Granville Lodge Care Home. The evidence before us is that it needed a considerable amount of work to bring it up to an acceptable standard, and the respondent employed two maintenance staff; the claimant who is Polish and at the time of his dismissal was sixty-two years of age, and Mr Harvey White, who is British and was fifty-six at that time. In September 2019 the respondent decided that the care home could operate with one maintenance operative and began a redundancy selection process. Mr White scored more highly than the claimant and was retained and the claimant was dismissed. The claimant contends that this was the culmination of a series of discriminatory events and that all the matters complained of, including dismissal are acts of direct race discrimination. In addition Mr White is younger than the claimant, and he contends that another maintenance operative was engaged at another care home run by the respondent who appeared to be in his forties and that both his dismissal and the failure to offer him the alternative roles are acts of direct age discrimination.

3. The tribunal has heard evidence from the claimant; and on behalf of the respondent from Ms Tanya Cantillon (Home Manager) and Mr Shah Seehootorah (Regional Manager).

Claims

4. The claimant's claims are, as recorded in EJ Bax's case management order, set out below. However for the reasons given below, in some cases the evidence placed before the tribunal was of a significantly different complaint to that recorded in the case management order:

1. *Direct race discrimination (Equality Act 2010 section 13)*

1.1 The Claimant describes himself as Polish.

1.2 Did the Respondent do the following things:

1.2.1 There was a staffroom and the Claimant understood that he could speak his own language in that room during his break and others spoke Romanian and Persian. About 2 weeks after Tanya became manager of the home in 2018, Shen Butt, owner, after speaking to Tanya told him that he must not speak Polish and told him to report others if they spoke Polish at work; No one else was told off for this.

1.2.2 The Claimant was made to travel to the other care home (Woodlands) in March and April 2019 near Filton to drop off supplies and blood samples in his private car, when Mr White lived 5km from it and he was not asked to do this

1.2.3 In March/April 2019, the Claimant had to buy paint and then paint at the care home near Filton (Woodlands) for 6 hours and travel from his care home in his private car to the other in his private car. Mr White was not required to do this.

1.2.4 In June/July 2019, the Claimant and Mr White were given separate tasks. Mr White did a poor job, but the Claimant was told off for not supervising him.

1.2.5 In summer 2019, he was told off for not wearing safety boots, but English children were allowed to run around the care home.

1.2.6 The scoring in the redundancy was not fairly done between him and Mr White, e.g. the Claimant not wearing safety boots was taken into account, but Mr White had been late on many occasions. The focus in the process was on what the Claimant had done

1.2.7 Offered the Claimant positions of being a care assistant when he had been a mechanic for 40 years and as a kitchen assistant for one hour per week.

1.2.8 Failed to properly search for alternative employment for the Claimant and hired a new maintenance employee at a different care home, woodlands, at the time of the redundancy process.

1.2.9 Dismissed the Claimant and discouraged him from appealing

1.3 Was that less favourable treatment? The Tribunal will have to decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and those of the Claimant. If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated. The Claimant says he was treated worse than Mr White and the new maintenance employee and he also relies upon a hypothetical comparator.

1.4 If so, was it because of race?

1.5 If so, can the Claimant prove primary facts from which the Tribunal could

properly and fairly conclude that the difference in treatment was because of the protected characteristic?

1.6 If so, what is the Respondent's explanation? Can it prove a non-discriminatory reason for any proven treatment?

2. *<u>Direct age discrimination (Equality Act 2010 section 13)</u>*

2.1 The Claimant's age group is early 60's and he compares himself with people in the 40's age group.

2.2 Did the Respondent do the following things:
2.2.1 Failed to properly search for alternative employment for the Claimant and hired a new maintenance employee, who was younger at a different care home at the time of the redundancy process.
2.2.2 Dismissed the Claimant

2.3 Was that less favourable treatment? The Tribunal will have to decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and those of the Claimant. If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated. The Claimant says he was treated worse than the employee who was engaged at Woodlands and/or a hypothetical comparator.

2.4 If so, was it because of age?

2.5 If so, can the Claimant prove primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?

2.6 If so, what is the Respondent's explanation? Can it prove a non-discriminatory reason for any proven treatment?

2.7 Was the treatment a proportionate means of achieving a legitimate aim? If such a defence is relied upon the Respondent will provide details in its amended response

2.8 The Tribunal will decide in particular:
2.8.1 Was the treatment an appropriate and reasonably necessary way to achieve those aims;
2.8.2 Could something less discriminatory have been done instead;
2.8.3 How should the needs of the claimant and the respondent be balanced?

5. Law - Section 13(1) Equality Act 2010-T provides that: 'A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others" For this purpose, S.23(1) stipulates that there must be 'no material difference between the circumstances relating to each case' when determining whether the claimant has been treated less favourably than a comparator. In other words, in order for the comparison to be valid, like must be compared with like.

6. Comparators- As is set out above there are in relation to different factual claims three different comparators. For some of the claims the comparator is Mr White, for one of the age discrimination claims a younger maintenance operative at the Woodlands Care Home; and for others a hypothetical comparator.

7. Burden of proof – The law is not in dispute. The first question for us is whether there are primary facts from which we could draw an inference of discrimination in the absence of an explanation from the respondent. If there are the burden shifts to the respondent to prove the absence of discrimination (the Igen v Wong test) . However, we are not necessarily required to assess those stages in a vacuum or to apply that structure in an overly mechanistic way.

8. Claims/Evidence - One of the central difficulties in the case is that the claimant's understanding of the process is that he needed only to place evidence of matters about which he complained before the tribunal. During evidence when the comparative nature of a claim of direct discrimination was explained to him he accepted that in respect of at least some of the claims that he had been treated identically with his comparator Mr White but was simply seeking to place the factual evidence before the tribunal from which the tribunal would determine whether he had been the victim of "discrimination" (in the lay sense of being treated unfairly) or not. In addition he had not complied with the case management order to exchange a witness statement. The respondent did not object when the tribunal took the course of going through each of the allegations orally to amplify and clarify the complaints. However as a result the actual complaints placed before the tribunal are in some cases very different from those recorded as the issues in the case management order. This is not to criticise the claimant who is a litigant in person conducting litigation in England in a language which is not his first language. Equally, however, it meant that in some cases the respondent only understood that the allegation it had to meet was not that set out in the case management order, but a claim which was only articulated on the first morning of the hearing itself.

Direct Race Discrimination

9. We will deal with the allegations in the order set out above.

Allegation 1

There was a staffroom and the Claimant understood that he could speak his own language in that room during his break and others spoke Romanian and Persian. About 2 weeks after Tanya became manager of the home in 2018, Shen Butt, owner, after speaking to Tanya told him that he must not speak Polish and told him to report others if they spoke Polish at work; No one else was told off for this.

10. The first allegation is that the claimant was spoken to by Shen Butt, after Ms Cantillon complained that he had been speaking Polish in the staffroom /canteen. He alleges that he was told not to speak Polish and to report any other members of staff who did so. It is not in dispute that he respondent had adopted a policy of all staff speaking English in the communal areas of the home, and the claimant accepted and makes no complaint about that policy. However he alleges that the canteen/staffroom was not a communal area and that staff of all different nationalities spoke in languages other than English in it without complaint. Ms Cantillon agrees entirely with this and accepts that it was entirely permissible for staff speak languages other than English in non-communal areas. However she denies ever complaining about the claimant speaking Polish in a staff area to Shen Butt.

11. The respondent submits that even if the claimant is correct that he was spoken to by Shen Butt about the policy, even on his own evidence all that occurred was that he was effectively reminded about a policy to which he takes no objection. He was not disciplined, on his own evidence nothing further occurred, and to describe this as being “told off” is not accurate. It follows firstly that there is no less favourable treatment, as the same policy applied equally to all employees; and given that there is no actual comparator no evidence that a similar conversation would not have occurred with a hypothetical comparator. Moreover there is no evidence from which it could be inferred, in the absence of an explanation that if Shen Butt spoke to him as he alleges that the reason was “because of” his nationality. Indeed it is the claimant’s case that he was asked to report other members of staff not speaking English which pre-supposes that he was not being treated differently to any other member of staff.

12. In our judgement this analysis must be correct. In our judgement there is nothing even on the claimant’s account from which we could properly infer discrimination, in the absence of an explanation by the respondent, so as to transfer the burden of proof. In reality this appears to be a prime example of an incident in which the claimant believes he was treated unfairly in that he was spoken to about speaking Polish at work when he had only done so in the staffroom, but in respect of which there is no evidence, in our judgement, from which any inference of discrimination because of race could be drawn.

Allegation 2

The Claimant was made to travel to the other care home (Woodlands) in March and April 2019 near Filton to drop off supplies and blood samples in his private car, when Mr White lived 5km from it and he was not asked to do this.

13. The second relates to travel. The claimant alleges, and it is not in dispute, that for approximately two weeks in March/April 2019 that he was required to drive regularly between Granville Lodge and another care home Woodlands. Although Granville Lodge care home had a van he used his private car, which was permitted, and did mileage of some 285 miles. The system for claiming mileage expenses was that there were expense forms in a pigeon hole in the office at the care home. Ordinarily the form would be given to Ms Cantillon or another member of the administrative staff and sent to the company's head office for payment. On this occasion the claimant says he was told by Ms Cantillon to give the claim form to another manager Rad, which he did. Ms Cantillon denies this but it is not in dispute that no claim form was ever given to her or processed through the home's administration. The claimant's case is that he was never paid these expenses but did not at any point before his dismissal chase Rad or make any further enquiry in respect of them. There is, therefore, no evidence before us as to what happened to the expenses claim; whether Rad even accepts that he was given it but forgot to submit it; or whether it was in fact sent to Head Office but not paid due to an administrative oversight or some other reason.

14. This is not to criticise the respondent. As is set out above the claim they understood was being made against them was not the failure to pay expenses but that Mr White had not been required to undertake similar journeys. However in evidence the claimant accepted that it was a normal part of both his and Mr White's duties to drive to acquire stores or equipment and that both on occasion used their private vehicles if the van were not available.

15. It follows that the original allegation as set out in the case management order is not factually borne out by the claimant's evidence; and in respect of the claim of the failure to pay expenses we have no evidence other than the fact that an expenses claim was given to a manager but not subsequently paid. On either basis there are in our judgement no primary facts we can find from which we could conclude that in the absence of an explanation from the respondent that we could draw any inference discrimination.

Allegation 3

In March/April 2019, the Claimant had to buy paint and then paint at the care home near Filton (Woodlands) for 6 hours and travel from his care home in his private car to the other in his private car. Mr White was not required to do this.

16. The third allegation is that in April 2019 the claimant was required to buy paint and paint Woodlands care home. The claimants evidence is that he did so and was fully reimbursed. The allegation as set out above is that Mr White was not required to do so. However as is set out above the claimant accepts in broad terms that he and Mr White were both required to travel and work elsewhere on occasion; and the evidence of the system of allocation of work is that the work required was noted in the maintenance book and the it would be for the claimant and Mr White to agree between themselves who did which job. The claimant does not dispute this. On that basis the fact that the claimant did a job which Mr White did not is firstly inevitable; and more pertinently not a fact from which we can draw any conclusions. In particular the fact that the claimant performed this task and not Mr White is not a fact from which we could draw any inference of discrimination even in the absence of an explanation.

Allegation 4

In June/July 2019, the Claimant and Mr White were given separate tasks. Mr White did a poor job, but the Claimant was told off for not supervising him.

17. The fourth allegation is that in June/July 2019 the claimant and Mr White were given separate jobs but the claimant was told off for not supervising Mr White. This allegation is difficult follow. It is not in dispute that the claimant and Mr White were of equal seniority and status and that neither were responsible for supervising the work of the other. The specific work involved was the installation of some speakers upstairs. Mr White appears to have carried out this work originally, but when the work was inspected by Shen Butt she was unhappy that the wiring was clearly visible and asked for the wires to be repainted or re-routed which was a task carried out by the claimant. The respondent submits that the claimant has not in fact presented any evidence to support the allegation, but rather appears to assume that being asked to carry out further work on a task carried out initially by Mr White equates to being “told off” for not supervising Mr White. However there is in fact no evidence or any suggestion that there was any question of the claimant being told off for failing to supervise Mr White as he alleges. He simply undertook remedial works as required by Shen Butt. There is no factual basis for this allegation; and nothing from which any inference of discrimination could be drawn. Again in our judgement this must be correct.

Allegation 5

In summer 2019, he was told off for not wearing safety boots, but English children were allowed to run around the care home.

18. The fifth allegation is of the claimant being reprimanded for not wearing safety boots whilst English children were permitted to run around the home without wearing them. It is not in dispute that the claimant was required to wear safety boots, as he accepts

Mr White was as well. It is also not in dispute that children, whether visitors' or staff members' children, were not required to do so. The respondent submits simply that this allegation as recorded is bound to fail as visiting children cannot be an appropriate comparator, not least because the respondent would have no ability or capacity to reprimand them as they did not employ them. This must obviously be correct.

19. In any event the respondent submits that the facts as disclosed by the documents were that the claimant was written to notify him that he had been observed wearing sandals and not safety boots and that if he continued to do so he could face disciplinary charges. However he explained that he had an infected toe and no further action was taken. Even if this is what the claimant is in truth complaining about, the appropriate comparator is Mr White and it is clear that given that the same requirement applied to him, that had Mr White been observed not wearing safety boots he would also have been written to in the same terms and it follows there can be no less favourable treatment. Again in our judgement this must be correct.

Allegation 6 / 7 / 8 / 9

The scoring in the redundancy was not fairly done between him and Mr White, e.g. the Claimant not wearing safety boots was taken into account, but Mr White had been late on many occasions. The focus in the process was on what the Claimant had done.

Offered the Claimant positions of being a care assistant when he had been a mechanic for 40 years and as a kitchen assistant for one hour per week.

Failed to properly search for alternative employment for the Claimant and hired a new maintenance employee at a different care home, woodlands, at the time of the redundancy process.

Dismissed the Claimant and discouraged him from appealing

20. The final allegations all relate to the redundancy process. By September 2019 the respondent had concluded that it no longer needed two maintenance staff and they decided to commence a redundancy process. The evidence of Mr Seehootoorah , which we accept, is that ELAS supplied the respondent with employment law advice and that at each stage they followed the advice that they were given. There was an initial meeting with both the claimant and Mr White on 20th September 2019 in which the process and scoring criteria were set out. Both were invited to individual consultation meetings by a letter dated 27th September 2019. Both meetings took place on 4th October 2019. The initial scores given by Mr Seehootoorah were discussed and a number of the claimants were revised upwards. However at the conclusion of the scoring the claimant had scored three marks fewer than Mr White. He had scored 4 and Mr White 5 on Technical Ability, and their respective scores were 3 and five on their disciplinary records. All other scores were identical.

21. At a further meeting on 24th October alternative roles were discussed with the claimant. It was accepted that these were care assistant and kitchen assistant which Mr Seehootorah agrees were not suitable for the claimant. However he was advised he was obliged to offer all available alternative roles and did so. In addition Mr Seehootorah's evidence which we again accept is that the Granville Lodge is a separate legal entity in terms of staff employment and he was advised only to consider redundancy and alternative employment within the context of that legal entity. However after the meeting he asked the claimant if he would be interested in a maintenance job at Woodlands. As the claimant said he was not, that possibility was not pursued, and no formal offer made.

22. We accept his evidence that in particular the issue of safety boots played no part in the selection, that the offer of the alternative employment was on advice, and that fundamentally the claimant was dismissed because his scores were lower than Mr White.

23. As set out above a claim for unfair dismissal was dismissed as having been lodged out of time. Accordingly the tribunal is only concerned with whether the decision to dismiss was itself an act of direct race discrimination and/or whether the other complaints in respect of the redundancy process are acts of direct race discrimination; that is to say they occurred "because of (at least in part) the claimant's nationality.

24. To deal with them individually we accept Mr Seehootorah's evidence that the issue in relation to the wearing of safety boots was not taken into account in the scoring, or played any part in the redundancy selection. It follows that this claim fails on the facts.

25. Again we accept Mr Sehootorah's evidence that he agrees with the claimant that the roles were not suitable for him, and does not criticise him for rejecting them, but that he had been advised that he was obliged to inform the claimant of all available alternative roles as part of the redundancy selection procedure, and did so acting on that advice. It follows that the claimant was offered the roles because Mr Seehootorah had been advised to do so, and not because of the claimant's nationality and that this claim must also fail.

26. The next allegation relates to allegedly hiring a new maintenance employee. Mr Seehootorah denied that this was factually correct, but as set out above, was advised only to focus on the redundancy procedure within Granville Lodge as it was a separate legal entity from Woodland's. In any event he did informally ask the claimant after the formal redundancy selection meeting had concluded whether he wanted to consider working at Woodland's and the claimant declined so the matter was not pursued any further. Again having accepted that evidence it follows that neither the hiring of a new employee , nor the failure to offer the claimant a role at Woodland's is because of his nationality and this claim must also fail.

27. Finally the claimant contends that his dismissal was an act of direct race discrimination. Again we accept Mr Seehootorah's evidence that the dismissal was

because the claimant had scored lower than Mr White and had declined the only alternative roles available; and was not because of his nationality. It follows that this claim must also fail.

Direct Age Discrimination

The Claimant's age group is early 60's and he compares himself with people in the 40's age group.

Did the Respondent do the following things:

Failed to properly search for alternative employment for the Claimant and hired a new maintenance employee, who was younger at a different care home at the time of the redundancy process.

Dismissed the Claimant

28. As set out above the claim is of the failure properly to search for alternative employment and/or hire a younger maintenance employee at Woodlands Care Home. In relation to alternative employment, as set out above, we accept Mr Seehootorah's evidence that he did offer the claimant the only alternative roles available, albeit that he accepts that they were unsuitable. This claim must therefore fail on the facts.

29. In relation to the second, again we accept Mr Seehotorah's evidence that it is not factually correct that a younger maintenance employee was hired at the time of the redundancy selection, albeit that it is not in dispute that there was younger maintenance operative already employed at Woodlands. Again we accept Mr Seehootorah's evidence as to why the claimant was not formally offered any role at Woodland's, and that he was asked informally but declined. In our judgement there is no evidence from which we could conclude in the absence of an explanation that this was discriminatory on the basis of age; and even if we had we would have found that the respondent had discharged any burden.

30. In relation to dismissal the comparator is Mr White who is six years younger than the claimant. In our judgement the simple fact that the claimant was six years older than the other employee who was retained would not of itself be sufficient to satisfy stage 1 of the Igen v Wong test and transfer the burden of proof. For the reasons set out above we have accepted the respondent's evidence as to the reason for dismissal and even if the burden had transferred, which in our judgement it did not, we would have held that the respondent had discharged it.

Time Limits

31. As the claims have all been dismissed on their merits it follows automatically that they cannot form part of any continuing act of discrimination; and that it would be necessary to extend time in respect of them. However, equally having dismissed them on the merits it is not necessary to consider whether to extend time for allegations which will fail in any event.

32. It follows that all the claimant's claims must be dismissed.

Employment Judge Cadney
Date: 25 October 2021

Reasons sent to the parties: 18 November 2021

For the Tribunal Office