EMPLOYMENT TRIBUNALS

Claimant: **Mr L Mbuisa**

Respondents: **(1) Cygnet Healthcare Limited**
(2) Caireach Limited
(3) Isand Limited

HELD at Leeds (in person) **ON: 16th, 17th, 18th, 19th and 20 January 2023**

BEFORE: Employment Judge Lancaster
Members: J L Hiser
G M Fleming

REPRESENTATION:

Claimant: **In person**
Respondent: **Ms L Gould, Counsel**

JUDGMENT having been sent to the parties on 20 January 2023 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 taken from the transcript of the decision delivered orally immediately upon the conclusion of the hearing:

REASONS

Background

1. The essential background to this case is that Mr Mbuisa was engaged as a bank worker assigned to the respondent's facility at Norton Lodge which was a residential care home for those with learning disabilities and significant behavioural problems. That engagement as a worker was terminated on 10 November 2021. That date coincided with the introduction the following day 11 November of the regulations in relation to care homes during the

Coronavirus pandemic. Those regulations imposed a legal duty upon the registered manager of every care home to ensure that there was no attendance at that facility apart from those who are fully vaccinated or had a medical exemption.

2. The claimant had been on notice of potential termination of his agreement since 9 September and still as of 10 November he was not vaccinated. He had chosen not to have any vaccination. There were legitimate potential health concerns that had led him to take that decision. Subsequently at the end of December he did obtain a note from his GP that he was in fact clinically exempt from the requirement. But by that stage his engagement had already been ended.

3. In the meantime on 14 October during the notice period, he had submitted a form on which he had self-certified that he believed he was clinically exempt. But, using a document downloaded simply as a proforma from a website, he did not specify the reasons. The respondents however under their internal procedures had not accepted that self-certification, either as a permanent or temporary justification for not being vaccinated, and therefore his engagement was ended.

4. It has become abundantly clear particularly from the closing submissions, if not also indeed throughout the rest of this case, that Mr Mbuisa's principal complaint is that he believed that decision was unfair. Initially this claim was brought as a complaint of unfair dismissal. Because the claimant was not an employee, as was held at an earlier preliminary hearing, he would not be entitled to bring that complaint. In any event on the facts of this case he did not have two years' qualifying service, so the only way he could have claimed unfair dismissal in any case would have been on the basis it was automatically unfair. Had he in fact been an employee and had he had the requisite two years' qualifying service, in these circumstances there certainly would have been potential issues to be explored as to whether the respondents were acting reasonably or unreasonably in the way they approached enforcement of the government regulations. But that is not the case before us.

The complaints

1. Direct Race (Sex) Discrimination/Harassment

5. Looking at the actual complaints that are brought, firstly there was an incident on 20 June 2021. That is claimed to be either harassment (unwanted conduct having the proscribed effect) related to the claimant's race, he being black, or alternatively direct race discrimination (less favourable treatment): sections 26 or 13 of the Equality Act 2010, the claims being mutually exclusive under section 212. It is also potentially in the mind of the claimant from his witness statement an act of sex discrimination. The sex discrimination complaint in this case had never been properly formulated. It had always understood from previous hearings that that was focused upon the decision to terminate the engagement. We shall, nonetheless, deal with the facts of 20 June incident looking at both potential discriminatory complaints.

6. On that morning the claimant had attended his shift to start at 7.45am. In normal practice there was of course a handover then from the nightshift to

those coming on duty. Two people on the nightshift were known to the claimant and it is common ground that they shouted his name when he came in, and that there was then some conversation between them. So it is quite clear that at that point the claimant was part of a small group of three people, who all happened to be black men, who were conspicuously noisy in that environment.

7. Another member of staff, a lady called Shelley Hinchliffe, remonstrated at the level of noise. The claimant's complaint is that he was singled out by her. There is no dispute that Ms Hinchliffe in her tone and the volume of her complaint acted inappropriately, and clearly the claimant was upset by that. However it is quite clear that the initial complaint, even if inappropriately expressed, was specifically about the level of noise, and as we have said the claimant was part of a particular group at that time who were conspicuously noisy.

8. Ms Hinchliffe may have been incorrect in identifying him as contributing to that level of noise. The claimant is ordinarily softly spoken, though there is some evidence from the statements taken at the time to suggest that on this occasion he was unusually loud for him. It is also clear from the context of what was said and also from the surrounding statements, taken contemporaneously or shortly afterwards in the course of the grievance, that Ms Hinchliffe even if her comments were perceived to be directed specifically towards the claimant intended them to encompass the larger group.

9. There were then two further exchanges. Having initially told people to shut up, or potentially having addressed the claimant on behalf of that group telling him to shut up, the claimant then made a comment "are you talking to me?" Ms Hinchliffe said yes she was, and she then made a further comment saying she was not going to apologise because she had the interest of the residents at heart. The point in issue was this was the changeover time, still relatively early in the morning, some residents were not yet up and there was an excessive level of noise. In particular one of the phrases used by Ms Hinchliffe was to say "this is not a nightclub."

10. The claimant was not on these facts, because of his colour treated less favourably than his two colleagues who were also black males. His complaint if anything is that he should not have been singled out because he was not he one who was actually principally contributing to the noise levels, but he was not so singled out because he was of a different race to his friends. There may have been other people present, including women, or more specifically white women, who were not spoken to by Ms Hinchliffe but they were not part of that conspicuously noisy group of three identified by reference to calling out the claimant's name, "Lee". So, if there was a difference in treatment as compared to any such women, or to white people generally, it was because, not being part of that group, their circumstances were materially dissimilar to the claimant's

11. Even if that tone of addressing the claimant as part of that group was unwanted conduct that caused him upset, there is nothing whatsoever to suggest that that was related to his race. There is even less evidence that it was connected in any way by the fact that he was a man. The admitted context of what was said clearly indicates that the concern was about the noise levels at that time and that is why these comments were made. If the

claimant's own perception was genuinely that it was related to his race and that was what created an intimidating, hostile, degrading, humiliating or offensive environment for him, that perception of the effect of the conduct is objectively not reasonable.

12. All that the claimant can seek to point to as an indication that Ms Hinchliffe may have been singling him out for prohibited reasons, so that an inference of discrimination could be drawn under section 136 of the Equality act 2010, is that he said there had been an earlier incident when she had blocked in his car. He believes that is evidence that she was exhibiting a racist attitude to him. However it became clear in the course of cross-examination from Ms Gould that there had been no previous interactions between Ms Hinchliffe and the claimant, There was no obvious reason to suggest that she would have known which vehicle he drove and still less reasons to suppose that knowing that and because she knew it was driven by somebody who was black she had deliberately chosen to block him in. So there can be no basis on that factual account from which we could possibly conclude that it indicated any form of discrimination. So that claim in relation to the incident on 20 June is not substantiated.

13. We note further that the time limit for presenting any complaints would have expired on 19 September yet the claimant did not approach ACAS until 3 October and even having received a certificate on 14 November did not then bring his complaint within one month by 14 December, but only two days later on the 16th. He has now said for the first time, when asked about that delay between 14 and 16 December, that at some point he was suffering a mental breakdown but we have had no further evidence as to what that was nor when. But more significantly he did not bring any complaint and did not approach Acas before the three month time limit expired on 19 September. We are satisfied that the claimant knew full well that there were significantly restrictive time limits in the Tribunal, and not as he has alleged in evidence to us that he believed he had years to bring a complaint of discrimination. The reason we come to that conclusion is that the claimant is no stranger to Tribunal proceedings. In particular he had brought a claim against a previous employer where there was a hearing in front of Employment Judge Licorish in 2019. At that hearing and in the course of her decision on amendment she made a finding of fact that the claimant had known full well what the time limits were in the Tribunal. Whether she were right or wrong in that finding, at that point in 2019 it certainly however put the claimant on notice that there were severely restrictive time limits that applied. Therefore in any subsequent complaint that he had brought he would have been aware of the need to check if it was in time. We cannot accept his account that he did not, by June 2021, know full well what the time limits were. Despite that he did not comply with them so there is no good reason why he did not bring that complaint in time, so that it would have been dismissed even had it been made out which of course we have concluded it was not.

2. Victimisation: protected act

14. Because of that altercation with Ms Hinchcliffe on the morning of 20 June, the claimant was reassigned to another location at Norcott House. When there he gave his account of the earlier incident to a manager, that is Maria Iqbal.

We have a record bearing her name and the claimant's name, though signed by neither of them, which is quite clearly in context her record of what she was told about what had happened. In the course of that interview the claimant made the assertion to Ms Iqbal that he believed the way he had been treated by Ms Hinchliffe may have been because of his race.

15. As a result of that concern having been expressed the respondents acted properly and promptly. As well as having that statement via Maria Iqbal the assistant manager at Norcott Lodge also took statements from those who were still then available. That did not include the nightshift who had by then gone off. On the basis of those statements, in conjunction with advice from the respondent's HR department, it appeared that there was no obvious basis for the claimant's assertion this had anything to do with his race, even though Ms Hinchliffe may have been "out of order". Therefore the manager at Norcott Lodge, that is a Miss Womersley who has given evidence before us, was instructed by HR to hold an informal meeting with the claimant. That was to convey that information from the investigations and also to invite him to engage in mediation with Ms Hinchliffe so they could resolve the issues. That short meeting between Ms Womersly and the Claimant was held on 22 June, just two days later.

16. Ms Womersley having communicated that position to him, the claimant however was unhappy with any such informal resolution. The minutes of that meeting therefore record that Miss Womersley acted entirely properly in then explaining to him how he could raise a more formal grievance and indeed facilitating the presentation of that. He did that on 6 July. At that point the claimant was much more explicit in asserting that this was an act of race discrimination.

17. So taken together that initial complaint via Ms Iqbal together with more specifically the written grievance of 6 July are the doing of a protected act for the purposes of any victimisation complaint: section 27 Equality Act 2010. They are raising allegations of a breach of the Equality Act, an act of discrimination. And even though the claimant, as we have found, was wrong in those assertions there is not sufficient for us to conclude that that was not made in good faith. So that will found the possible basis of any further claim of victimisation, unfavourable treatment because of his having done that protected act.

18. That formal grievance was investigated not by Miss Womersley but by an external manager brought in, Miss Thoming. Statements were then taken some by her, some again by Mr Hoyle, from all potential witnesses. There was also a grievance meeting held with the claimant. Although the notes were never signed by him, they were sent to him within two hours of the conclusion of that meeting, and he never objected to them. As a result of those investigations Miss Thoming reached a conclusion that confirmed the initial informal decision that there was no evidence to substantiate the complaint that this was any form of race discrimination. She delivered that on 22 July. So again this was done within a very prompt period.

19. Although the claimant disagrees with that conclusion it is a perfectly proper and reasonable decision for Miss Thoming to have made on the information before her, and which we too have seen. And that therefore appeared to be the end of that matter.

3. Disability-related discrimination

20. The next incident that arose came from a waking nightshift that the claimant had worked on 3 August. There was a new manager at that time and the claimant therefore disclosed his prevailing back condition, which is admitted to amount to a physical disability. In the course of that disclosure something was evidently said about the claimant's inability to deal with a particular resident CH who would need help being supported and who could not walk. These concerns were passed back to Miss Womersley and she therefore wrote to the claimant on 9 August and explained that, as she understood it, there had been an allegation that he would not respond to an alarm call. Of course as we have said these were residents who had particular disabilities and who clearly potentially could be troublesome, so if there was an incident it would require two, potentially three members of staff to deal safely with that and it may involve physical restraint.

21. As reported to Miss Womersley she was concerned therefore that the claimant was indicating that he would not be able to provide the appropriate level of support to other workers. On the nightshift this was significant because there was a skeleton staff and if not all those on duty were able to assist in the event of emergency it would create potential difficulties both for the service and for the service user. There is nothing whatsoever improper in the tone of Miss Womersley's email to the claimant where she reports these allegations. We accept her evidence that the intention was to then engage in a fact-finding exercise. And indeed after subsequent enquiries she was able to confirm that there was not any specific allegation that the claimant had in fact positively refused to attend to an alarm call, it was that he had indicated the potential health issues arising from his back condition that may prevent him from carrying out those duties. It was established that he apparently had told the manager on 3 August there were already restricted duties in place for him. However that had never been formally agreed and that too was a point that Miss Womersley needed properly to investigate. Again that matter was progressed very quickly. There was a meeting on 24 August, a welfare meeting. It was agreed that the claimant would be referred expeditiously to occupational health for more information. That was done. There was then a delay but that appears to have been because the claimant did not receive the phone call from occupational health and certainly on one occasion he did not attend as intended, but that meeting was eventually re-arranged as quickly as was practicable for 1 October.

22. In the meantime the respondent's policy was that those who required to be on restricted duties should not be allocated waking nightshifts. The claimant was informed by Miss Womersley that that position would pertain until they had further information from occupational health. That meant that there was one specific shift on 21 August which had been offered to bank workers and which the claimant had indicated he would accept but which Miss Womersley then told him would not be available for him. As we say the reason was that it was still pending confirmation by occupational health as to whether he in fact needed any specific adjustments to allow him safely to work the nightshift. The reason why he was denied that specific and single opportunity on 21 August was indeed because of something arising in consequence of his disability: section 15 Equality Act 2010. That something is the limitation on his

ability to lift patients that had caused him to express his concerns about the degree to which he could provide assistance when on a nightshift. But it is quite evident within this context that the respondent's decision at that point was a proportionate means of achieving the legitimate aim of ensuring the safety of the claimant, the safety of the service users and the efficiency of the service during the skeleton staffing on nights.

23. There were no other waking nightshifts potentially available to be offered to the claimant in the relevant period until occupational health reported. When that report came through in early October, for different reasons they recommended that the claimant should not be assigned nightshifts. So there was only that short period from 9 August until the report following the discussion on 1 October when there was any possibility of the claimant being offered nightshifts and there was only one such shift identified as having been available which he would have taken but which was refused by the respondents. And as we have said that clearly was a justifiable decision in the circumstances.

4. Dismissal: sex and/or race discrimination or victimisation

24. At around the same time the issues in relation to the change in regulations regarding Covid became relevant. The claimant, shortly before the welfare meeting on 24 August, had also therefore had a meeting with Miss Womersley on 20 August to discuss those pending changes in the legislation. At that point he had indicated that he had not been vaccinated because he was still awaiting confirmation from his doctors that it was appropriate for him given his underlying medical conditions. However he did also report that his GP had advised that it *would* be beneficial for him to be vaccinated, but that he simply could not guarantee that there would be no adverse effect whatsoever upon his health.

25. Throughout this period the respondents were applying an internal policy, which had been drafted by the head of HR Miss Watters who has also given evidence before us. The regulations as to exemption contain no definitions section. Therefore, necessarily, it was up to every employer within the care sector to establish their own procedures as to how they would ensure compliance with the law. That is to ensure either of those attending at their premises were indeed fully vaccinated, that is having had two vaccinations, or that they had a proper clinical reason to be exempt. Therefore the respondents invited the claimant to a further meeting at the end of August to explore the matters further. From this point, however, he declined to attend any meeting with Miss Womersley, or subsequently the more senior manager Mr Hartlett. He averred that that was because he felt he had been bullied by Miss Womersley and it was affecting his health, but that alleged effect on his mental health is no part of any disability discrimination complaint before us.

26. Having failed to attend any meeting at the end of August the claimant also failed to attend a meeting on 9 September. At that point he was then issued with formal notice of termination of his bank worker's agreement to take effect on 10 November, which as we have said was the day before the new regulations would actually come into force. It is alleged that that issuing of the notice by Miss Womersley, and the subsequent decision not to accept his self-certification without his also attending at a meeting, that led to his engagement being terminated was further an act of race discrimination or sex

discrimination or of victimisation because he had made the earlier complaints against Ms Hinchliffe.

27. The respondents, as we have said, were following a considered policy. That required discussion to be had with particular workers at a meeting of the potential issues arising from their decision not to be vaccinated. In particular there was a pro-forma checklist prepared by the respondents to confirm whether somebody who was self-certifying to that effect, did in fact appear to have a good reason to claim exemption from vaccination. Mr Mbuisa is quite right that there was potentially some leeway at this stage to allow self-certification, at least on a temporary basis, either until somebody obtained a doctor's certificate or they had had time to go through the newly instituted Covid pass system. But the respondents under their policy did not simply accept such certification at face value without further exploration. Had the claimant attended a meeting it is quite possible that he would have been granted at least a temporary exemption but that did not happen.

28. The respondents, we are quite satisfied, applied this policy across the board. We have received unchallenged evidence that the same procedures and requirements to attend meetings and the same timelines in relation to discussion of issues prior to 11 November were followed with other employees who are either white or female.

29. Nor is there any reasonable inference to be drawn that the fact of the earlier complaints of 20 June and 6 July, and which had led to a concluded grievance investigation on 22 July, had any further bearing on any decision. Certainly Mr Hartlett, who was ultimately the decision maker, has given evidence, which we fully accept, that he was unaware of the content of any such complaints raised about the 20 June incident. Miss Womersley, who on advice issued the various pro-forma letters generated under the procedures and who gave the two months' notice of termination, was of course aware. But the highest the claimant can put it in inviting us to draw any inference of victimisation, is to say that when she acknowledged his grievance, a process which as we have said she had informed him about and facilitated, she expressed "disappointment". However, we accept her evidence that this was not disappointment at the claimant that he had raised a grievance such that she then nurtured some grudge against him, but disappointment that a situation had arisen "on her watch" which meant that one of her workers felt the necessity to raise complaints against another. So those complaints of either form of direct discrimination or of victimisation also fail.

30. The reason why the claimant's engagement was terminated was solely and entirely because of their applying the Covid regulations in force at that time with respect to care homes.

5. Unauthorised deductions from wages

31. That leaves only the complaint in relation to wages. The claimant had been a bank worker at another of the respondent's sites but that had closed. He then transferred so that his primary place of assignment was Norcott Lodge. The best evidence that we have as to the date of that change is that it was from 14 May 2021. The reason for that is that the claimant was not paid for work in the second half of May on the due pay date, which was usually the 15th of the following month that is 15th June 2021. So he immediately, on 15 June, raised

the matter with Miss Womersley and indicated he had not been paid from 14 May to the end of the month. She replied immediately and acknowledged that that was incorrect and facilitated therefore an immediate payment of the sums due. The documentary evidence indicates that that was done by way of an advance of salary to the claimant. This was then recorded in the following months' payslip from 15 July, with a similar amount also then deducted because it had already been paid. Doing the calculation we can see that that equates to 60 hours work. Subsequently the claimant has identified that although he received that advance in relation to 60 hours, which appears to have been for five 12 hour shifts in May, there was still a further outstanding payment for a shift worked on16 May, and that is now accepted by the respondent.

32. In June, for which payment was made on 15 July the claimant was paid for four 12 and a quarter hour shifts plus and one and a quarter hours to represent the meeting he attended with Miss Womersley on 22 June, to which we have already referred.

33. The system for authorising payments of workers is that the manager submits a spreadsheet to payroll at the end of the month, ordinarily on the first day the following month therefore. There is no requirement that a worker fill in any timesheet, and it is of course the obligation on the employer to maintain sufficient and proper records of work done. Principally of course this pursuant to their obligation in relation to the National Minimum Wage. The claimant was paid at £9.28, that is only just above what was then the national minimum wage rate of £8.91. So of course it was important the respondents had clear and robust systems to record the work done to ensure that their legal obligations were being met.

34. Even though the claimant was primarily, from 14 May, assigned to Norcott Lodge it was still possible that he would be reassigned to other locations. The payment would however still come through Norcott Lodge. There is a complication in that the claimant, as well as being on the bank, was also registered with an agency, Duttons, through whom he received assignments at various of the respondent's facilities. Indeed prior to the transfer to the bank at Norcott Lodge in May it does appear that he had previously been assigned through the agency to work there.

35. When a worker receives their payslip on 15th of the month there is no indication as to which shifts they are actually being paid for, only a total number of hours. So it is only if a worker identifies that the calculations suggest they had worked more shifts than actually been paid for that they can raise any issue. That did not happen immediately in this case, but in early October the claimant did identify that, as he then believed, he had been underpaid for one shift in June. By that stage he had no indication of which shift it may have been. That then led to an enquiry by Miss Womersley, who as the manager would have been responsible for submitting spreadsheets, and she then categorically confirmed the particular dates which the claimant had worked in June and for which she had authorised payment on the July pay date. But for some reason those dates did not include the 20th June. That was the date when the claimant had been reassigned from Norcott Lodge to Norcott House and had certainly been at work. The respondent should have had a clear record of that. Nor did the authorised payment account for the claimant working on 13 June. We have

clear evidence that he was offered and accepted a shift on that date and was put on the rota. There is no contrary evidence to suggest he was ever taken off that rota, so it is now by the respondent accepted that he worked on that date.

36. For the dates that were identified by Miss Womersley, as of 5 October, as having been worked and paid for in June, one of them was 27th. That was at a different location. Subsequently an issue has potentially been raised as to whether that was work done through the bank or via the agency. Certainly Mr Mbuisa did fill in a timesheet for the agency for that date but the significance of that is unclear. The timesheet is for a six hour shift whereas Miss Womersley categorically confirmed that he had been paid for 12 1/4 hours through the bank, and that does not coincide. And of course it is not known what time the shift that she authorised payment through the bank system was for. But it does mean therefore there was a categoric assertion that the dates that had been paid and accounted for in June did not include either the 13th or the 20th. That categoric assertion was repeated when the matter was investigated again by Mr Hartlett as of 28 October.

37. The claimant subsequently identified a further date where he says he was unpaid in June which is the 26th. There is no evidence via the exchange of text or email messages to indicate that those shifts were offered. Some shifts, as it is accepted by Miss Womersley, may be offered on an ad hoc basis by telephone. So, although the respondent's census records that the claimant was not shown as working, certainly not at Norcott Lodge on the 26th, that is limited evidence to show that he was not working at all on a date he asserted.

38. As we have said the obligation is on the respondents to keep appropriate and proper payment records, and also of course they should have available any records that show which shifts were actually assigned through the agency and which were then claimed. And of course it is also the responsibility of the manager to authorise the payment of any invoice raised by the agency. We accept there may well have been difficulties at this time, and that prior to the pandemic where they were able to operate by a geometric fingerprinting system of clocking in the records may be much more accurate. But it is still a primary responsibility of the respondents to keep proper records and the limited information that they put before does not, in our view, displace Mr Mbuisa's own evidence that he also worked on the 26th. That is a conclusion we draw particularly given that he is categorically right in stating that he worked on 13th and 20th, despite the assertions in the Response to this claim that he had not worked on those dates.

39. We should say that within the claim for unauthorised deductions there was also an earlier claim for 23 April. That is clearly a mistake because that pre-dates the commencement of work on the bank and there is documentary evidence that that was in fact assigned through the agency. There is also a claim for 29 August. That was certainly a date when the claimant worked but the subsequent calculation by Miss Womersley on 6 October indicates that that was one of the dates that was worked and paid for in August and recorded within the submissions for the 15 September payslip.

40. This still means, though, that we have therefore a succession of dates claimed: 23 April, 16 May, 13 June, 20 June, 26 June and 29 August on all of which it is quite clear the claimant did actually attend for work.

41. What is then contentious is that he also claims for the 1st, 5th and 8th September. This claim was made after Miss Womersley had indicated, in early October, the shifts that had purportedly been paid to date. That did not then include dates in September because that was before the usual pay date would have fallen due on the 15th. It is quite clear to us that the best interpretation of this timeline is that when it first became apparent to Mr Mbuisa that the respondents were, in some cases clearly incorrectly, disputing the dates that he worked, he then gave them an up to date schedule of all the shifts that he had identified were still outstanding, even though those three in September were not yet due for payment.

42. The first response by Miss Womersley was simply record that these sums were not yet due: but she does not on 5 October also say words to the effect "but also you have not in fact worked those shifts." By that date she will, though, have already reviewed the documentation because she will have submitted the spreadsheet on the 1st. She does then on 6 October come back with a further email to the claimant disputing that there was any record of him having worked on those dates.

43. So we have a clear conflict. The claimant said by 5 October, so within a very short time of those claimed working days, that he had worked on those dates. There is a reason for him having given a schedule of due work up to that date. Also it corresponds with the period ending on 9 September, when he was given notice: so it was a significant date within the period of his working that he might have been expected to remember. The contra-indications to this being an accurate recollection are that there is no record of the claimant being sent texts or emails to offer him those shifts. We do not have a complete record but we can see a text sent to the claimant on 3 September. That does not include any of those dates now claimed. Then subsequently on 15 September there is a message about available dates through to 15 October. Neither of those texts was responded to.

44. The claimant had originally sought to argue that he was not given any opportunity to work after 8th September 2021 or that, though he sensibly withdrew this allegation, that the messages were deliberately sent to an incorrect phone number. We find that he was certainly offered further shifts, but for whatever reason did not respond at all.

45. Those documented offers of work do not include these contentious dates, and the respondent's census records again do not indicate the claimant being recorded as being present at Norcott Lodge on any of those three occasions.

46. As we say the claimant made this assertion very soon afterwards. It was made in the context of his also asserting the dates between April and August when he had worked and which were clearly correct. It is also followed up, when the respondents disputed these claims, with his asserting that he would bring a claim through ACAS or to the Tribunal. So either he is deliberately lying about having worked at all on these dates and is prepared also to lie to the Tribunal, or this is accurate. We also observe that to have attended on these days would be consistent with the general pattern of his working. Throughout August he worked nearly every Sunday. One of them is also a Sunday and the others a Wednesday. That is consistent with him having worked the previous Sunday 29 August and then also going on to work the next one,5

September. A pattern of Wednesday working is also evident as a fairly common working day for the claimant.

47. On balance we do accept the claimant's evidence that he worked these three days as well as the other contentious date on 26 June and that none of these dates have therefore been paid. That means that the claimant has suffered a series of unauthorised deductions up to the payroll ran on 15 October, which is the last date by which he should have been remunerated for work done in September. So all those claims are in time. That is a total of seven shifts at twelve and a quarter hours, which is 85.75 hours. At the hourly rate gross of £9.28, that is £795.76.

48. In addition the respondents operated a rolled-up-holiday-pay system. So the claimant is incorrect to assert that he has been unpaid pro rata for 28 days annual holiday. He never worked a five day week and so cannot have qualified for that maximum 5.6 weeks holiday allowance. But he is of course entitled to further claim as unauthorised deduction from wages the £1.12 for each hour actually worked to account for rolled up holiday, with an expectation that he then take that leave during the gaps between assignments. That gives a further entitlement to £96.04.

Amendment

49. The final matter is that we do accept the respondents' submission that we should amend/add as the appropriate respondent to this claim Isand Limited, and that Judgment for unauthorised deductions is made against that company. That is the company whose name appears at the top of the payslips. It is part of the Cygnet group. It is a company whose business is to provide care, it is not simply a payroll company or similar. We do not remove the other two named respondents from proceedings lest there be any complication, which we do not envisage, but we therefore make the Judgment for the unauthorised deductions only against Isand Limited.

Employment Judge Lancaster

Date 15th February 2023