Case No: 2414311/2021

EMPLOYMENT TRIBUNALS

Claimant: Mr J Serrao Da Veiga

Respondent: Titan Risk Management Limited

Heard at: Manchester Employment Tribunal (by CVP)

On: 25, 26, 27 and 28 April 2023
3 May 2023 (in chambers)

Before: Employment Judge Dunlop
Mr A Clarke
Mr R Cunningham

Representation

Claimant: In person
Respondent: Mr M Mensah (counsel)

JUDGMENT

1. The respondent made unauthorised deductions from the claimant's wages and is ordered to pay the claimant the (gross) sum of £102.50.

2. The claimant's other claims of disability discrimination, race discrimination, victimisation, and wrongful dismissal are not well founded, and are dismissed.

REASONS

Introduction

1. The claimant worked for a short period as a security guard/steward for the respondent, which provides contract staff for large-scale events. He is

disabled by reason of diabetes, although there is a dispute as to whether the respondent was aware of that during his employment.

2. The claimant says that he repeatedly requested breaks for medical reasons and that this was denied. Matters came to a head on 4 September 2021, when he told a manager, Mr McKenna, that the respondent's actions amounted to discrimination and that he would take them to court. The respondent then dismissed him by cancelling his shifts and removing him from the Whatsapp group and app used to manage shift allocation. The claimant brings various claims of disability and race discrimination arising out of his employment.

3. The respondent gives a very different account. On its case, it had no idea of the claimant's diabetes. The relationship was a very positive one until allegations were made by other staff that the claimant was requesting money for driving them home in the respondent's minibus (he was entitled to payment from the respondent for driving duties). When the claimant was notified of the allegations on 4 September 2021 he promptly resigned. The complaints of discrimination were raised after employment, as a means of building a case before the Tribunal.

The Hearing

4. The claimant speaks English as a second language, and the Tribunal had the benefit of a Portuguese interpreter throughout. The quality of the interpretation appeared to be excellent, and we would like to pay tribute to the interpreter, Ms M Mendes, who worked very hard throughout the four days of the hearing.

5. The hearing was conducted by CVP which generally worked well for all parties. There were a few technical issues, but where this caused short delays we allowed the parties extra time to complete that part of the hearing.

6. At the start of the hearing we took time to pre-read the bundle, which was relatively small at 166 pages, and the witness statements. The claimant had prepared a witness statement and gave evidence on his own behalf. The following individuals had made statements on behalf of the respondent:
   4.1 Frank Stirling, Director of OpusApeiro Ltd
   4.2 Michael Roberts, Director of Support Services
   4.3 Damian Hall, Head of UK Operations
   4.4 Andy Cooper, Assistant Head of Security
   4.5 Liam McKenna, a manager

7. The parties introduced a number of new documents. On the first day, the respondent introduced some rota documentation. Mr Veiga did not object to this material being added to the bundle, and we designated these documents R1 and R2 for reference.

8. Generally, it would be for the claimant to give his evidence first. However, Mr Mensah applied for the Tribunal to interpose one of the respondent's witnesses, Mr Frank Stirling. Mr Stirling works for a third-party company and

was, we were told, only available on Day 1. Mr Veiga consented to us hearing Mr Stirling's evidence before his own. We completed Mr Stirling's evidence and started Mr Veiga's evidence in the afternoon of Day 1.

9. Mr Veiga said that he had new information to produce and, overnight, he sent the respondent and the Tribunal some Companies House documentation (C1 and C2) along with a small file of messages/photographs (C3). The respondent also sent new documents overnight; a 24-page file of pictures of Whatsapp conversations between Liam McKenna and Mr Veiga (R3). Again, each party agreed that the new documents could be admitted, and we numbered them as indicated.

10. Very shortly before the hearing commenced on day 2, the respondent sent Mr Veiga and the Tribunal a further document, which comprised an email chain between one of the witnesses, Mr Hall, and a Mr Dominic Margiotta (R4). We discussed this material after lunch on day 2. Again, Mr Veiga did not object to it being admitted but wanted to introduce his own further material, by way of a copy of print outs of his banking records, in response. These were duly produced and designated as 'C4'.

11. Mr Mensah's cross examination of Mr Veiga lasted until shortly after lunch on day 2, following which the panel asked some questions of Mr Veiga. Mr Hall then gave evidence on behalf of the respondent. His evidence concluded at the end of Day 2.

12. At the start of day 3, C introduced two more pages of new documents (C5). The respondent did not object to their admission, although we found that they had no relevance to matters in dispute in this case.

13. During the morning of Day 3, Mr Veiga cross-examined Mr Roberts and Mr Cooper. Mr Veiga asked his questions in a clear way, but he did have a tendency to repeat certain questions and also to dwell on points which were peripheral to the issues we had to decide. The Judge moved Mr Veiga on from time to time and, with some witnesses, gave Mr Veiga deadlines to finish his cross examination. He was given ample notice of these deadlines.

14. Prior to the hearing, Mr Veiga had applied on more than occasion for witness orders for two of the respondents' staff members, Martin McKinney and Jade Hodson. This had been refused on various grounds, including the fact that the Tribunal would not make a witness order to allow a party to cross-examine witnesses. Mr Veiga raised the point at the start of the hearing and the Judge explained that there were no grounds to re-open the decision. The Judge also commented, in respect of Ms Hodson, that she did seem to play a role in the events that had given rise to the proceedings and it was somewhat surprising that the respondent had not called her. The Judge explained that if Mr Veiga gave evidence which was uncontested then it may prove to be in his favour that those witnesses had not been called.

15. Throughout his evidence and his questions for the other witnesses, Mr Veiga continued to state that Jade would be able to confirm what he said on this point or on that point. As the proceedings progressed, her absence

became more glaring. After lunch on day 3, the respondent produced a short (7 paragraph) statement from Ms Hodson and Mr Mensah asked for permission to call her as a witness.

16. We anticipated that Mr Veiga would be pleased about this as it would give him the opportunity to ask the questions he wished. However, at this point Mr Veiga objected to Miss Hodson being called. He made the point that the statement was late and could have been influenced by the evidence which had already been given. He also said that he would have to translate the statement and prepare questions, and that that would take him two days. The Judge explained that to adjourn the hearing to give him that time would mean the hearing was not re-listed for around six months.

17. As the application to call Ms Hodson was contested, the Tribunal adjourned to consider it and gave a decision. We considered that Mr Veiga's points were valid to some extent, but that we would be better able to make a fair decision in the case if we did hear Ms Hodson's evidence. We considered that Mr Veiga had some reasonable opportunity to translate the statement if the respondent supplied a word version of the text (he has told us he uses Google translate) and to prepare some questions. We also informed the parties that we would ask Ms Hodson to read her statement so it could be translated during evidence, and informed them that the Tribunal would be asking questions of Ms Hodson as well. We considered that these factors should all provide some reassurance to Mr Veiga.

18. On the afternoon of Day 3 we heard evidence from Mr McKenna. We sat late on Day 3 but Mr Veiga's cross examination of Mr McKenna remained unfinished. The Judge informed Mr Veiga that he would have up to a further hour to cross examine Mr McKenna in the morning, and the remaining time in the morning would be used for Ms Hodson. The parties would be expected to make oral submissions on the afternoon of Day 4, limited to one hour each.

19. Overnight, Mr Veiga submitted further documents to the Tribunal which he wished to rely on in his cross-examination of Miss Hodson. They were mainly text messages between himself and Miss Hodson, some of which appeared in the bundle already. There were some additional messages, and a photograph of a group of people. There were 11 pages in total. Mr Mensah could have little objection this material being admitted given the late application to call Miss Hodson, and he did not do so. We called these documents C6.

20. On Day 4, Mr Veiga informed the Tribunal that he did not need Ms Hodson to read her statement out and that he had been able to prepare his questions. He cross-examined Ms Hodson and the parties made closing submissions as planned. We finished at around 4pm. This meant that, overall, Mr Veiga had been given much longer for the presentation of his case than had originally been envisaged. This was partly due to the requirement for translation (although Employment Judge Horne had already extended the hearing length by one day to account for that) and partly due to technical problems with CVP. However, the bulk of the delay was due to

Mr Veiga taking a long time in cross-examination of the witnesses and for his submissions. We considered that it was appropriate and in the interests of justice to give Mr Veiga extra time to the extent that we did, but to allow the hearing to go part-heard would have been disproportionate. The Judge managed the case in a way which avoided that outcome.

21. The Tribunal reserved its decision and met again in chambers to deliberate on 3 May 2023.

The Issues

22. The issues in the case were set out initially in a case management order prepared by Employment Judge Feeney, and then in a case management order prepared by Employment Judge Cookson. The issues as defined by Employment Judge Cookson are set out in full below:

1. Disability

1.1 It is accepted that the respondent that the claimant had a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about by reason of his Type 2 diabetes.

2. Direct disability discrimination (Equality Act 2010 section 13)

2.1 Did the respondent do the following things:
- 2.1.1 Not allow the claimant to take breaks during shifts on 27 July, 1 3 and 28 August, and 4 September 2021 (by Liam and Jade)
- 2.1.2 The claimant says that the respondent knew he was disabled on 17 July after he spoke to Martin McKinney when he had to go to the medical tent.

2.2 Was that less favourable treatment?
- 2.2.1 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.
- 2.2.2 If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether s/he was treated worse than someone else would have been treated.
- 2.2.3 The claimant has not named anyone in particular who he says was treated better than he was.

2.3 Has the claimant proven facts from which the Tribunal could conclude that this was because of his disability?

2.4 If so has the respondent shown a non-discriminatory reason?

3. Harassment related to disability (Equality Act 2010 section 26)

3.1 Did the respondent do the following things:
- 3.1.1 Say to the claimant (by Liam) "fucking hell black people want breaks all the time. If you are ill go home".

Note: I raised with the claimant that this seems to a hostile comment referring to his race but the claimant says because it referred to being ill and going home it also related to his disability

3.2 If so, was that unwanted conduct?

3.3 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

3.4 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it Is reasonable for the conduct to have that effect.

3.5 Has the claimant proven facts from which the Tribunal could conclude that this conduct related to the claimant's disability?

3.6 If so has the respondent shown that there was no contravention of s26?

4. Victimisation (Equality Act 2010 section 27)

4.1 Did the claimant do a protected act as follows:

4.1.1 On 4 September 2021 when the claimant told Liam that he needed a break and he needed to take his medication and it was not allowed and after Liam made the comment above, he told Liam that this was discrimination, and he would go to court.

4.2 Did the respondent do the following things:

Following the incident on 4.9.21

4.2.1 cancel all of the claimant's shifts (which the claimant says was dismissal)

4.2.2 delete the claimant's shifts in the app

4.2.3 remove/cancel the claimant's access to the company's app

4.3 By doing so, did it subject the claimant to detriment?

4.4 If so has the claimant proven facts from which the Tribunal could conclude that it because the claimant did a protected act?

4.5 If so, has the respondent shown that there was no contravention of section 27?

5. Direct race discrimination (Equality Act 2010 section 13)

5.1 Did the respondent do the following things:

5.1.1 On 13 and 28 August 2021 and 4 September 2021 Liam said the claimant "Fucking hell you black people want breaks all the time. If you are ill just go/go home".

5.2 Was that less favourable treatment?

5.2.1 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.

5.2.2 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.

5.2.3 The claimant has not named anyone in particular who he says was treated better than he was.

5.3 Has the claimant proven facts from which the Tribunal could conclude that this was because of his race?

5.4 If so has the respondent shown a non-discriminatory reason?

6. Harassment related to race (Equality Act 2010 section 26)

6.1 The claimant is Black Portuguese.

6.2 Did the respondent do the following things (see the comments made by Liam in section 5 above);

6.3 If so, was that unwanted conduct?

6.4 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

6.5 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

6.6 Has the claimant proven facts from which the Tribunal could conclude that this conduct related to the claimant's race?

6.7 If so has the respondent shown that there was no contravention of s26?

Note: Employment Judge Feeney had recorded the disability claims as set out below but the claimant had not referred to his claims in this way in his witness statement and the documents he produced about his claim in the bundle he produced I understand he has decided not to pursue his claims in the way she recorded but if I am wrong about that he must confirm this in writing to the tribunal.

7. Discrimination arising from disability (Equality Act 2010 section 15) (section 4 in EJ Feeney's annex)

7.1 Did the respondent know, or could it reasonably have been expected to know, that the claimant had the disability? From what date?

7.2 If so, did the respondent treat the claimant unfavourably in any of the following alleged respects:
- 7.2.1 in not giving the claimant any shifts after 4 September;
- 7.2.2 that the respondent dismissed the claimant (at present, the respondent says the claimant resigned, which the claimant denies)?

7.3 Did the following things arise in consequence of the claimant's disability:
- 7.3.1 That the claimant needed additional breaks because of his diabetes?

7.4 Has the claimant proven facts from which the Tribunal could conclude that the unfavourable treatment was because of any of those things?

7.5 If so, can the respondent show that there was no unfavourable treatment because of something arising in consequence of disability?

7.6 If not, was the treatment a proportionate means of achieving a legitimate aim?
- 7.6.1 The respondent says that its aims were: *The respondent has not provided these details.*

7.7 The Tribunal will decide in particular:

7.7.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;
7.7.2 could something less discriminatory have been done instead;
7.7.3 how should the needs of the claimant and the respondent be balanced?

8. Reasonable Adjustments (Equality Act 2010 sections 20 & 21) (section 5 in EJ Feeney's annex)

8.1 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs
8.1.1 that no additional breaks were available to employees?

8.2 Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that the claimant required breaks for his diabetes?

8.3 Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at that disadvantage?

8.4 Did the respondent fail In its duty to take such steps as it would have been reasonable to have taken to avoid the disadvantage? The claimant says that the following adjustments to the PCP would have been reasonable:
8.4.1 additional breaks

8.5 By what date should the respondent reasonably have taken those steps?

9. Remedy [omitted]

10. Unauthorised deductions

10.1 Did the respondent make unauthorised deductions from the claimant's wages and if so, how much was deducted?
10.2 The claimant says he is entitled to be paid for the following shifts [information from claimant was annexed to EJ Cookson's List of issues but it omitted for brevity]

23. It is clear from this list that the claim of discrimination arising from disability under s.15 Disability Discrimination Act is not being pursued. The understanding of this Tribunal, having talked through the list with the parties, was that Employment Judge Cookson's comment also applied to the reasonable adjustments claim. However, Mr Mensah cross-examined on the basis that the reasonable adjustments claim was subsisting and made submissions on it. We therefore addressed this claim in our deliberations and reached conclusions on it, as set out below.

24. At a further preliminary hearing on 22 February 2023 before Employment Judge Horne, Mr Veiga was allowed to amend the claim to add a claim of wrongful dismissal. Employment Judge Horne defined the issues for that as follows:

1. The claimant says he was an employee under a contract of employment. The response to the claim conceded (at Box 6.1) that the claimant was employed under a contract of employment. The respondent will need permission to resile from that concession. No application for permission has yet been made.
2. The claimant says he was dismissed:
   2.1. By having his shifts removed and from being excluded from the WhatsApp group where shifts were allocated.
   2.2. Alternatively, in November 2021.

3. The claimant is not suggesting that his contract entitled him to any more than the statutory one-week period of notice.
4. Neither party contends that the claimant was given notice. If the claimant was dismissed, the dismissal was in breach of contract.
5. The issue is whether the claimant was dismissed or not.
6. If there was a dismissal in breach of contract, the tribunal will have to decide whether that dismissal caused the claimant any loss. This may involve deciding whether the respondent *would have* offered him shifts during the notice period. It may involve deciding whether the respondent was *contractually obliged* to offer shifts during the notice period. The tribunal at the final hearing will decide which is the correct legal test.

25. The unlawful deductions claim arose from an arrangement between Mr Veiga and respondent that he would be paid for driving co-workers to and from events. The parties agreed he would be paid at £10 per hour and appeared to (broadly) agree the days on which he had been driving. For some of these days, however, there was a disagreement about the length of the driving time. Mr Veiga said that in total he should have been paid for just over ten hours more than he was. At the end of Mr Veiga's evidence, Mr Mensah indicated that the respondent wished to concede the unauthorised deductions claim, and proposed that the correct figure for payment was £102.50. Mr Veiga accepted that this was the correct figure and the Judge informed the parties that the Tribunal would issue a Judgment to that effect.

Findings of Fact

26. The respondent is a company which provides stewarding and security services for events such as sporting fixtures and festivals.

27. Mr Veiga came to work for the respondent following a course he undertook with another organisation called Blue Apple training. We understand from Mr Hall that the Blue Apple courses receive government funding and are targeted at helping people into employment.

28. The course that Mr Veiga undertook was specifically in relation to security work. It involved a number of elements over a 6-8 week period. The respondent partners with Blue Apple to provide "assessment opportunities" whereby course participants work a small number of shifts for the respondent and, which they are required to complete successfully to complete their NVQ qualification. The respondent also offers successful candidates the chance to work for it on a casual basis following completion of their course. If both parties are happy, this can progress to more regular work.

29. Towards the end of Mr V's course, on 23 June 2021, members of the respondent's team visited the training facility to sign up candidates. This included Mr Hall, someone called Emily and possibly Andy Cooper. It also included someone called 'Jade'. Mr Hall believes that this was likely to be Jade Brockenhurst, who works in the respondent's office dealing with HR

matters. Mr Veiga believes that this was Jade Husdon, who he later worked with.

30. Following this visit, on 24 June 2021, Mr Veiga visited the respondent's office in order to present identification documentation and complete some more forms. Again, he was assisted by 'Jade'.

31. At some point on the 23/24 Mr Veiga downloaded to his phone an app used by the respondent, called C247. This app allowed the respondent to store information about its employees and manage the shifts they were allocated to. In his disclosure, Mr Veiga produced print outs of screen shots taken from his phone of the 'User Details' pages of the app. The page appears as a form, with boxes for personal details such as name phone numbers, date of birth and so on. A section headed 'Additional Questions' includes the question "Do you have any medical conditions that you need to make us aware of – If yes then please input in text field". Mr Veiga's screenshot shows the answer "*I'm diabetic. I need to take my medication 4x days. Because of my diabetes, I use a lot of toilets*." His evidence was that he completed this section with the help of Jade. He has also produced printouts of pages purporting to show the digital properties of the screenshots, in particular that they were taken on 23 June 2021.

32. The respondent denies that Mr Veiga ever notified the business that he had diabetes before this litigation started. They have produced screenshots of the employer-side of the C247 interface showing the information that, they say, was inputted by Mr Veiga when he signed up to the app. There is no text in the field relating to medical conditions, and no mention anywhere of diabetes.

33. One of the respondent's witnesses was Frank Stirling, who is a director of the business which developed and operates the C247 app. He gave evidence that the information entered on the app was as shown in the respondent's screenshots, and that, although the respondent would be able to make changes to an employee's details, the app would log any such changes. According to Mr Stirling, no changes have been made to Mr Veiga's records since they were first created. He also gave evidence that the screenshots produced by Mr Veiga displayed an updated version of the app interface, which meant they could not have been taken in summer 2021. Essentially, it was his view that Mr Veiga had entered the information again at a later date and taken a screenshot, but not submitted it to the app. He gave his opinion that the 'properties' of the screenshot had been tampered with and explained how, in his view, this might have been done. This is only a summary of his evidence which was detailed and specific on these points.

34. In questions from the panel at the end of Mr Stirling's evidence, we probed the relationship between his business and the respondent's business to seek to establish whether he had any motivation to lie in order to support the respondent. His response to those questions, in summary, suggested that the respondent's business accounted for a relatively minor part of his business's turnover and that there was no other connection or reason for him to collude with the respondent. Mr Stirling was released following the

completion of his evidence in the afternoon of Day 1, and did not attend the rest of the hearing.

35. Some of the documents which Mr Veiga introduced at the start of Day 2 (C1 and C2) were documents obtained from Companies House designed to undermine Mr Stirling's answers to the Tribunal questions. We note that it would have been open to Mr Veiga to ask questions himself about the finances of Mr Stirling's business and its connection with the respondent. It would also have been open to him, in support of that line of questioning, to introduce these documents at an early stage. He had not done those things. The documents were of little use to us, in part because they appear to be incomplete but, more fundamentally, because Mr Stirling did not have the opportunity to comment on them. Even taken at face value, the documents would be of only marginal value in undermining Mr Stirling's evidence. There was no

36. We found Mr Stirling's evidence credible and compelling. We find as a matter of fact that Mr Veiga did not provide information about his diabetes to the respondent via the C247 app in June 2021. The other conclusion, which follows inevitably from the first conclusion, is that Mr Veiga has sought to present 'doctored' evidence (to adopt Mr Mensah's word) to the Tribunal and has lied to us in giving evidence about those screenshots.

37. That is a serious matter and it is one which weighs heavily as we consider other conflicts of evidence which arise in this case. We do bear in mind, however, that people can fabricate evidence in support of allegations which they know to be true (where they consider the evidence is weak), as well as in support of allegations which they know to be false.

38. We make a further, broader, finding that Mr Veiga did not disclose his medical condition to anyone at the respondent throughout the application process. We were shown an Equal Opportunities monitoring form, which had been signed by Mr Veiga and on which a box was ticked to indicate he had no disability. There was a dispute between the parties as to whether Mr Veiga had ticked this box himself or whether the respondent's staff (in particular, Jade) had ticked it for him. We note that given Mr Veiga's language difficulties he may have had some assistance with the form, and we also note a discrepancy in that this form indicates he was 'single' whereas the app information recorded on the respondent's system indicates that he was 'married/co-habiting' (which is correct). It is improbable that Mr Veiga wanted to mis-record his marital status, and more likely that these forms were completed in a somewhat careless way as neither party set much store by the paperwork. The latter conclusion is also supported by the fact that the respondent issued Mr Veiga an employment contract in which the start date had not been filled in. However, regardless of his level of understanding about the questions he was being asked, we are content that Mr Veiga did sign this form and did not indicate that he had a disability, or otherwise disclose his medical condition.

39. Given that conclusion it is unnecessary to determine whether it was, in fact, Jade Hudson or Jade Brockenhurst who assisted him with completing the

forms. No one at the respondent had knowledge of the claimant's condition when he started work, nor knowledge that it might mean he would need extra breaks.

40. We note that there was evidence from the respondent's witnesses about other employees who did have adjustments. In particular, we were told about one casual employee who could not stand for long periods of time and was provided with a seat or stool to undertake his duties. Andrew Cooper also gave evidence that he himself was diabetic and other staff confirmed they were aware of this and that he would sometimes take a break in order to have food or medication to manage his condition. We note that Mr Cooper is a manager and that sometimes more established or senior employees might receive better treatment, but we nonetheless consider this is an example of the respondent making appropriate adjustments for someone with Mr Veiga's specific condition.

41. As noted in Employment Judge Horne's case management order, the respondent conceded that Mr Veiga was an employee and did not resile from that concession. This case therefore proceeded on that basis. The evidence before us was that, despite this, people working for the respondent were offered and accepted shifts on an casual basis. There was no obligation to accept shifts. Work opportunities were publicised through a Manchester Whatsapp group which Mr Veiga was added to. The Manchester managers, including Jade Hodson and Liam McKenna, were administrators of that group. We accept the respondent's evidence that many of their workers were casual – for example some were students who would work in the holidays but not in term time. People were regularly being added, removed and re-added to the group depending on whether they were looking for work at that time.

42. The bundle contained a helpful document which set out all of the shifts worked by Mr Veiga, including the dates, times and the events he was working at. This shows that he initially picked up single shifts on 4 and 7 July 2021. From 16 July onwards, he was working very regularly, mostly at events lasting several days.

43. Initially, the relationship between Mr Veiga and the respondent was good. Mr Hall described Mr Veiga as someone who was punctual and reliable and 'hungry for shifts'. Mr McKenna gave evidence to similar effect. Such workers would be valued by the respondent's managers. Mr Veiga quickly came to do a lot of work. He was offered the opportunity to be a driver. This meant that he was responsible for driving a minibus between the respondent's offices, where the workers met, to whatever festival or event they were working at. As noted above, he was paid extra for this responsibility. Mr McKenna note, almost as a throwaway remark, that Mr Veiga was asked to be a driver because he was always punctual. It makes sense that the respondent would need people who were reliable and punctual to be drivers. We find that the Manchester managers genuinely found Mr Veiga to be a good member of the team and were not simply saying nice things about him for the sake of the case. Related to this, we find that the respondent did have difficulty in recruiting and retaining

workers, particularly good ones. This arises from the fact that this is low paid work, with long, unsociable hours, and some potential for discomfort and/or conflict. The difficulty is reflected in respondent's involvement with recruitment schemes such as the Blue Apple course.

44. On 16, 17 and 18 July, Mr Veiga worked at the Grand Prix at Silverstone. This was a huge event and the respondent supplied staff from its Leeds office. To make up extra numbers, Manchester staff were also offered these shifts and they would be driven to Leeds and driven on to Silverstone from there. Mr McKenna drove Mr Veiga and other staff members from Manchester to Leeds and back. He was not otherwise involved in the job, and neither were the other Manchester managers.

45. Mr Veiga gave evidence that he had had to attend the medical tent at Silverstone on 17 July, due to having had to work for a number of hours without the opportunity to eat or take medication. He says this happened about 12.30pm, and following an examination and the chance to take medication, he was released to work for the rest of the day. He says a manager named Martin McKinney was aware of this and took papers from the doctor detailing the medical issue. Mr Veiga went on to say in his statement that he had asked Mr McKenna on the journey home if he had received a report from Mr McKinney about the incident and Mr McKenna said that he had but that nothing would be done since he (Mr McKenna) wasn't there. Mr Veiga's account is that he then told Mr McKenna that diabetes is serious and could kill him, and Mr McKenna smiled.

46. Mr McKinney has not given evidence. The respondent has been aware of since November 2022 the Mr Veiga says Mr McKinney was aware of his condition from that event, as it was recorded by Employment Judge Cookson in the List of Issues. We were told that Mr McKinney is on longterm sick leave, which is why he was not called to give evidence. Mr Mensah invites us to find that there was no episode at Silverstone on 17 July, because if there had been it would have been reported by Mr McKinney and there would have been a paper trail within the respondent's records. Mr Veiga disputes the claim that Mr McKinney is on sick leave and says there has been a post on the respondent's social media, with a group photograph including Mr McKinney (C6, pg 1). The question of Mr McKinney's sickness absence was one of the 'rabbit holes' or tangents, which Mr Veiga pursued at length in his questioning of other witnesses. Ultimately, we do not consider that that assists us much in determining what happened at Silverstone. The fact is that the respondent has no witness who can directly contest what Mr Veiga says, and that presents them with some difficulty on this point.

47. However, it is for Mr Veiga to prove the facts which he asserts in the case and, after careful consideration, we find that it more likely than not that the alleged episode at Silverstone did not happen. We take into account the fact that there is no paper trail. That is a factor in the respondent's favour, although it is not determinative as we consider that the respondent's paperwork is not particularly robust. More significantly, we consider that it would be artificial to separate the part of the allegation which relates to what

Mr McKinney was informed of during the event from the part which relates to what Mr McKenna was informed of on the journey home. We have no hesitation in preferring Mr McKenna's account to Mr Veiga's. We are satisfied that if Mr Veiga required adjustments due to his disability and, raised this, this would have been accommodated. In reaching this conclusion we take into the findings we have made above about Mr Veiga being a good worker, and the difficulties the respondent had with recruitment/retention, alongside the findings that adjustments had been made for other workers. This gives a strong basis for preferring Mr McKenna's account, and the fact that we have found Mr Veiga's evidence to be false in respect of the app issue reinforces that decision.

48. Having rejected Mr Veiga's evidence in relation to telling Mr McKenna, we consider that it is more likely than not that he did not tell Mr McKinney, despite the lack of any direct evidence. We find that Mr Veiga only raised his medical condition at a much later date as a means of advancing a Tribunal claim. We consider we are entitled to reach that conclusion on the balance of all the evidence, notwithstanding the absence of Mr McKinney.

49. Moving on from 17 July, Mr Veiga makes complaints about being denied breaks by Mr McKenna and/or by Ms Hodson, on a number of occasions. He says that they did this in the knowledge of his disability and that he needed the breaks to take medication. He says this happened on many occasions, but for the purposes of the claim there are four dates recorded by Employment Judge Cookson in her List of Issues – 27 July, 13 and 28 August and 4 September.

50. In Mr McKenna's statement he denies ever having been told about Mr Veiga's medical condition, or that he needed extra breaks. He maintained this position in cross-examination. Mr Veiga was very insistent that Ms Hodson would have supported his position as she was very aware of his need for extra breaks, and had referred him to Mr McKenna to pursue this on numerous occasions. When Ms Hodson was called as a late witness she did not support Mr Veiga on this point. Her evidence, both in her statement and under cross examination, was that she was not aware Mr Veiga had any medical condition until these proceedings. We accept the evidence of these two witnesses over Mr Veiga's evidence.

51. We also accepted Mr McKenna's evidence that breaks were generally very important for staff and that it was the first thing they would ask about when setting up for the day. Formal breaks of 20-30 minutes were covered by managers or supervisors and members of staff had to wait for the supervisor to get around to them in order to take their break. Outside of that, there was the ability for staff to take short comfort breaks at their own discretion, when their work would be covered by colleagues.

52. It is easy to imagine that there may well have been times when Mr Veiga did not get a break at the point when he would have wanted one, and even that he may have had to wait in circumstances where he became anxious about attending to his health needs. We are satisfied, however, that Mr Veiga was treated in the same way as other employees regarding breaks, and that he

never communicated anything linking any request for breaks to his disability. We find that neither Mr McKenna nor Ms Hodson prevented Mr Veiga from taking breaks on the dates listed in the list of issues. (Indeed, we accept the respondent's evidence that neither of them worked on the first date in the allegation, 27 July.)

53. Mr Veiga made allegations that Mr McKenna had made offensive comments to him when he had asked for breaks, including on the dates mentioned above. This allegation evolved over the course of proceedings. Mr Veiga's evidence about exactly what was said, and the circumstances in which it was said, was vague. The thrust of the complaint was that Mr McKenna had made one or more comments to the effect of "Fucking hell. You black people like to take breaks all the time. If you're not well then go home."

54. Mr McKenna accepted that he did tell workers that if they did not feel well they should go home. We find that he would have said that to Mr Viega, had Mr Viega been complaining about feeling unwell on a shift, but we are unable to find that he ever actually did.

55. We do not consider the comment "if you are unwell, go home" to be an inappropriate thing to say, taken in isolation. Mr McKenna robustly denied making the other comments, or saying anything that could be interpreted in that way. When Mr Veiga was asked if anyone witnessed the comments, he said that Jade (Hodson) had been present for most of them. When Ms Hodson was called to give evidence she denied ever having heard Mr McKenna say anything of this sort. Mr Veiga also suggested that other black employees had been treated badly by the respondent, including having been dismissed, but he did not have any supporting evidence from any of those individuals. Finally, we note that these serious allegations were not raised in the complaints that Mr Veiga emailed to the respondent after his employment ended. In all these circumstances, we preferred the evidence of Mr McKenna, and find that these statements were not made.

56. On Saturday 4 September 2021 Mr Veiga, Ms Hodson, Mr McKenna and other staff were working at the Highest Point Festival. This took place in the Lancaster area and Mr Veiga was driving a minibus to and from the event. He had also worked on the previous two days.

57. Both parties agree that an exchange took place in the logistics tent between Mr McKenna and Mr Veiga. Mr Veiga says that he was being singled out and humiliated by being prevented from taking a break, and he went to speak to Mr McKenna about this. He says that he told Mr McKenna that he needed to take a break to eat, have his medication, and go to the bathroom and if Mr McKenna wanted to "say goodbye" then that was "it". He says he told Mr McKenna that the situation amounted to disability discrimination and racial discrimination and that if he ended up in hospital he would take the respondent to court.

58. Mr McKenna denies that any such conversation took place. He says that it had been brought to his attention that other members of staff had complained that Mr Veiga was asking them for money for dropping them off

at home after the event, when he was being paid by the respondent to take everyone to the office. He saw Mr Veiga taking a break in the logistics tent and wanted to notify him that the allegations had been made and would need to be looked into.

59. Mr Veiga was very concerned to 'clear his name' about these allegations and for the Tribunal to make a finding that he had not taken money from other staff. There were lots of Whatsapp messages submitted, dating from the 7 September onwards, which showed exchanges between various individuals about these allegations and how they had come about. As the Judge explained to Mr Veiga during the hearing, it is not necessary for us to decide whether Mr Veiga had been asking for money in order to decide the case.

60. What is clear to us is that the text messages demonstrate that there had been some complaint made about Mr Veiga concerning this issue. It is easy to infer from the content of messages on the 7th, that this had been discussed with Mr Veiga on the 4th (the last time he was in work). This is not a case where a respondent has dismissed an employee for a discriminatory reason and then manufactured a conduct issue when a claim is brought. The conduct issue has genuinely been raised, whether or not Mr Veiga was actually at fault.

61. We find that Mr McKenna is a more reliable witness, for reasons already set out, and we accept his account of the exchange which took place on 4 September. After Mr McKenna put the allegations to him, Mr Veiga became agitated and defensive and said that he was leaving and no longer wanted to work for people who would accuse him of lying. Mr Veiga took off his hivis vest and handed to Mr McKenna. He had the minibus keys in his hand. Mr McKenna told him he was free to leave but could not take the minibus and would have to make his own way home. Mr Veiga then agreed to work for the remainder of his shift, but said he would not return the following day.

62. Mr McKenna's account was supported in part by Andrew Cooper, who was nearby for some of the conversation, and also by Mr Hall. Mr Hall was the senior employee on site and was approached by Mr McKenna after his initial conversation with Mr Veiga. Mr Hall gave evidence that he approached Mr Veiga to reassure him that these were only allegations and they would be investigated. Mr Veiga told him he did not want to work for the business any longer and would not be back. Mr Veiga invited us to find that all three of these witnesses were lying. Their evidence corroborates each other, and we find that they are telling the truth.

63. Mr Veiga did not undertake his shift at the festival on Sunday 5 September as planned. On the same day, he was removed from the Manchester Whatsapp group and his access to the respondent's account within the C247 app was cancelled. Mr Veiga says that this amounted to a dismissal. We accept the respondent's case that this was a response to Mr Veiga's actions in telling them he didn't want to work for them. He had resigned.

64. The experience of the panel is that questions of resignation and dismissal are less clear cut in cases involving zero-hours contracts than in other cases. It is not uncommon for an employer to simply stop offering shifts, or an employee to stop turning up, without any formal words of termination. We are satisfied that if Mr Veiga had approached the respondent at this point and taken back his comments about not wanting to work for the company then that would have been accepted and he would have been permitted to continue working (at least pending the outcome of the enquiry into the conduct allegations). That did not happen, and in the circumstances of this case we do not consider that the respondent's actions in removing Mr Veiga from the app/Whatsapp group can be seen as dismissal, when we are satisfied that Mr Veiga had expressly told both Mr Mckenna and Mr Hall that he no longer wanted to work for the business.

65. Mr Veiga did attend the office the following week to return his uniform. This was confirmed by a number of the respondent's witnesses. Mr Veiga invited us to find he had not returned his uniform as he still had items from it. We do not consider the fact that he may still have had some items is enough to cause us to reject the evidence of the respondent's witnesses.

66. There was a text message from Mr Veiga to Jade Hodson on 7 September where he asked if he had been fired. This caused us some concern as it seemed potentially inconsistent with the respondent's case that Mr Veiga had resigned, particularly given that Ms Hodson did not explain in her response that the respondent's understanding was that he had resigned. Overall, however, this was a confused period and we note that Ms Hodson had not been directly involved in the discussions on 4 September. The text message alone is not sufficient to undermine our conclusion that Mr Veiga had resigned.

67. It was part of the respondent's argument that we should find Mr Veiga resigned because he had other work to go to. Document 'R2' was introduced in support of this argument. It comprises emails and attachments from one Dominic Margiotta to Mr Hall, sent on the evening of Day 2 of the trial. Mr Margiotta runs a competitor business to the respondent. Mr Hall knows him through their work in the same industry and, evidently, asked him to provide any evidence of Mr Veiga working through his business.

68. Mr Margiotta informs Mr Hall that he paid Mr Veiga a certain amount for work done in the period 9 September to 3 October 2021 on a PAYE basis. He says that he is unable to access payslips as these are subcontracted. He does, however, provide copies of invoices Mr Veiga apparently submitted for work done on a self-employed basis at a later date. One email ends "I'll see what I can dig out tomorrow".

69. The panel took a very dim view of Mr Margiotta's apparent willingness to disclose personal information relating to one of his workers at the request of a business acquaintance. Further, we noted that that evidence could not be tested as Mr Margiotta was not a witness. Although Mr Veiga agreed to these documents being admitted, we decided that any conclusions based on partisan evidence, obtained in an unorthodox way, at such a late stage

in the proceedings would be unsafe. We have not placed any reliance on the documents at R2 in reaching this decision.

70. Mr Veiga commenced early conciliation through ACAS on 20 September 2021.

71. On 7 October Mr Veiga sent an email to Mr Hall. He complained about being removed from the Whatsapp group and not offered shifts. He also complained about not being paid his driving time for various shifts he had worked. There was no complaint about discrimination, breaks, or comments allegedly made by Mr McKenna. We have taken the absence of such complaints into our account in making the findings of fact we have set out above. Mr Hall did not respond to this email.

72. On 16 October Mr Veiga complained again. This time he said it was a complaint of discrimination. Again, however, the thrust of his complaint was being removed from the Whatsapp group and not offered shifts. Again,he received no reply from Mr Hall, nor from the other individual copied into the email.

73. Early conciliation closed on 1 November 2021 and Mr Veiga submitted his claim on the same date.

74. A longer and more detailed complaint was sent on 10 January 2022. Again there was no response. The respondent's evidence (from Mr Hall and Mr Roberts) was that the respondent did not respond to these complaints because of the ACAS process, and later than Tribunal process. That is not a good explanation, and Mr Mensah acknowledged that the respondent's actions in this respect did it no credit. This is particularly true in circumstances where the claimant had to push for a considerable period to get payment of the sums that the respondent was agreed he was owed for driving duties, and the respondent has conceded further sums partway through this hearing.

75. It seems to be too often the case that, whether through intention or negligence, companies employing staff in low paid, variable-hours roles, such as this do not meet their obligations to pay those staff properly on termination. Those sums can be very significant to the employees involved. Whilst it is obviously preferable that such errors are avoided in the first place, it is also possible that an employer who engages constructively with a departing employee to try to understand their concerns, rather than ignoring them, might find that by resolving a small, legitimate, pay dispute they avoid engendering a sense of grievance in an employee which then mushrooms into a much larger and more complex claim.

Relevant Legal Principles

76. We have chosen not to set out the legal principles in detail to avoid making this Judgment longer than it needs to be. This is a case which turned on the findings of fact and, in particular, on credibility. The statutory basis for the claims which Mr Veiga brought, and the basic ingredients of those claims,

are set out in the List of Issues which we have already replicated above. No legal authorities were cited to us in the parties' submissions.

77. In terms of the legal principles relevant to our findings of fact, we note that the evidential burden is on the claimant to prove the primary facts on which the case relies, and that those facts must be proved on the balance of probabilities. The shifting burden of proof in discrimination cases (s.136 Equality Act 2010) becomes relevant only where the claimant has established facts from which a conclusion that discriminatory treatment had occurred could be drawn. It then falls to the respondent to provide a nondiscriminatory explanation.

Submissions

78. Mr Mensah's submissions focused on the credibility of Mr Veiga and of the respondent's witnesses and the findings of fact which he argued the Tribunal should make. Mr Mensah had originally proposed to produce written submissions, but the Employment Judge indicated that Mr Veiga would not, realistically, have the opportunity to either absorb those submissions nor produce his own, given the language barrier. She requested that Mr Mensah restrict himself to oral submissions only, to ensure that the parties were placed on a level playing field, so far as possible. Mr Mensah did this, and the resulting submissions were comprehensive, measured and of assistance in our deliberations.

79. Mr Viega gave very lengthy submissions which rehearsed much of the evidence that had been given with little in the way of argument or commentary. He also attempted to introduce new matters which we had not heard evidence about. Mr Viega did explain why, in his submission, the panel should find that the respondent's witnesses lacked credibility and were not to be believed.

Discussion and conclusions

80. Our Discussion and Conclusions should be read alongside the Lists of Issues prepared by Employment Judge Cookson and (in relation to the wrongful dismissal claim) Employment Judge Horne.

Direct Disability Discrimination

81. As set out in the findings of fact, we have concluded that the respondent did not fail to allow the claimant to take breaks on any of the dates alleged, or at all. (The dates being 27 July, 13 and 28 August and 4 September 2021).

82. We note that knowledge of disability is not a necessary ingredient for a direct discrimination claim, although it is difficult to imagine a case in which the Tribunal would be satisfied that the less favourable treatment was on the grounds of disability when the respondent did not know the claimant was disabled.

83. In any event, and with reference to the issue noted at 2.1.2 in Employment Judge Cookson's List of Issues, we have found that the respondent did not have knowledge of the claimant's disability during the currency of his employment, whether through a disclosure made to Mr McKinney on 17 July, or through any other means.

84. For completeness, we record that if we are wrong, and the claimant *was* prevented from taking a break on any of the dates alleged, we are satisfied that he was not treated less favourably than a non-disabled employee would have been treated in the same circumstances.

Harassment related to disability

85. We have found that the comment relied on by the claimant was not made in the form alleged. We find that Mr McKenna did have a habit of saying "if you are ill you should go home" or words to that effect. We do not find that he said it to the claimant, as we have not found that the claimant raised health issues with him.

86. In any event, we are content that the comment as described, even if it had been made to the claimant, did not have the purpose or effect described in s.26 Equality Act (see issues 3.4 and 3.4). The harassment claim therefore fails.

Victimisation

87. We have found as a fact that the conversation summarised at paragraph 4.1.1 of Employment Judge Cookson's List of Issues did not take place. There was no protected act and the victimisation claim therefore fails.

Direct race discrimination

88. We have found that the comment relied on by the claimant was not made in the form alleged. Although we have found that Mr McKenna may have used the words "go home" this was not used in the context of Mr Viega's (or any other worker's) race or national origins (nor was that ever alleged by Mr Viega). The comment that Mr McKenna accepts he said from time to time had nothing at all to do with race. As above, we do not find that this comment was actually made to Mr Viega but, even if it was, it would have been made to any employee complaining about being unwell during a shift. It was not less favourable treatment on grounds of race.

Harassment related to race

89. We repeat our conclusions above. No comment with any racial element was made. The harassment claim therefore fails.

Reasonable Adjustments

90. We considered this claim, as there seemed to be some confusion as to whether it was before the Tribunal or not.

91. We find that the respondent did not apply a provision, criterion or practice ("PCP") that no additional breaks were available to employees (issue 8.1.1).

92. Further, we find that the respondent did not know (and could reasonably have been expected to know) that the claimant was likely to be placed at a disadvantage by such a PCP (issue 8.3).

93. In those circumstances, no duty to make reasonable adjustments arises, and the claim of failure to comply with that duty must fail.

Unauthorised deductions

94. As noted above, the respondent conceded the claimant's claim that it had made unauthorised deductions to his pay and Judgment was given in an amount agreed between the parties.

Wrongful Dismissal

95. We have found that the claimant resigned and was not dismissed. The claim of wrongful dismissal therefore fails.

Employment Judge Dunlop

Date: 11 May 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

19 May 2023

FOR EMPLOYMENT TRIBUNALS

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990
ARTICLE 12

Case number: **2414311/2021**

Name of case: Mr J Serrao da v Titan Risk Management Veiga Limited

Interest is payable when an Employment Tribunal makes an award or determination requiring one party to proceedings to pay a sum of money to another party, apart from sums representing costs or expenses.

No interest is payable if the sum is paid in full within 14 days after the date the Tribunal sent the written record of the decision to the parties. The date the Tribunal sent the written record of the decision to the parties is called **the relevant decision day**.

Interest starts to accrue from the day immediately after the relevant decision day. That is called **the calculation day**.

The rate of interest payable is the rate specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as **the stipulated rate of interest**.

The Secretary of the Tribunal is required to give you notice of **the relevant decision day**, **the calculation day**, and **the stipulated rate of interest** in your case. They are as follows:

the relevant decision day in this case is: 19 May 2023

the calculation day in this case is: 20 May 2023

the stipulated rate of interest is: **8% per annum**.

Mr S Artingstall
For the Employment Tribunal Office

GUIDANCE NOTE

1. There is more information about Tribunal judgments here, which you should read with this guidance note: www.gov.uk/government/publications/employment-tribunal-hearingsjudgment-guide-t426

   If you do not have access to the internet, you can ask for a paper copy by telephoning the Tribunal office dealing with the claim.

2. The payment of interest on Employment Tribunal awards is governed by The Employment Tribunals (Interest) Order 1990. Interest is payable on Employment Tribunal awards if they remain wholly or partly unpaid more than 14 days after the **relevant decision day**. Sums in the award that represent costs or expenses are excluded. Interest starts to accrue from the day immediately after the **relevant decision day**, which is called **the calculation day**.

3. The date of the **relevant decision day** in your case is set out in the Notice. If the judgment is paid in full by that date, no interest will be payable. If the judgment is not paid in full by that date, interest will start to accrue from the next day.

4. Requesting written reasons after you have received a written judgment does **not** change the date of the **relevant decision day**.

5. Interest will be calculated as simple interest accruing from day to day on any part of the sum of money awarded by the Tribunal that remains unpaid.

6. If the person paying the Tribunal award is required to pay part of it to a public authority by way of tax or National Insurance, no interest is payable on that part.

7. If the Secretary of State has claimed any part of the sum awarded by the Tribunal in a recoupment notice, no interest is payable on that part.

8. If the sum awarded is varied, either because the Tribunal reconsiders its own judgment, or following an appeal to the Employment Appeal Tribunal or a higher court, interest will still be payable from **the calculation day** but it will be payable on the new sum not the sum originally awarded.

9. The online information explains how Employment Tribunal awards are enforced. The interest element of an award is enforced in the same way.