# EMPLOYMENT TRIBUNALS

**Claimant:** **Mr J Casas**

**Respondent:** **Midshires Care Ltd**

**Heard at:** **Bristol** **On:** **11 & 12 October 2021**

**Before:** Employment Judge Midgley
Mr K Ghotbi-Ravandi
Mr H Adam

**Appearances**
For the Claimant: In person
For the Respondent: Mr F Mortin, Counsel

Judgment having been handed down orally on 12 October 2021, and written reasons for that Judgment having been requested, the following written reasons are provided pursuant to Rule 62.

# REASONS

**The Claims and Parties**

1. The claimant was employed by the respondent as a live-in carer between 20 December 2019 and 28 May 2020. The respondent is a family run care provider providing services in England and Wales with ninety branches; it provides home visiting and domiciliary care nationwide.

2. The claimant presented a claim to the Tribunal on 14 August 2020 in which he brought complaints of unfair dismissal and of discrimination on the grounds of race and sex. A period of early conciliation through ACAS commenced on 26 June 2020 and a certificate of early conciliation was issued on 20 July 2020.

3. The claimant lacked the necessary continuity of employment to bring a claim for unfair dismissal and in consequence that claim was struck out on 23 September. The respondent entered a response to the discrimination complaints on 1 October 2020, and the claimant was ordered to provide further details of his discrimination claims. He complied with that Order on 21 March 2021.

4. At a case management before me on 6 May 2020, the claimant clarified that

the sole claim that he was pursuing was one of sex discrimination in respect of a single allegation which was recorded in the case management summary as follows:

*Did the respondent on 7 May 2020 require the claimant to move to short-term temporary accommodation prior to his placement with another service user? (The claimant's case is that the respondent provides longer term temporary accommodation between placements which avoids the need for short-term bookings, and therefore for carers to move between different accommodation blocks with any regularity.)*

**Procedure, Hearing and Evidence**

5. We had the benefit of written witness statements from the claimant and from Mrs Jade Gould, a Team Manager for the Southeast Region for the respondent. We were provided with an agreed bundle of documents of approximately 190 pages and supplementary documents running to approximately 10 pages.

6. Following the evidence of the witnesses, we were provided with unredacted copies of some of the bundle documents and additional documents relied upon by the respondent. We gave the claimant the opportunity to review and consider those and address us in respect of them. He did not object to their inclusion in the bundle or our consideration of them.

7. We heard verbal closing arguments from the claimant and from the respondent, the latter of which expanded upon the written submissions that Mr Mortin had prepared on behalf of the respondent which were provided to us.

8. A procedural point arose during the hearing: namely whether the claimant could amend his claim beyond so as to articulate a complaint that the difference of treatment occurred not on 7 May 2020 as had been identified at the case management hearing, but rather between the 7th and 11 May 2020. The purpose of the amendment was to focus the allegation of discrimination upon the booking for accommodation made by the respondent for the claimant on the later date.

9. The respondent initially argued that the claimant was not entitled to pursue any claim of sex discrimination (on the grounds that none was articulated in the claim form) and so could not pursue an amended allegation of sex discrimination. However, Mr Mortin subsequently withdrew from that position and argued that the claim should be limited to that which was expressed and recorded at the case management summary.

10. On balance having regard to the fact that the claimant is a litigant in person we concluded that the balance of prejudice favoured permitting the amendment and it was in the interests of justice to do so, as there was no substantial prejudice to the respondent because the respondent had the relevant documents to address the period in question and had done so and both within the bundle and within the statement of Ms Gould, and, further, Ms Gould was able to give evidence in relation to the material period. The amendment was therefore permitted.

## Background Facts

11. We make the following findings on the balance of probabilities in light of the evidence which we heard and read.

12. The claimant was employed by the respondent as a live-in carer; his employment beginning on 20 December 2019. The respondent's practice is to recruit carers both from the EU and nationally. The claimant was recruited in Spain and provided with an induction.

The terms of the contract

13. The respondent's business practice is to recruit individuals, and subsequently to provide the recruits with the requisite induction and training and to provide employees with contracts. We will turn to the question of the induction in due course, but there is no dispute that the relevant terms of the claimant's contract were as follows:

14. Firstly, at clause 2.5, the contract provided that the claimant would only be paid whilst he was in placement or was taking paid holiday leave. The company would make reasonable steps to find continuing placements but could not guarantee ongoing placements due to the nature of the business.

15. Secondly, at clause 6.1 'place of work', the contract specified that "the Company may with your agreement require you to work anywhere in the UK. The Company requires you to carry out and undertake your duties at various Customers' houses and according to Company and Customer needs. The duration of each placement may vary and will be estimated and agreed between you and the Company and the customer prior to it commencing".

16. Further, at 7.7, the contract specified that "as a live-in carer accommodation will be provided whilst you remain active in placement."

17. By clause 30 provided that travel expenses would be reimbursed.

18. Clause 34.1 of the contract addressed shared Company Accommodation. It provided that "The Company does not guarantee to provide any overnight accommodation when not in placement. You must book accommodation in advance of arrival. In the event of accommodation being available and offered, all overnight stays in the Company accommodation will be chargeable. You will be made aware of the charge rates at the time of booking."

The respondent's business structure

19. The respondent had a head office in Alcester and, after 2019, a series of hubs in each region in which it operated. The hubs were staffed by managerial roles such as Care Team Managers and Care Coordinators who placed employees into locations with customers. The respondent's practice was to fund travel to the customer's location. The expenses of travel would be refunded, if they were not booked in advance, through a process of reimbursement.

20. Live-in carers were accommodated in the customers' addresses. When a

placement for a live-in carer came to an end, the respondent's practice was to place that employee into temporary accommodation pending further placements being identified and agreed. Once a placement had been finalised the respondent would fund travel to that accommodation.

21. The same policy was adopted where an employee was removed as a consequence of a suspension following a complaint by a customer or third party, pending an investigation by the respondent.

The claimant's induction and accommodation.

22. At the time of the claimant's recruitment, the respondent owned a number of cottages or flats at which employees were housed for the purposes of induction and/or, if there was space, accommodation pending placement with customers or service users. Those properties were in the Alcester region. Initially the respondent had a number of such cottages which were organised to provide a number of flats, but subsequently, in order to reduce overheads, the number was reduced as indicated below.

23. The respondent's general practice was to use one flat or cottage for male recruits and approximately four or five flats for female recruits. That ratio reflected the general recruitment ratio between female and male staff, as female employees significantly outnumbered their male counterparts.

24. During the claimant's induction, he was told that accommodation would be provided in the flats for female staff between placements, but it could not be guaranteed for men. That message was confirmed in an email to the claimant from Ms Moorhouse on 17 December 2019 in which she stated,

> *"I hope you are well. Unfortunately, the accommodation for carers is only for females. You have been successful on the family of X who have accepted you for placements starting 20 December 2019. We normally have carers arrive at placement by 12.00pm if you could let me know your flight details, I can arrange your train to the placement". [Sic]*

25. In approximately March or April 2019, the respondent restructured the Alcester office and all but one of the cottages were closed and sold. The respondent therefore retained a property that provided approximately four rooms which was used predominantly for accommodating female members of staff but also for the inducting male staff as well.

The history of the claimant's placements and accommodation booking

26. The claimant was initially assigned to two placements: the first between 20 December 2019 and 2 January 2020 and one from the third to the Seventh January 2020. When the second placement came to an end the claimant could not be found another location, and the respondent informed the claimant of that difficulty: the claimant was advised that he could either fly home to Spain in line with company policy or arrange accommodation for himself in the UK.

27. The claimant subsequently arranged and paid for accommodation between 8 and 10 February 2020. A further assignment was identified for the claimant

between 13 – 16 February with a third customer. The respondent booked and paid for travel to and accommodation at that location for the claimant between 11 and 12 February.

28. A further long-term placement was assigned to the claimant on 19 February 2020. The respondent agreed to arrange and pay for the claimant to travel to the placement on 17 February and for two nights accommodation prior to the start of the placement. In the event the respondent funded accommodation for the claimant until 23 February because severe flooding in the area caused the customer to be transferred to hospital. The claimant then booked and paid for accommodation for himself between 23 and 27 February as there were no further placements available at that time.

29. The next placement, which is the focus of these claims, was a long-term placement that took place between 4 March and 7 May 2020, when the claimant was removed from the site and suspended as detailed below.

The claimant's suspension and the background to the claim

30. On 7 May 2020, the respondent received complaints about the claimant from a family member of the customer and, subsequently, from a professional who was involved in her care. The respondent therefore removed the claimant from the location. Mrs Deborah Yaxley-Batch, the claimant's line manager, attended the premises and notified the claimant that he was being suspended and an investigation would take place. When the conversation occurred a member of HR was listening to the discussion as Mrs Yaxley-Batch was forced to call her so that she could listen to Mrs Yaxley-Batch's discussion with the claimant by telephone.

31. The respondent arranged for temporary accommodation for the claimant at the Corner House Hotel in Taunton. He stayed there between 7 and 11 May 2020, and the respondent paid for the cost of his travel to and accommodation there.

32. An investigation meeting took place on 11 May 2020. It was conducted by telephone given the impact of the Covid 19 pandemic. On 11 May the respondent was told that the room was no longer available for the claimant's use at the Corner House Hotel. The evidence as to the reason for that instruction is somewhat confusing; the reasons advanced by the respondent are inconsistent. Two explanations have been offered by the respondent: first, that the accommodation was removed because the claimant was no longer categorised as a key worker as a consequence of his suspension and or lack of placement with a customer, or, secondly and alternatively, because the rooms were needed for doctors or nurses who were then placed at the Taunton hospital.

33. However, irrespective of that inconsistency, it is clear to us that for one or other of those reasons the respondent believed that the claimant could no longer stay at the hotel and therefore booked new accommodation for him in Bristol. That is because there was no advantage to the respondent, whether financial or otherwise, in moving the claimant from the hotel in Taunton to a separate location paying for the transport costs to that location. It is therefore more likely than not that the reason the respondent moved the claimant was because it

was told either one of both of the reasons that it now relies upon, as detailed above, rather than for some other reason.

34. The respondent booked a train from Taunton to Bristol for the claimant to travel to the Bristol hotel and paid for that accommodation in central Bristol, ready for the claimant's arrival on 12 May. The claimant was required to book a taxi in order to travel to the station. In the event, the claimant did not travel to Taunton but chose to travel to Penzance which led to a consequent police search for him when he did not arrive at the Bristol hotel or report to the respondent.

35. The remainder of the factual history of the case is not relevant to the matters that we need to determine.

**The Issues**

36. As a consequence of the amendment, the issue for us was whether the claimant was treated less favourably than an actual or hypothetical female member of staff would have been in the period between 7 and 11 May 2020 as a consequence of:
    a. the booking of temporary accommodation for a short period and/or
    b. the claimant being required to travel to a second location to use the accommodation.

**The relevant law**

37. The claimant brings a claim under the Equality Act 2010 for direct discrimination (s.13 Equality Act 2010 ("EQA"). The relevant law is contained in sections 39 and 13, and 23 which provide respectively (in so far as is relevant) as follows:

> *39 – Employees and applicants*
>
> (2) An employer (A) must not discriminate against an employee of A's (B)—
> (a) as to B's terms of employment;
> (d) by subjecting B to any other detriment.
>
> *13. Direct discrimination*
>
> (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.
>
> *23. Comparison by reference to circumstances*
>
> (1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

38. The basic question in every direct discrimination case is why the complainant was subjected to less favourable treatment (Amnesty International v Ahmed [2009] IRLR 884, per Underhill P, para. 32).

39. Once it is established that the treatment is because of a protected

characteristic, unlawful discrimination is established, and the respondent's motive or intention is irrelevant (Nagarajan v London Regional Transport [1999] IRLR 572 HL).

40. The protected characteristic does not need to be the only reason for the less favourable treatment, or even the main reason, so long as it was an 'effective cause' of the treatment: O'Neill v Governors of St Thomas More Roman Catholic Voluntarily Aided Upper School and anor [1996] IRLR 372, EAT.

The reverse burden of proof

41. The statutory tests are subject to the reverse burden of proof in section 136 EQA 2010 which provides:

> (2) If there are facts on which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

42. The correct approach to the reverse burden of proof provisions in discrimination claims has been the subject of extensive judicial consideration. In every case the Tribunal has to determine the "reason why" the claimant was treated as he was (per Lord Nicholls in Nagarajan v London Regional Transport [1999] IRLR 572 HL). This is "the crucial question."

43. It is for the claimant to prove the facts from which the Tribunal could conclude that there has been an unlawful act of discrimination (Igen Ltd and Ors v Wong [2005] IRLR 258 CA), i.e., that the alleged discriminator has treated the claimant less favourably or unfavourably and that the reason why it did so was on the grounds of (or related to if the claim is under s.26) the protected characteristic. That requires the Tribunal to consider the mental processes of the alleged discriminator (Advance Security UK Ltd v Musa [2008] UKEAT/0611/07).

44. In Igen the court proposed a two-stage approach to the burden of proof provisions. The first stage requires the claimant to prove primary facts from which a Tribunal properly directing itself could reasonably conclude that the reason for the treatment complained of was the protected characteristic. The claimant may do so both by their own evidence and by reliance on the evidence of the respondent.

45. If the claimant does so, the second stage requires the respondent to demonstrate that the protected characteristic was in no sense whatsoever connected to the treatment in question. That requires the Tribunal to assess not merely whether the respondent has proven an explanation, but that it is adequate to discharge the burden of proof on the balance of probabilities that the protected characteristic was not a ground for the treatment in question. If it cannot do so, then the claim succeeds. However, if the respondent shows that the unfavourable or less favourable treatment did not occur or that the reason for the treatment was not the protected characteristic the claim will fail.

46. The explanation for the less favourable treatment advanced by the respondent does not have to be a 'reasonable' one; it may be that the employer has treated the claimant unreasonably. The mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one (London Borough of Islington v Ladele [2009] IRLR 154).

47. Furthermore, it is not sufficient for the claimant simply to prove that there was a difference in status i.e., that the comparator did not share the protected characteristic relied upon by the claimant) and a difference in treatment. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an act of discrimination (see Madarassy v Nomura International Plc [2007] ICR 867 CA; Hewage v Grampian Health Board [2012] IRLR 870 SC and Royal Mail Group Ltd v Efobi [2019] EWCA Civ 18.)

48. The Tribunal does not have slavishly to follow the two-stage process in every case - in Laing v Manchester City Council and anor [2006] ICR 1519, EAT, Mr Justice Elias identified that 'it might be sensible for a tribunal to go straight to the second stage… where the employee is seeking to compare his treatment with a hypothetical employee. In such cases the question whether there is such a comparator — whether there is a prima facie case — is in practice often inextricably linked to the issue of what is the explanation for the treatment." That approach was endorsed by the Court of Appeal in Stockton on Tees Borough Council v Aylott [2010] ICR 1278.

49. It is for the claimant to show that the hypothetical comparator in the same situation as the claimant would have been treated more favourably. It is still a matter for the claimant to ensure that the Tribunal is given the primary evidence from which the necessary inferences may be drawn (Balamoody v UK Central Council for Nursing Midwifery and Health Visiting [2002] IRLR 288).

Detriment and unfavourable treatment (s.15)

50. The test of a detriment within the meaning of section 39 EQA 2010 is whether the treatment is "of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment?" (per Lord Hope in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11; [2003] ICR 337, para 35).

## Discussion and conclusion

Detriment

51. The first issue for us is whether in booking temporary accommodation for a short period and/or requiring Mr Casas to travel to a second location for accommodation in the period between 7 – 11 May, the respondent subjected the claimant to a detriment. We ask that question because there has to be something detrimental about any conduct which is alleged to be less favourable treatment for the purposes of section 13 EQA 2010.

52. The respondent says that those acts were not detrimental and could not be

regarded as a detriment in the circumstances of the case on three grounds: first, that the accommodation was paid for by the respondent; secondly, that travel to the accommodation was arranged and paid for by the respondent; and thirdly, that in general circumstances an employee would be or could required to be placed in temporary accommodation in between placements and there was nothing that distinguished this case from that scenario.

53. The claimant argues that he was subjected to a detriment because he had had to pack up all his worldly belongings (which he transported to the UK) when he left the placement on 7 May 2020, and then had to pile those belongings into a taxi and move them to the hotel in Taunton, only then to be required to move them a further time when he was asked to leave his hotel room in Taunton by 10.00am.

54. The matter was relatively finely balanced, but we concluded on balance that in the circumstances of this case, applying the test in Shamoon of whether the treatment of such a kind that in the view of the reasonable employee it was to his detriment, the claimant was subjected to a detriment. For the reasonable employee, particularly one in the circumstances of the claimant, an instruction which required them to pack up their entire possessions repeatedly, to move location by a series of taxis and trains in the Covid pandemic, would we find, be regarded as a detriment by a reasonable employee. In reaching that conclusion we have also had regard to the claimant's particular circumstances: in his previous placement he had worked a double shift where there was a limited care plan to assist him, and he was on his account exhausted which added to his difficulties with further moves.

55. We accept that an employee could be asked to move to temporary accommodation in between placements and we have considered the respondent's argument that when an employee was suspended it was the respondent's practice to book accommodation for the employee close to the managers who would investigate the allegation. In this case it is argued that that necessitated the claimant's move to Bristol. We make two observations that informed our conclusion on the issue. Firstly, in relation to the booking of accommodation close to the mangers: these events took place during the Covid pandemic and meetings were conducted almost entirely remotely rather than in person. There was not any overt or obvious reason therefore for the claimant to be moved to Bristol, and that must inform what the reasonable employee might regard as being a detriment. Secondly, we address the argument that it was the respondent's practice to book accommodation for a short-term period after suspension because it was unclear how long the investigation would last. In our view the respondent's argument invites us to adopt the wrong perspective from which to assess whether the treatment was detrimental: the argument would require us to judge that issue from the perspective of the employer rather than the employee. The scenario must be viewed from the perspective of the employee as Shamoon makes clear, and from the employee's perspective, as we say, the matter was detrimental.

Less favourable treatment

56. We turn then to the overarching question of whether the claimant was treated less favourably than female employees had been or would have been treatedin

the circumstances which prevailed at the time of 7 until 11 May 2020.

57. We were presented with evidence which identified the practice adopted by the respondent towards its female employees in the form of a series of letters of suspension issued to female employees. Those letters demonstrated that where female employees were suspended the respondent's practice was to remove them from their placements and to place them into temporary accommodation. The situation of one of those individuals, Ms Dorset, was almost identical to that of Mr Casas in that she was removed following an unannounced visit to the location where she had been providing live-in care.

58. Secondly, we were provided with statistics showing the length of bookings for such temporary accommodation across all staff, male and female. That showed that on average staff were booked for temporary accommodation for two and a half days. There were two outliers to that general trend, but we accepted the respondent's explanations for them, namely that the outliers were not live-in carers in the same situation as the claimant. In the event, the claimant had five nights' accommodation booked for him at the Corner House Hotel between 7 and 11 May 2020, and then a further two nights in Bristol, and that (namely 9 nights booked accommodation) was in excess of the general average of length of booked short-term accommodation.

59. We were therefore satisfied that the practice of booking temporary accommodation following suspension of an employee was consistent as between male and female staff.

60. The claimant however, identified two named comparators, Nalaska Assay and Zain Castello, with whom he compared his treatment. We address each in turn.

61. In respect of Mr Castello, the respondent was unable to identify any employee of that name and the claimant was unable to provide us with evidence that she was an employee and therefore that might be capable of demonstrating that her material circumstances were the same as the claimant's as required by Section 39 of the Equality Act. The claimant therefore failed to prove that Miss Costello was an appropriate comparator

62. In relation to Ms Assay, we were not satisfied on balance that she was an appropriate comparator because there was a material difference between her circumstances and those of the claimant. In paragraphs 20 and 21 of the response, the respondent identified that Ms Assay knew the date of her placement in advance because she provided cover for annual leave and breaks for permanent carers; the claimant did not challenge that account and we therefore accepted it. That is a different scenario to the claimant in that his placements were intended to be permanent (in the sense that he was the designated live-in carer) whereas Ms Assay provided cover for such 'permanent' carers when they were on leave.

63. Lastly the claimant argues that we should draw an inference that the reason for any difference in his treatment was because of his sex from the following two circumstances. Firstly, he points us to the comments that were made to him during the induction that accommodation was only provided to female members of staff. Secondly, he refers us to the confirmation of that approach contained

in Mrs Moorhouse' email of 17 December.

64. The respondent advanced (through Ms Gould) an explanation in respect of those matters and on balance we accept the explanation she gave that Ms Moorhouse was new in post at the time that she sent the email and had simply misunderstood the circumstances of the accommodation that was provided. We accepted that explanation because Ms Gould's evidence was supported by the statistical evidence that demonstrated that the respondent's accommodation was used for both male and female members of staff (following their recruitment) and, secondly, that the approach was consistent between male and female members of staff in relation to temporary accommodation following suspension and in relation generally to the periods of the bookings.

65. In any event we were satisfied that the reason for the treatment for the requirement for the claimant to leave his accommodation in the Corner House Hotel in Taunton was not a discriminatory reason of itself or tainted by a discriminatory mindset. The reason was (as the respondent argued) that the respondent could not rebook accommodation in the Corner House Hotel, with the result that the claimant's booking could not be extended and he had to be moved and, secondly, that the respondent's general practice following suspension was to move employees closer to their managers who were conducting the investigation. Whilst in the circumstances of this case, as we have indicated, Covid meant that that step was unnecessary, that is a separate issue to whether those booking the accommodation realised that it was unnecessary, but in any event, we are satisfied on the balance of probabilities that the reason for the hotel was not rebooked was that the respondent was told that it was no longer available. As we said above, there was no advantage to the respondent in having to pay for transport and accommodation in Bristol as opposed to keeping the claimant in Taunton if it were possible.

66. We conclude that the claimant was not treated less favourably than an actual female member of staff or less favourably than the manner in which a hypothetical female member of staff in the same situation as the claimant would have been treated. The claim is therefore not well founded and is dismissed.

Employment Judge Midgley
Date: 1 January 2022

Reasons sent to parties: 11 January 2022

FOR THE TRIBUNAL OFFICE

Note - Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.