EMPLOYMENT TRIBUNALS

Claimant: **Ms P Wilson**

Respondent: **Elle Beauty Limited t/a Elevatione Time Stops London**

Heard via Cloud Video Platform (London Central) On: 20, 21, 22 June 2023

Before: **Employment Judge Davidson**
Dr V Weerasinghe
Ms H Craik

Representation

Claimant: in person
Respondent: Ms J Veimou, Litigation Consultant

Judgment having been given orally at the hearing and sent to the parties on 22 June 2023 and written reasons having been requested by the respondent in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013 by email dated 28 June 2023, the following reasons are provided:

REASONS

Issues

1. The issues between the parties which fall to be determined by the Tribunal are as follows:

   Equality Act 2010 (EQA), section 13: direct discrimination because of race.

2. The claimant described her race as Black British. The claimant complained of the following treatment:

   2.1. her dismissal;
   2.2. not being allowed to do any consultation work as she had requested.

3. Was that treatment "less favourable treatment', ie. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in materially the same circumstances? The claimant did not refer to any actual comparators and so relies on hypothetical comparators.

4. The claimant referred to the following incidents which she said led her to believe that the less favourable treatment (as above) was because of her race;

   4.1. the claimant was addressed by Paulina (her line manager) as 'Brown Sugar" on two occasions: once on or around 10 April 2022 and again on or around 11 April 2022;
   4.2. the claimant heard colleagues (other therapists on duty on 8 April 2022- she did not know their names) discussing a black client and saying that they did not like dealing with black people as they were difficult;
   4.3. on 11 April at a meeting at 9am, following a complaint by a client who had overheard therapists talking about her religion/religious beliefs, Paulina told the therapist team that they should not discuss religion/religious beliefs but that they could talk about race.

5. Did these incidents take place and if so, do they lead to the inference that the alleged unfavourable treatment was because of the claimant's race?

   Unauthorised deductions

6. Did the respondent make unauthorised deductions from the claimant's wages by not paying the full amount for the days worked? The claimant says she should have been paid for 60 hours work at £15 per hour — a total of £900. The claimant says she was only paid £373.75.

   Remedy

7. If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the claimant is awarded compensation and/or damages, will decide how much should be awarded. On a race discrimination claim this will include loss for injury to feelings.

Evidence

8. The tribunal heard evidence from Ms Wiryani (Beauty Therapist) on behalf of the respondent and from the claimant on her own behalf. The person who recruited the claimant (Paulina) and the person who managed and dismissed her (Gabriele) no longer work for the respondent and we did not hear from them. We understand that Gabriele left in late 2022 and Paulina left in early 2023. We note that the claimant only set out her claims in detail at a case management hearing on 30 January 2023.

Facts

9. The tribunal found the following facts on the balance of probabilities.

10. The respondent operates a luxury boutique spa, rejuvenation centre and skin care clinic. The claimant had previously worked for the respondent. The

claimant had qualifications in NVQ Beauty Therapy and Beauty Therapy in Beauty.

11. In March 2022, she successfully applied for the position of Beauty Consultant and she began on 5 April 2022. The decision to appoint the claimant was taken by Paulina.

12. Beauty Consultants are primarily in a sales role, selling treatment packages to clients. Beauty Therapists carry out the treatments and discuss the appropriate treatment path for the particular client. The respondent's position is that Beauty Consultants need to be trained in Beauty Therapy work so that they have knowledge of what are they are selling. The claimant accepted that the Beauty Consultants needed to understand how the treatment worked but did not consider that it was necessary to have hands-on training.

13. The claimant was not issued with a contract of employment or a job description prior to starting with the Respondent. We were not shown the content of the online job advert to which the claimant responded so we were given no information regarding the terms of her employment. We understand that the Beauty Consultant rate is £11 per hour and the Beauty Therapy rate is £13.50 per hour. .

14. Her first three days were 'training days'. The respondent had understood that there was an agreement that these would be unpaid but accepts that they cannot evidence this and concede that the claimant is due to be paid for these days.

15. Following the training days, the claimant shadowed Beauty Therapists including Gabriele and Ms Wiryani. In the second week of her employment, the claimant also carried some treatments with clients herself. She was qualified to do some treatments but not all treatments offered by the Respondent.

16. We find that the respondent had a greater need for Beauty Therapists at the time the claimant joined than Beauty Consultants. Although it had been agreed that the Claimant would do the Beauty Consultant role at her request, even though the pay was lower, as she had qualifications to carry out some treatments, she was asked to do these.

17. The claimant alleges that Paulina called her 'brown sugar' on two occasions in private on 10 and 11 April 2022. As stated above, Paulina no longer works for the respondent and we did not hear from her. We have seen other communications, in particular Whatsapp messages and emails from Paulina, and from the familiar and affectionate tone she uses, we find it likely that Paulina used that expression when talking to the claimant. We find that it was intended affectionately and not insultingly. We also find that the claimant was unhappy about the term but did not object to Paulina. Ms Wiryani accepted that it was Paulina's style to use endearments, which were friendly and not meant unpleasantly.

18. The claimant alleges that she was in the staff room on 8 April 2022 when she heard colleagues discussing that black clients were difficult to work with. In giving particulars of her claim, she had not identified who was in the meeting although during cross examination she thought that Gabriele was there. We had no evidence other than the claimant's account which had no context and no detail in relation to this conversation. Our view is that this was more likely than not (if it happened) to have been about skin colour. We reach this finding on the basis of Ms Wiryani's evidence that skin and skin type was mentioned regularly in the workplace as that was the core of the respondent's business.

19. On 11 April 2022, Paulina led a regular morning meeting at which she discussed a client complaint that a therapist had mocked her religion. Paulina told the meeting that speaking about religion could be deemed offensive and that there was no call for discussing religion in the context of the clients. She went on to say that it was never appropriate to discuss religion but it might be relevant to discuss client's country of origin if that related to their skin colour, since skin was the what the respondent was dealing with. We find that Paulina may have referred to Africa and Jamaica, as examples of clients with black skin, but we do not know if she referred to any other countries as well.

20. We are unsure whether the claimant was present at the beginning of the meeting on that day as she records it being scheduled for 9am but her own breakdown of hours worked shows that she started work at 9.30am on 11 April 2022. It is possible, therefore, that she joined the meeting part-way through in which case she may not have been aware of the context. However, we do not have sufficient evidence to make a finding on this.

21. Before she started her employment (or possibly shortly after she started), the claimant messaged Gabriele informing her of her booked holiday dates from 7 to 13 May, 13 to 20 June and 22 July to 10 August 2022. It is not clear when this message was sent but it was the message previous to the dismissal message in the Whatsapp chat between Gabriele and the claimant.

22. On 15 April 2022, Gabriele sent a message to the claimant dismissing her saying '*Taking all consideration, unfortunately we will have to let you go, due to not showed enough initiative during training and improvement. We wish you all the best in the future'*.

23. After the termination of the client's employment, she raised issues with the respondent relating to her pay, in particular in relation to the three training days at the start of her employment. The respondent has made an offer to pay but this has not been accepted by the claimant and the issue remains unresolved.

24. She did not raise any allegations of discrimination before starting the employment tribunal process. Her Originating Application states ' *My claim is regarding unfair dismissal and arrears of payment. I have not been paid in full for the hours I worked. I had witnessed and experienced racism in the workplace from the directing manager Paulina*'.

25. The claims were particularised at a preliminary hearing for case management before EJ Henderson on 30 January 2022 at which the issues set out above were agreed. The unfair dismissal claim did not proceed because the claimant did not have sufficient service to bring this claim.

The Law

Direct discrimination

1. Section 13 of the Equality Act 2010 provides that a person must not be treated less favourably than another because of a protected characteristic.

2. The claimant compares herself to a hypothetical comparator, who she says would have been treated more favourably than she was. There must be no material differences between the circumstances of the claimant and the comparator other than the protected characteristic.

3. Direct discrimination also encompasses *unconscious* discrimination. As stated by Lord Browne-Wilkinson in the House of Lords case *Strathclyde Regional Council v Zafar* [1997] UKHL 54: *"those who discriminate on the grounds of race or gender do not in general advertise their prejudices: indeed they may not even be aware of them."*

4. The less favourable treatment must be because of the protected characteristic. There must be something more than a difference in protected characteristic from which the tribunal could conclude that the difference in treatment was because of the claimant's protected characteristic (*Maderassy v Nomura International plc* [2007] IRLR 246). If there are facts from which the tribunal could conclude that discrimination occurred, the burden of proof shifts to the respondents to provide an adequate non-discriminatory explanation.

5. Guidance on the burden of proof was given by the Court of Appeal in *Igen v Wong* [2005] ICR 931. In *Igen* the Court of Appeal established that the correct approach for an employment tribunal to take to the burden of proof entails a two-stage analysis. At the first stage the claimant has to prove facts from which the tribunal could infer that discrimination has taken place. Only if such facts have been made out to the tribunal's satisfaction (i.e. on the balance of probabilities) is the second stage engaged, whereby the burden then 'shifts' to the respondent to prove — again on the balance of probabilities — that the treatment in question was 'in no sense whatsoever' on the protected ground.

6. Unreasonable or unfair treatment is not sufficient to transfer the burden of proof to the respondent. There must be other indications of discrimination relating to the treatment in question.

Unlawful deduction from wages

7. Section 13 of the Employment Rights Act 1996 provides that an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised to be made or the worker has previously signified in writing her agreement or consent to the making of the deduction.

Determination of the Issues

Direct discrimination

26. It is accepted that the claimant was dismissed. There is no actual comparator relied on and, looking at a hypothetical comparator, we believe that a person in the same situation as the claimant who was of a different race would have been treated the same. There is therefore no less favourable treatment.

27. The claimant complains that she was not allowed to do any consultation work. We find that she was appointed as a consultant but the respondent, at that immediate time, required Beauty Therapists more than Beauty Consultants. As the claimant had the relevant qualifications to carry out some Beauty Therapy work, she was asked to do so. There was one occasion evidenced by the claimant before us where she asked whether she should go to Room 9 (to do Beauty Therapy work) or downstairs with the Beauty Consultants. She was told to go to Room 9. This was the only instance brought to our attention. We take into account that the whole period of the claimant's employment was less than two weeks, including three days of training, which we do not consider long enough to establish a pattern of work.

28. We do not find that this was less favourable treatment as a comparator would have been treated the same way. The request for the claimant to do beauty therapy work rather than beauty consultation work was due to the needs of the business at that particular time and the fact that the claimant had the necessary qualifications.

29. We must ask ourselves whether the claimant has shown facts from which we could conclude that race was a factor in the respondent's treatment of her. We find that she has not discharged this burden. She relies on three matters as evidence of a racist element within the respondent. We note:

    29.1. The decision maker in relation to the termination of her employment, Gabriele, is not the person who is named by the claimant as making the discriminatory comments (Paulina).

    29.2. The term 'brown sugar' was used and caused the claimant distress. However, we do not find that this was intended as a term of abuse but as a term of endearment. We accept that the claimant felt upset by the comment and understand why this would be. Although we accept that the claimant found the term unwelcome, we do not see this as evidence of a racist environment.

    29.3. The decision maker was Gabriele and the claimant now states that she was at the meeting on 8 April. There was no hard evidence that Gabriele attended that meeting and the claimant first mentioned her involvement during cross examination. It was not in her witness statement and she accepted that she had not mentioned it before. There has been no opportunity for the respondent to find out Gabriele's

account of the incident. In any event, taking the claimant's case at its highest, she does not allege that Gabriele herself made any offensive comment.

29.4. We accept that Paulina may have referred to people from Africa or Jamaica in the context of skin treatments and that the claimant would have found this uncomfortable if these were the only nations mentioned. We find that Paulina's choice of words was, at best, unfortunate. It would have been better if she had expressly referred to skin type rather than nationality. However, it is the case that client's skin type, including colour, is an important element in their beauty treatment by the respondent.

30. We conclude that the claimant has not shown facts from which we could infer that race was a factor in her treatment. If we are wrong about this, we find that the respondent has provided a non-discriminatory explanation for the treatment.

31. In relation to the dismissal, we find that the respondent was not satisfied with the claimant's attitude and application during her training. We find the most likely explanation for the claimant's dismissal to be in Gabriele's message to her and we do not find that this is tainted by discrimination.

32. In relation to the work allocation, there was an issue regarding the work she wanted to do and the work she was allocated. There do not seem to be any records of conversations about this but we take into account that this was an informal workplace with most communications being verbal. We find that the most likely explanation for beauty therapy work being allocation to the claimant was the needs of the business at the time.

33. It was suggested on behalf of the respondent that the claimant's extensive holiday request may have been in Gabriele's mind. We have no evidence either way as we have not heard from Gabriele. It is possible that being informed by the claimant that she had booked over four weeks holiday within a three month period affected Gabriele's view of the claimant's attitude and application but we have no evidence that this was the main reason for termination and it is possible that Gabriele was aware of this before the claimant started work.

34. We have taken into account the claimant's short service. Gabriele reached the decision shortly after the claimant began her employment with the respondent that the working relationship was not going to work out and she brought things to an end sooner rather than later.

35. The claimant's claims of direct race discrimination fail and are hereby dismissed.

Unauthorised deduction from wages

36. We find that the claimant is owed money. Having heard representations from both parties we award the claimant three days' pay for Beauty Consultant training of 9 hours per day at £11 per hour, totalling £297.

37. We also find that she should have been paid the Beauty Therapy rate for the 34 hours she worked as she was doing beauty therapy work. We therefore uplift the payment she received at £11 per hour by £2.50 per hour to the Beauty Therapy rate of £13.50 per hour. This comes to £85.00.

38. The claimant's claims for unlawful deductions from wages succeed. The respondent is ordered to pay the claimant the sum of £382.

Conclusion

39. The claimant's claims of direct race discrimination fail and are hereby dismissed.

40. The claimant's claims for unlawful deductions from wages succeed. The respondent is ordered to pay the claimant the sum of £382.

Employment Judge Davidson
Date 6 July 2023

JUDGMENT SENT TO THE PARTIES ON

06/07/2023

FOR EMPLOYMENT TRIBUNALS

Notes

Public access to employment tribunal decisions: Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

CVP hearing

This has been a remote which has been consented to by the parties. The form of remote hearing was Cloud Video Platform (CVP). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing