EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr GH Ngankeu	**v**	Marshall of Cambridge Aerospace Limited

Heard at: Bury St Edmunds (by CVP)

On: 02, 03, 04 and 05 November 2021.

Before: Employment Judge KJ Palmer

Members: Mr C Davie and Ms L Durrant

Appearances
For the Claimant: Mr J Ratledge (Counsel).
For the Respondent: Mr I Wilson (Solicitor).

JUDGMENT

It is unanimous judgment of this tribunal that the claimant's claims in discrimination on the protected characteristic of race fail and are dismissed. Claimant's counsel having requested written reasons at the conclusion of the hearing those reason are attached below.

REASONS

1. In a claim presented on 8 September 2019 the claimant ventured claims in discrimination on the basis of race being a claim in direct discrimination under s.13 of the Equality Act 2010. He also included a claim at that time for unfair dismissal and other claims for outstanding payments. Subsequently, the claim for unfair dismissal was struck out and the claims for outstanding payments fell away.

2. This tribunal took place over 4 days from 2nd November to 5 November and we had before us a bundle running to many hundreds of pages which had been sent to us electronically by those representing the respondent We also had witness statements and a skeleton argument produced by Mr Wilson on behalf of the respondent and subsequently we received a skeleton argument from Mr Ratledge who was Counsel representing the claimant.

3. During the course of this tribunal we heard evidence from the claimant and the claimant's wife. We also heard evidence from three witnesses for the respondent; Mr Stephen Ward who effected the dismissal and from George Anthony and from Jenny Holland both of whom are employed in the Human Resources department of the respondent. We are very grateful to all parties and witnesses for the way in which they have conducted themselves during the course of this tribunal. Conducting a tribunal by Cloud Video Platform is not easy and it is a very difficult and skilful exercise for the advocates and those involved to navigate their way round the technology and to enable such proceedings to take place relatively seamlessly is a credit to all of those who were involved.

4. The claimant's claims were isolated in an excellent summary produced by Employment Judge Spencer pursuant to a preliminary hearing which took place on 12 June 2020. Essentially the remaining claim being pursued by the claimant was a claim in direct discrimination under s.13 of the Equality Act 2010 and the issues arising out of that claim were broken down by EJ Spencer pursuant to that hearing into four categories. The claimant claims he was subjected to the following treatment:

   (a) A delay in the provision of accommodation in the UAE between January and March 2019.

   (b) Being given a lower accommodation allowance in respect of funding of the claimant's apartment in the UAE from January to March 2019.

   (c) Being unsatisfactorily appraised and not being given the support and guidance to improve his performance (if that was a problem) during his probationary period from 12 March 2019 to 5 August 2019.

   (d) The respondent meeting and then deciding to dismiss the claimant purportedly for unsatisfactory performance, the date of that decision is unknown to the claimant and is believed to be in the period from 5 August to 29 August 2019.

5. The claimant relied in respect of the first claim on an actual comparator Gary Glover, in respect of the second claim on the actual comparators Gary Glover and John Davis and in respect of the third and fourth claims hypothetical comparators.

6. One of the first issues we had to determine was whether claims (a) and (b) were out of time bearing in mind the time limits that are inherent in the legislation in the Equality Act 2010. Dealing with the first claim, claim (a) it is clear on its face that the claim was presented out of time, the claimant presented his claim on 8 September 2019 having initiated ACAS early conciliation on 8 August 2019 yet the claims that he refers to in (a) all occur in a period from January to March 2019. Time begins to run from the last date of the act of discrimination complained of so therefore on any analysis the claimant was at least 1 month and 8 days out of time in respect of claim (a) when lodging his ET1.

7. We have given very careful thought to this aspect and have considered the evidence that we have heard. We understand that during the course of his time in the UAE probably in about March and thereafter the claimant did some research into employment law and what would be required of him if her were to initiate a claim. He did not instruct lawyers and in the giving of his evidence he did admit that he might have concentrated on other aspects of information he gleaned having done that research rather than the time limits themselves.

8. Our view is however that there is very little or no prejudice suffered by the respondent in us exercising our discretion on the just and equitable basis to extend time to validate claim (a). The evidence which is going to be heard is the same evidence that would be ventilated in respect of all of the other claims and we think in the circumstances with the claimant being away and in the UAE it is reasonable that we exercise our discretion to validate claim (a) albeit that it is out of time. We do so.

9. Dealing with claim (b), we are persuaded by Mr Ratledge that the wording in the preliminary hearing summary referring to that claim being restricted to the period from January to March 2019 is a mistake. It seems clear to us having heard the evidence that the claimant's claim in claim (b) relates to the lower accommodation allowance afforded to him in respect of the accommodation he and his wife moved into on 25 March 2019 and which they have occupied thereafter. That means that that claim must be a claim that is extant throughout the period up to him leaving the UAE and therefore on that analysis it seems to us that that is likely to be a continuing act and therefore not out of time. However we are conscious of the authority that was put before us by Mr Wilson and we accept and understand the principal set out in South Western Ambulance Service NHS Foundation Trust v King which essentially said that you cannot consider a claim to be a continuing act until such time as the act is deemed to be discriminatory, so we make an indication that on the basis of the mistake that we think appears in the summary it is likely that if found to be a discriminatory act then it certainly was a continuing act but we will deal with our views on whether it was discriminatory in due course.

10. The background to this claim is that the claimant obtained a job working for the respondent on a particular project which was taking place in the UAE. The claimant was employed as an aircraft fitter and he was deployed to the UAE in January 2019 to work on a project of converting a particular aircraft to a different type of platform for different usage. Naturally that was a very responsible position for him to hold and it brought with it all the attendant importance and safety aspects of working as a fitter in such circumstances.

Findings of Fact

11. The first of the claimant's claims relates to the allegation that there was a delay in the provision of accommodation in the UAE between January and March 2019. We heard evidence that the process of obtaining a visa is handled by an independent contractor and is not dealt with by the

respondent themselves. It appears that such things are to an extent haphazard, we know for example on the evidence before us that Stephen Ward who went to the UAE at the same time as the claimant and whose application was put in at the same time as the claimant did not in fact get his visa until the end of March 2019 when the claimant obtained his visa at the beginning of March on the 3rd or 4th, 2019. As we understand it accommodation cannot be allocated on a more permanent basis until such time as that visa was in place.

12. We cannot see on the evidence before us that we can attach any blame to the respondent for the period of time in which it took to obtain the claimant's visa between his arrival in the UAE and the 3rd and 4th of March particularly in light of the fact that we understand that the rules on visa application changed at about the time he arrived and of course Stephen Ward himself had greater difficulty in obtaining a visa.

13. The question of whether there was then a delay perpetrated by the respondent in the finding of accommodation for the claimant arose more out of the general evidence which we heard than out of the detail in claim (a). One of the claimant's complaints was that he felt he should have been placed in the early part of his time in the UAE in an hotel with his wife rather than being put in a villa for men only where he was subsequently joined by his wife. There is some doubt about when she joined him in the villa, in her evidence his wife indicated that it was early February and in his evidence he indicated that it was later in February.

14. We heard no evidence from anyone who would have been involved in that decision making process but equally we have heard no evidence from the claimant that he made it clear to the respondent that he intended for his wife to join him immediately upon his arrival in the UAE, right from the beginning of his tenure and there is no evidence that he asked to go into the hotel with her either. It seems to us that his wife gave notice on her accommodation as she was already working in the UAE for another company somewhat speculatively and perhaps a little optimistically resulting in a situation where she was likely to become homeless sometime in February 2019. As a result the respondent acceded to her joining the claimant in the male only villa block until such time as they were housed in more appropriate accommodation on 25 March 2019. On the evidence before us we see nothing sinister in the process undertaken between his arrival in the UAE and the housing of him and his wife on 25 March.

15. The claimant's comparator for this complaint was Gary Glover who did go into a hotel with his wife initially before being housed with her subsequently. They were however in a very different position in that they both worked for the respondent so that his wife also worked for the respondent and the visa application had been made earlier when Gary Glover was still in the UK. The respondent knew that his wife would join him from the very start and she was also employed by the respondent. So we do not consider there is anything sinister in the way in which accommodation was handled and dealt with in respect of the claimant's arrival in the UAE.

16. Turning to the second limb of the claimant's claim, this is that he was discriminated against on the grounds of race in that when he was given accommodation for him and his wife the budget for that accommodation and, also the furniture that was to go in it, was lower than that offered to Gary Glover and another employee of the respondent John Davis. This was the subject of the claimant's first complaint which he raised in an email dated 18 March 2019 although perhaps significantly in an email sent the very next day on 19 March he somewhat resiled from that complaint.

17. We are satisfied having heard the evidence of Stephen Ward that there was a perfectly sound reason for the disparity in budget in that Gary Glover and John Davis were more senior than the claimant. The claimant even admitted this fact in cross examination when the corporate chart at page 11 of Stephen Ward's witness statement was put to him. Moreover we know that Gary Glover's wife was also an employee and would herself have attracted a budget which combined with her husband's who was more senior than the claimant would naturally have resulted in a higher budget than the claimant's.

18. Clive Morgan who dealt with budget approval was indeed slow in approving the claimant's accommodation budget and much apology was made to the claimant in this respect by Mr Beddows who was a contractor assisting the claimant with his accommodation. It might have been useful to hear evidence from Clive Morgan but we find nothing to suggest that his delay was motivated by anything other than pressure of work.

19. Turning to the third limb of the claimant's claims and that is being unsatisfactorily appraised and not being given the support and guidance to improve his performance during the probationary period from 12 March to 5 August. Employees at the respondent were all subjected to three appraisals. This is not surprising bearing in mind the nature of the work they were involved in on the conversion of an aircraft with all the attendant safety concerns that such work entails. The 4 week review for the claimant took place in the UK and nothing turns on that and we have heard little or no evidence as to that in these proceedings. The 8 week review which was essentially the first review of the claimant's work that he was subject to after he started working in the UAE was conducted by two individuals, the lead technician on the aircraft who was called Chris O'Hare and the Project Manager for the project who was essentially Chris O'Hare's superior Iona McFarland. We had the notes of that meeting before us.

20. It is clear from the very start that there was some concerns about the claimant's work and these concerns are recorded in these notes. It is clear that the claimant's communication skills were highlighted as an issue, the quality of his work was also questioned and it was determined that greater support would be given to him. We find that better and more detailed examples of his technical failings could have been provided to him at this stage but we were still surprised when in evidence the claimant averred that he thought the 8 week appraisal had gone very well.

21. As a result of that appraisal he was put on a Performance Improvement Plan and the 13 week review then took place on 8 April 2019 and was again conducted by the lead technician and Iona McFarland. Much the same was said as had been said at the 8 week review in that communication skills were still lacking and it was felt that if the claimant were to seek help more often from colleagues the quality of his work would improve and perhaps the speed of him completing tasks would improve. It was noted that he disagreed with this and pursuant to this the claimant was then required to attend a Probationary Review Meeting with Stephen Ward on 29 April. Interestingly there were no notes of this meeting, in fact its very existence and significance only became clear during the course of the hearing and it was necessary to re-swear both Stephen Ward and the claimant back in to give evidence on this meeting alone. It was at this meeting that the claimant raised his principal grievance that he was being discriminated against because of his race in the way he was being appraised and managed.

22. There is some conflict between the evidence Stephen Ward and the claimant as to what took place at that meeting and we feel we must address this.

23. The claimant said that he was clear and articulate about which individual specifically he was accusing of discrimination.

24. Stephen Ward said that he was rather more vague and just said that everybody was discriminating against him.

25. Here we prefer the evidence of Stephen Ward in that when sworn back in we found that he was very happy to admit his failings and his handling of this meeting and we were impressed by his honesty. We have to say the claimant's evidence at times was muddled and unclear. We found that when confronted within incontrovertible facts often recorded in documents which conflicted the evidence he was giving us he would often argue those documents were inaccurate. We therefore consider his evidence less reliable. On balance therefore we accept Stephen Ward's evidence here.

26. However we do agree that when Stephen Ward in essence out of a lack experience, as he admitted, somewhat panicked and put the claimant on what he described as garden leave but which was actually paid leave pending the outcome of the investigation into the allegations of discrimination the claimant quite probably saw this as a fait accompli in respect of which he had no say. We accept that. The fact was that the respondent essentially put the claimant on paid leave pending the grievance investigation outcome. We do find this odd and reprehensible from a procedural point of view. Surely, it would not have been in the claimant's interest to be removed from the work place at the very time when the quality of his work was in question. He should have remained in situ and been able to be given the chance to improve. Nonetheless we accept that Mr Ward's motives were honest and done with good intentions however misguided they may look now in hindsight.

27. We are also bound to say that we take a dim view of the involvement of the HR advisor Mr Anthony who in June extended that misnamed paid leave and further compounded the error by referring to that leave as suspension. This is most unfortunate as suspension should only be used as a last resort as it has connotations of disciplinary sanctions. We accept that there was nothing in this error which was connected with the claimant's race but as an experienced HR Manager this was a serious error of process and had this case been a case of unfair dismissal these actions would we believe have had serious consequences for the respondent. We find no evidence however that such practices would have been different had a hypothetical comparator who was not black been in the same situation as the claimant.

28. The respondent then undertook a grievance process culminating in a meeting on 3 June 2019. The grievance was conducted by Alastair Leech. The outcome of the grievance was given on 13 July and whilst it criticised aspects of the process in respect of the claimant's appraisals it found no grounds to conclude that there was any discrimination on the grounds of race. There was an appeal by the claimant and this confirmed the original findings of the grievance. The appeal was heard by Stephen Ward.

29. The fourth claim of the claimant's limb in these proceedings is that the claimant was discriminated against on the basis of race in his probationary review conducted by Stephen Ward and the subsequent dismissal which was pursuant to that. Once again in this respect he relies on a hypothetical comparator.

30. The meeting took place on 5 August 2019 and in it Stephen Ward confirmed that the quality of the claimant's work had continued not to improve albeit that he had not been working since April. He provided specific details of the failings of the claimant's work which perhaps had not been highlighted before.

31. The claimant's employment was terminated on 30 September 2019 he remained away from work during his notice period and was given five working days to appeal.

32. At the outset of these proceedings and certainly on 20 June 2020 the claimant seemed unaware of the date of his dismissal yet it is clear in the dismissal letter. The claimant says to us that the dismissal letter may have gone into his junk folder which was the reason why his appeal was lodged out of time. He clearly found it at some point as he lodged an appeal on 10 September, interestingly he makes no mention of that letter in the dismissal appeal going into his junk folder just that he had been unwell and that is why he had not applied in time. Despite this anomaly we do not consider that in any event it would have been good practice to disallow the appeal. We find it was poor practice to disallow the appeal because the claimant's appeal was only a matter of a few working days out of time. Whilst there is a 5 day time limit specified in the respondent's Disciplinary and Grievance Procedure which is incorporated into the review procedure it is generally unwise to treat this as set in stone. We consider once again

that if this was a claim for unfair dismissal this might have had a deleterious effect on the respondent's case.

Submissions

33. We are grateful for the submissions that we heard from both advocates and the summary of the law which was put forward in the respondent's submission and which was not demurred from by Mr Ratledge. Essentially this is a claim which is framed in very narrow terms as a claim in direct discrimination under s.13 of the Equality Act 2010. Section 13 tells us:

> "that a person (A) discriminates against another (B) if because of a protected characteristic in this case race (A) treats (B) less favourably then (A) treats or would treat others."

34. We are guided by further aspects of the Equality Act in particular s.136 which deals with the burden of proof and there has been plenty of guidance on how tribunals should consider the burden of proof, the leading case being the case of Igen Ltd v Wong and Laing v Manchester City Council.

35. Essentially the claimant must prove facts which could in the absence of an explanation show that less favourable treatment because of the protected characteristic has taken place. In other words the burden is on the claimant initially to prove both the treatment and the reason for it. If he does not do that then the respondent is not required to provide an explanation for its actions.

36. The case of Madarassy v Nomura International plc is interesting as often in tribunals we get circumstances where there is evidence of different treatment and evidence of a protected characteristic in this case different race but it is impossible to connect the two and Madarassy tells us that there must be something else rather than different treatment and different race for there to be a finding of discrimination, it is not simply sufficient to say that I was treated differently from my comparator and because I have this protected characteristic it must be because of that. There has to be some link between the two, what Madarassy refers to as 'something else'.

Conclusions

37. We very carefully sifted and considered our findings of fact and we have applied those to the law and to the claimant's claims in this case. So dealing with each limb of the claimant's claims in turn:

38. Issue (a), we do not consider that we have heard any evidence which suggests to us that the accommodation arrangements set in train for the claimant and his wife on his arrival in the UAE were in any way tainted by the claimant's race. We consider that the reasons we have given that Gary Glover was in a different situation from the claimant and that any difference in treatment can therefore be explained by that different situation. The visa for Stephen Ward took far longer than did the claimant. Moreover

the visa application was dealt with by an external contractor and was nothing to do with the respondent, it was out of their hands. We find nothing sinister in the fact that the claimant went into a male only villa instead of the hotel. We accept that the respondent did not know that the claimant would want to be with his wife from the very first day. In fact we consider the respondent bent over backwards to help the claimant by allowing his wife to go and stay with him in the villa pending the finding of more permanent accommodation after she had perhaps unwisely given notice too early on her own accommodation.

39. On the second limb we find no reason to believe that the difference budget meted out to the claimant for accommodation from that accorded to Gary Glover and John Davis was anything other than perfectly understandable, they were both senior to the claimant a fact which the claimant admitted in cross examination having given previous evidence in his witness statement that this was not the case. Gary Glover's wife was also a more senior employee and it is entirely consistent that a couple that were both employed together would have a higher budget.

40. On limb three relating to the appraisals, we do find that it would have benefited the tribunal to hear evidence from either Chris O'Hare or Iona McFarland in respect of these appraisals and we consider that the respondent took a risk in not calling them. We also consider that these appraisals could and should have descended into more detail as to the failings in the claimant's quality of work. Nonetheless we accept that as lead technician Mr O'Hare knew full well what was required of a fitter as would Iona McFarland have understood. We find no evidence whatsoever to support the assertion that their handling of the appraisals was in anyway tainted by the claimant's race.

41. We draw the same conclusion in respect of the grievance conducted by Mr Leech which we consider to have been conducted entirely fairly and properly. The same can be said of the grievance appeal.

42. We find the decision to place the claimant on paid leave throughout the period of the grievance process to be ill-conceived although we also consider that until the evidence was being put in the tribunal the claimant clearly did not consider this to be an issue even indicating in an email that it was because of the sensitive nature of the grievance and he did not referred to it in his witness statement.

43. We accept Mr Ward's evidence that however misguided it was done with the best of intentions. We do not recommend it however in future and re-iterate strongly the point that had this case been a case for unfair dismissal this could greatly have affected the respondent's chances. However it is not a case for unfair dismissal, it is a case in direct race discrimination and we find no evidence to connect this to the claimant's race. The same goes for the claimant's dismissal which we consider was made on the grounds of the claimant's performance.

44. We criticised the failure to afford the claimant a right of appeal however on the grounds that he was out of time. He should have been allowed to appeal nevertheless this was not in any way connected with the claimant's race on the evidence before us.

45. We find that where a hypothetical comparator is cited, a hypothetical comparator who was white would have been treated in exactly the same way. There is not a scintilla of evidence which has been put before us in this hearing which link any of the claimant's treatment at the hands of the respondent to race. On the Madarassy principle there is no 'something else' which has been brought to our attention on the evidence. There is nothing to convince us that the burden of proof in s.136 has shifted to the respondent applying the test as laid out in Igen Ltd v Wong. The claimant has therefore failed to prove his case and it must fail. It does so and is dismissed.

46. We are bound to say that the respondent's handling of matters could have been better and we would recommend training for both HR professionals we heard from during the course of this case and possibly for Mr Ward. We also believe that the tribunal's job might have been made easier had we heard evidence from Clive Morgan, Chris O'Hare and possibly from Joanne Boyd HR Director.

_____

Employment Judge KJ Palmer

Date: 16 November 2021

Sent to the parties on:

29 November 2021

For the Tribunal Office