EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Mr S Moharos	**v**	DHL Services Limited

Heard at: Reading (by CVP) **On:** 1 - 2 September 2022

Before: Employment Judge Anstis
Ms D Ballard
Mr D Palmer

Appearances
For the Claimant: Ms K Szigeti
For the Respondent: Mr R Dunn (counsel)

JUDGMENT

1. The claimant was dismissed in breach of contract. The respondent must pay the claimant £504.24 as compensation for breach of contract. This is a gross figure and the respondent will make any deductions from it as are required by law.

2. The claimant's claim of race discrimination is dismissed.

REASONS

INTRODUCTION

1. These written reasons were requested by the claimant's representative at the conclusion of the hearing. Accordingly, it is convenient to produce them in one document together with the judgment.

2. The claimant's claims are of wrongful dismissal and race discrimination (in respect of his dismissal).

3. The basic facts are not in dispute and are described by Mr Dunn in the second paragraph of his skeleton argument. The claimant worked in the respondent's Cherwell III warehouse. He started his night shift, having previously taken a Covid-19 test but without knowing the outcome. Towards the end of his shift he was notified that his test had been positive. He

reported this to his manager and was then sent or went home. The only thing we would add to what Mr Dunn says is that the claimant had no Covid-19 symptoms at the time, and his test seems to have been prompted as a precaution given that colleagues at his workplace who he had worked closely with were off work.

4. These events took place during the Covid pandemic. They were during a time of great anxiety about Covid-19 and its effects. That anxiety would have been particularly acute in the warehouse environment the claimant worked in, where we heard that he worked shoulder to shoulder with colleagues.

WRONGFUL DISMISSAL

5. Ms Szigeti is correct to say that there was no formal dismissal letter giving a reason for the claimant's dismissal, but there is the notes of the probationary review, which records the reasons as follows:

> *"Sandor has breached the Covid 19 guidelines by completing a shift after he went for a Covid test, he did not inform a manager that he had been for a Covid test. Sandor completed a shift and then informed a manager that he had been for a test and he had been informed of a positive result. Sandor's actions put that whole shift at risk of transmission. For this reasons Sandor's employment will be terminated."*

6. It is never been in dispute that this is an accurate record of the reason why the respondent decided to dismiss the claimant. His dismissal occurred without notice.

7. For the purposes of the wrongful dismissal claim we have to decide whether the claimant committed a repudiatory breach of contract. We note from Mr Dunn's submissions that this is to be assessed objectively and so an employee can repudiate the contract even without an intention to do so.

8. The probationary review refers to a breach of the Covid-19 guidelines. It has not been said by the respondent that the claimant breached any legal restrictions or government guidance in force at the time, nor that he should have considered his behaviour so inherently risky that no warning or notice to him of this need be given. It is the respondent's case that his actions in attending work, while awaiting the results of his Covid test, were a breach of its internal policies, and that the claimant either knew or should have known that.

9. In his witness statement Mr Hawkins says that the policies were well known at the time, through regular briefing meetings and also posters that were put up around the warehouse. That is what we would expect: that there were simple one page guides for the respondent's staff, setting out Covid-19 dos and don'ts - but there were no such documents. We have not been provided

with any of the posters that Mr Hawkins refers to, nor notes of any of the briefing meetings he refers to, and the policy extract that Mr Hawkins refers to in his statement as being particularly relevant to the claimant's case was not in force at the time of the claimant's alleged offence.

10. Mr Dunn relies on the clearest statement of this rule being in a document at page 38 of the tribunal bundle. This is a dense and detailed document headed "Pay Scenarios Covid-19 Advice Flows". We were surprised at the respondent's suggestion that this document was on their intranet and intended for the use of shop floor employees such as the claimant, but we will take it that that is true. Page 38 sets out the pay arrangements for individuals who have gone for a Covid-19 test. It includes the words "*colleagues should isolate until test results received*". This appears simply to be a statement of fact. It is not set out as an instruction to the individual on what they should do in those circumstances, nor does it contain any warning of possible consequences if this does not occur.

11. The clearest statement of the position that we have found is that set out on the front page of that document. This says:

> "*In circumstances where it is found that individuals who have gone for a Covid-19 test due to displaying symptoms have returned to work whilst waiting for test results this will be considered a serious breach of DHL's Covid-19 H&S measures and could lead to a potential disciplinary offence*".

12. What is notable about that is that it does not simply refer to people who have gone for a Covid-19 test. It refers to people who have gone for a Covid-19 test due to displaying symptoms. The claimant displayed no symptoms.

13. In this document the respondent seems to have gone out of its way to come up with a more complicated rule than simply that those who have gone for a test should not attend work.

14. We do not consider that this "pay scenarios" document can reasonably be taken to alert the claimant to the need not to attend work in a case where he has taken a test but is asymptomatic.

15. A further document was produced by the respondent at the start of the second day of this hearing. This was an induction checklist. It is a one-off document that seems to contain a continuing obligation to inform the line manager without attending site if you have had a Covid-19 test and are awaiting test results. The late production of this document strikes us as significant. First, it cannot have been something so obvious that the respondent would have it in mind at the time of dismissing the claimant. It has never previously been referred to by the respondent. Second, the late production also means we have no copy of this document signed by the claimant. We certainly do not see this document as alerting the claimant to

the fact that attending work while awaiting the results of a Covid-19 test would be considered a repudiatory breach of contract by the respondent.

16. A final point Mr Dunn relies upon is that barely a week or so before this incident the claimant had taken it upon himself to self-isolate and not attend work while asymptomatic and awaiting the results of a Covid-19 test. This is something that has given us pause for thought as it would add to Mr Hawkins's view that the policies were well known. However, we have concluded that the claimant staying away on that occasion was down to his own assessment of the possible risks associated with that particular situation, rather than because he considered himself to be following any particular policy.

17. We have to assess whether objectively the claimant committed a serious breach of contract in attending work while awaiting his test results. Mr Dunn paraphrased this as being him attending when he knew or should have known that such a matter was against the respondent's rules, and we adopt that approach for the purposes of our decision.

18. We do not find that the claimant either knew or should have known it was against the respondent's rules to attend work in those circumstances. The position is not as Mr Hawkins says in his witness statement. There were no posters. The policy was not well known. The most prominent policy document we have been referred to stated that the rule was to stay away if awaiting a test while displaying Covid-19 symptoms, not simply to stay away when awaiting results. The claimant's dismissal without notice was a breach of his contract.

19. We do not intend this finding as any particular criticism of the individual managers involved. They were right to be cautious about Covid-19 risks and we suspect the errors in Mr Hawkins's statement may simply be attributable to difficulties in the preparation of his statement.

RACE DISCRIMINATION

20. Looking at the question of discrimination, the claimant says that his dismissal came about or was influenced by him being of Hungarian national or racial origin.

21. It originally appeared that in saying that the claimant was comparing what happened to him with what happened to English, or at least non-Hungarian, employees named Sam and Ella. For there to be any kind of relevant comparison, Sam and Ella would have had to be either in breach of or suspected to be in breach of the respondent's Covid-19 rules, but in his evidence the claimant was unable to identify anything that they may have done against the rules.

22. Given that, a relevant comparison cannot be made between his situation and that of Sam and Ella.

23. The claimant has given us no basis on which we could construct a hypothetical comparator or find that anyone of a different national or racial origin would have been treated differently.

24. Even if he had succeeded in establishing a comparison with Sam and Ella, we find nothing in the respondent's behaviour that amounts to the "something more" necessary to establish a sufficient case of race discrimination for the respondent to answer. The claimant's race discrimination claim is dismissed.

REMEDY

25. It was agreed between the parties at the end of our decision that the consequence of our finding of breach of contract was that the claimant was entitled to one week's notice. The parties agreed that this was a gross weekly salary of £387.88, with a 30% increase to take account of his night shift allowance, giving gross weekly pay of £504.24, which is what we have awarded by way of compensation. We have set this out as a gross figure, as the respondent is likely to have to make deductions from this for tax and possibly national insurance contributions, but we are not in a position to say what those deductions may be or what the resulting net figure may be.

Employment Judge Anstis
Date: 5 September 2022

Sent to the parties on: 22 September 2022

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For the Tribunals Office

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