EMPLOYMENT TRIBUNALS

Claimant: Vusi Mathebula

Respondent: Time 4 U Limited

Heard at: **London South Employment Tribunal**

On: **30th – 31st August 2022**

Before: **Employment Judge Apted, Tribunal Member Mr Khan, Tribunal Member Mr Wilby**

Representation
Claimant: Litigant in person
Respondent: Mrs Fairclough Haynes

JUDGMENT having been sent to the parties on the 7th September 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

Introduction:

1. The respondent provides supported living services to clients who have learning disabilities, mental health, and other complex care needs. They provide supported living services in London, Milton Keynes and Kent. They employ approximately three hundred staff.

2. The claimant was employed by the respondent as a Support Worker on the 6th August 2019. His contract of employment stated that his salary was £114 per day live-in rate.

3. On the 23rd September 2019, the claimant was promoted to Team Leader. His new contract of employment stated that his was salary was £145 per day live-in rate, but that this salary was only payable whilst he worked with a particular client, who is named in the contract of employment.

4. In May 2020, the respondent decided that they wanted to ensure that all Team Leaders were paid on the same basis. The claimant was the only one of eight Team Leaders who was paid a daily rate. The rest were paid an hourly rate plus an additional sum for sleep-in shifts. The net effect of this proposed change was that the claimant would be paid approximately fifty percent less than previously.

5. A meeting was held with the claimant on the 11th May 2020 to discuss these proposed changes to his contract of employment and he was provided with a new contract on the 12th May 2020. (The claimant does not accept that this meeting occurred but asserts that there was a meeting on the 1st May 2020).

6. The claimant raised a grievance on the 2nd July 2020 and a grievance meeting was held on the 6th July 2020. His grievance was dismissed on the 9th July 2020 and he lodged an appeal against that decision on the 10th July 2020. An appeal meeting took place on the 15th July 2020. His appeal was dismissed on the 11th August 2020.

7. On the 21st August 2020, the claimant contacted ACAS and a certificate was issued by ACAS on the 21st September 2020.

8. On the 23rd September 2020, the claimant submitted a claim to the London South Employment Tribunal on form ET/1 claiming direct race discrimination. The respondent responded on form ET/3 and served an amended response, both of which were undated, although the response was accepted on the 3rd December 2020.

9. On the 16th April 2021 the claimant was offered a promotion to the role of Assistant Manager from the 3rd May 2021, on a fixed salary of £23,500, which the claimant accepted. The claimant has been employed in that role by the respondent, since.

The Law:

10. Section 13 of the Equality Act 2010 reads as follows (insofar as is relevant):

"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.

(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.

(4) If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.

(5) If the protected characteristic is race, less favourable treatment includes segregating B from others.

…"

11. Section 9 of the Equality Act 2010 reads as follows (insofar as is relevant):

"Race

(1) Race includes—

(a) colour;
(b) nationality;
(c) ethnic or national origins.

(2)In relation to the protected characteristic of race—

(a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular racial group;
(b) a reference to persons who share a protected characteristic is a reference to persons of the same racial group.

(3) A racial group is a group of persons defined by reference to race; and a reference to a person's racial group is a reference to a racial group into which the person falls.

(4) The fact that a racial group comprises two or more distinct racial groups does not prevent it from constituting a particular racial group.

…"

The Issues:

12. At a Case Management Hearing on the 13th July 2021 Employment Judge Sage identified the issues that the Tribunal would need to decide, as follows:

'Direct race discrimination (Equality Act 2010 section 13):

1.1 The claimant self describes his ethnicity as Black South African.
1.2 Did the respondent do the following things:

- 1.2.1 Call the claimant (and other Black staff) 'Monkeys',
- 1.2.2 Reduce his pay because he should not be paid more than a European,
- 1.2.3 Failure to deal fairly with his grievance (and particularly not interviewing Mr Benn Ohurake)

1.3 Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

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 a white Polish worker)his name was provided in the hearing) or a hypothetical Black British worker.

1.4 If so, was it because of race?

1.5 Did the respondent's treatment amount to a detriment?

Remedy for discrimination or victimisation:

2.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

2.2 What financial losses has the discrimination caused the claimant?

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

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

2.5 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

2.6 Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

2.7 Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

2.8 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

2.9 Did the respondent or the claimant unreasonably fail to comply with it by failing to interview the person accused of making the comments?

2.10 If so, is it just and equitable to increase or decrease any award payable to the claimant?

2.11 By what proportion, up to 25%?

2.12 Should interest be awarded? How much?'

The hearing:

13. In preparation for the hearing, the Tribunal was in possession of a hearing bundle containing 232 pdf pages, an Index to the bundle and an additional page – labelled page 69A, as well as witness statements from Mrs Fairclough Haynes, Mrs Mudavanhu, Mr Shorthouse and the claimant. Both parties confirmed that they were in receipt of the same documents.

14. During the course of the hearing Mrs Mudavanhu, Mrs Fairclough-Haynes and the claimant gave evidence, which we noted in our record of

proceedings. Mrs Fairclough-Haynes on behalf of the respondent and the claimant made submissions, which we also noted in our record of proceedings.

15. The hearing was conducted as a hybrid hearing. Tribunal Member Mr Khan and I appeared from a hearing room at the Tribunal, whereas all other participants appeared via Cloud Video Platform. We were satisfied that it was in the interests of justice for the hearing to be conducted in this way. It was possible to see and hear each other clearly throughout the duration of the hearing and we were satisfied that there were no barriers to communication. We were also satisfied that the principles of open justice were complied with.

Discussion and Findings of Fact:

16. In reaching our decision, we only refer to those pieces of evidence necessary to explain our decision. The fact that we do not mention a piece of evidence does not mean that it has not been considered.

17. These written reasons have been provided at the request of the claimant. They were provided orally at the hearing. The findings that were made, were unanimous.

Did the respondent call the claimant (and other black staff) monkeys?

18. The respondent accepts that the word 'monkeys' was used. The respondent's case is that the word was used in a What's App group chat. Those messages were not retained and so have not been seen by this Tribunal. That is unfortunate. The claimant's case is that during the course of a meeting which he said took place on the 15th June 2020 – his manager – a man referred to as Mr Benn – referred to staff as monkeys. The claimant does not allege that the word was used in a What's App group.

19. We therefore find that although there is some discrepancy as to when the word was used, we find and it is accepted by the respondent, that the word was used. In her witness statement, Mrs Mudavanhu states that the respondent employs approximately three hundred staff and that the majority are black African or African diaspora. We therefore infer and find that the word "monkeys" was said to other members of staff including black staff members.

Reduce his pay because he should not be paid more than a European:

20. In May 2020, the respondent decided that it wanted to change the claimant's pay. Their motivation for doing so was that the claimant was being paid in a different way to the other Team Leaders. The net effect of this change was that the claimant would be paid less than he had previously been paid, but that he would then be paid at the same rate as the other Team Leaders. There is contemporaneous evidence of the respondent's motivation. At a meeting held on the 11th May 2020, the minutes of that meeting record that the claimant was told that the respondent was proposing to change his contract so that it was in line with all other Team Leaders. In evidence, the claimant stated that the meeting on the 11th May 2020 did not occur, but

that he had a meeting on the 1st May 2020 at which Mr Benn was present. There is no evidence of a meeting on the 1st May 2020 and we find as a fact that that meeting did not occur.

21. At a further meeting held on the 12th June 2020 to discuss the variation of contract, the respondent again explained that the reason for the variation was to ensure consistency with other Team Leaders. In the grievance meeting on the 6th July 2020, the minutes record that the variation was designed to "standardise" all Team Leader contracts.

22. In evidence we were told that of the eight Team Leaders, two were white European and the remainder were black.

23. We therefore find as a fact that there is no evidence that the claimant's pay was reduced because he should not be paid more than a European, but rather, we find that the claimant's pay was reduced in order to bring his pay in line with that of other Team Leaders.

Failure to deal fairly with his grievance (and particularly not interviewing Mr Benn Ohurake):

24. The claimant's initial grievance was that: (1) his new contract was on much reduced terms, (2) what would his position be if he refused to accept the new contract and (3) whether some form of discrimination was involved in his "downgrading".

25. A grievance meeting was held on the 6th July 2020. At the meeting, the respondent dealt with each of the claimant's grievances as set out above. The claimant was then sent the minutes of that meeting the following day, the 7th July 2020 and a letter providing the outcome of his grievance was sent to him on the 9th July 2020. On the 10th July 2020, the claimant stated that he wanted to appeal against the outcome of the grievance, and he was invited to attend an appeal hearing on the 15th July 2020. In preparation for that meeting, the claimant set out the key points of his appeal. The first related to the unfairness of the variation of his contract. The second related to a claim for racial discrimination, and the claimant identified that it was Mr Benn who had discriminated against him on the basis of race.

26. Following that meeting, the claimant's appeal was dismissed on the 11th August, (in a report dated the 3rd August). In relation to the claim for racial discrimination, Mrs Fairclough-Haynes found that the word monkey was used but that when considered in the context in which it was used, it was not a racial or prejudicial term. Instead, it was a reference to how the group were behaving. In relation to the change of contract, Mrs Fairclough-Haynes found that although the variation would result in difficulty for the claimant, the variation had been conducted lawfully.

27. During the course of her investigation, Mrs Fairclough-Haynes established that Mr Benn had not made or influenced the decision to change the claimant's contract. We have also not identified any evidence that Mr Benn had any influence. We find as a fact that Mr Benn did not make or influence the decision to change the claimant's contract.

28. As part of the investigation into the claimant's grievance, Mrs Fairclough-Haynes did not interview Mr Benn and did not obtain a copy of the What's app group messages.

29. Insofar as Mr Benn is concerned, Mrs Fairclough-Haynes stated that Mr Benn left the respondent two days after the grievance meeting on the 15th July 2020. She stated that it had not been possible to speak to him in the intervening two days, that she did not have any personal contact details for him and that he could be elusive. She had not attempted to contact him since.

30. Insofar as the What's app messages are concerned, she stated that she had been told that they existed, and that Mrs Mudavanhu would obtain a copy. She was subsequently told that Mrs Mudavanhu was unable to do so, but she told Mrs Fairclough-Haynes what the messages said (having previously seen them). She had no reason to disbelieve what Mrs Mudavanhu said and accepted her explanation; that when considered in the context in which the remark was made, that the comment was not racist. Mrs Fairclough-Haynes stated that she had been told that the remark had been made to all team leaders, which included white members of staff.

31. We therefore find that the failure to interview Mr Benn was not unfair in the circumstances, he having left the respondent, two days after the 15th July.

32. Mrs Fairclough-Haynes was investigating the outcome of the claimant's grievance. In doing so, she did not obtain the What's app group messages. She simply accepted what Mrs Mudavanhu said and accepted Mrs Mudavanhu's interpretation of the messages. She did not try to obtain the What's app messages herself and so has not viewed them to ascertain if Mrs Mudavanhu's interpretation was correct. It is unfortunate that she did not obtain the What's app messages and that we have therefore been unable to view them ourselves, but we find that the failure to obtain them was not unfair.

33. We therefore find that the claimant's grievance was not dealt with unfairly.

Was that less favourable treatment:

34. The claimant's initial contract with the respondent is dated the 6th August 2019. Prior to that contract existing, the claimant stated that he had received verbal assurances regarding his pay and conditions, as a result of which he signed the contract and began working for the respondent. That contract was subsequently changed when the claimant was promoted and also after he stopped working with a client named in the contract. (Although that version of the contract was not included in our bundle, we were told that the only difference in the terms, related to the reference to a particular named client. The fact that we have not seen that contract, does not make a difference to our decision). The respondent accepts that the claimant was given oral assurances regarding his pay and conditions. However, the respondents are entitled to change the terms of the contract's contract and gave notice to the claimant that they intended to do so. The claimant cannot expect never to have his terms and conditions varied and cannot expect that the respondent is bound by their original oral conditions for evermore.

35. We have already found that the reason that the respondent wanted to change the claimant's contract was to bring his in line with all other Team Leaders. We acknowledge that the claimant's contract, was the only contract that was changed. However, we find that the R was entitled to change the claimant's contract and we find that that did not amount to less favourable treatment.

36. We have already found that the claimant and others were referred to as monkeys. However, we have considered the context in which that remark was made, and we make the point again, that we have not seen the What's app messages for ourselves and are therefore unable to determine the context for ourselves. The evidence that we do have is that the remarks were made to other members of staff and that they were made in the context of the behaviour of the staff. This was the conclusion that was reached by Mrs Fairclough-Haynes and the respondent's management at the time and in our judgment, it does not seem unreasonable to have reached that conclusion. We do not have any other evidence to contradict this conclusion. We therefore find that although the remark was made, this did not amount to less favourable treatment.

37. Having made the findings that we have in relation to his pay and grievance, we find that the claimant has not been treated less favourably.

38. During the course of the Case Management hearing on the 13th July 2021, the claimant compared himself to a white Polish worker, who has been named in the bundle. However, we heard no evidence as to how the claimant had been treated less favourably than this person. The only evidence we heard was that in fact, this person was not a Team Leader (whereas the claimant was). In changing the claimant's contract, the respondent was seeking to bring his contract into alignment with all other Team Leaders. Similarly, no evidence has been adduced to show that the claimant was treated less favourably than a hypothetical black British worker.

39. We therefore find that the claimant was not treated less favourably than a white Polish worker and he was not treated less favourably than a hypothetical black British worker.

40. Having found that the claimant was not treated less favourably, we find that the respondent's treatment did not amount to a detriment.

41. The claimant's claim for direct race discrimination is therefore not well founded and is dismissed.

Employment Judge Apted

Date 23rd September 2022