EMPLOYMENT TRIBUNALS

Claimant: Mr J Arcanjo Dos Santos

Respondent: AV Unibrak South Ltd

Heard at: Manchester Employment Tribunal (by video)

On: 17, 18, 19, 20 and 21 July 2023

Before: Employment Judge Dunlop
Mrs A Booth
Mr P Dobson

Representation

Claimant: Mr C Barklem (counsel)
Respondent: Mr M Ramsbottom (consultant)

JUDGMENT having been sent to the parties on 31 July 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:

REASONS

Introduction

1. The respondent, AV Unibrak South Ltd, is a construction sub-contractor specialising in the installation of ventilation systems and equipment. The claimant, Mr Dos Santos, was employed by the respondent from 11 August 2020 to 29 October 2021 as a trainee duct fitter. He is black and of Brazilian Portuguese ethnic origin. He brings claims of unfair dismissal on grounds of asserting a statutory right, direct discrimination on grounds of race, unauthorised deductions from wages and failure to pay holiday pay.

The Hearing

2. The hearing took place over CVP over five days as set out above. With the cooperation of the parties and representatives the hearing went smoothly and we were able to give an oral Judgment on liability on the afternoon of Day 4, and, following further evidence and submissions, to give oral Judgment on remedy during Day 5.

3. Mr Dos Santos' native language is Brazilian Portuguese and an interpreter was provided to ensure that he was able to fully participate in the hearing.

4. We were provided with a 328-page agreed bundle of documents. A small number of additional documents were introduced by the parties and compiled into a supplementary bundle of 11 pages. We considered the documents which were referred to in the witness statements and by the parties, we did not necessarily read other documents included in the bundles but not referred to.

5. We heard evidence from Mr Dos Santos on his own behalf. On behalf of the respondent, we heard from Kier McCann and Jamie Dove. Mr McCann is a Contracts Manager for the respondent. He is part of the senior management team and a relative of the business owner. Mr McCann gave a main witness statement and a supplemental statement dealing with disclosure issues. Mr Dove was, at the relevant time, a Project Manager for J S Wright M&E Services Ltd and gave evidence relating to the circumstances of Mr Dos Santos' dismissal.

The Issues

6. The issues in the case were clarified and set out in a case management hearing which took place on 7 November 2022 before Employment Judge Horne. They were set out in a narrative form to assist the parties, particularly the respondent which was, at that time, unrepresented. We have summarised them below.

1. <u>Unfair dismissal</u>

   1.1 What was the sole or principal reason for Mr Dos Santos's dismissal? Can Mr Dos Santos prove that the reason was that he had complained about non-payment of his wages?

2. <u>Race discrimination</u>

   2.1 Did the respondent:
   - *2.1.1 fail to increase Mr Dos Santos's hourly rate despite his experience increasing;*
   - *2.1.2 start Mr Sandu and Mr Inculet on higher hourly rates of pay than the hourly rate paid to Mr Dos Santos and also pay them a bonus despite Mr Sandu and Mr Inculet, like Mr Dos Santos when he started, having no prior experience of duct fitting/ventilation work;*
   - *2.1.3 require Mr Dos Santos to do labouring work, but not require Mr Bodocan to do labouring work - the alleged background being that Mr Bodocan was a trainee lagger (a position which Mr Dos Santos argues has less responsibility than a trainee duct fitter);*
   - *2.1.4 start Mr Bodocan on a higher hourly rate than the hourly rate paid to Mr Dos Santos when he started as a trainee duct fitter, despite Mr Bodocan having no previous experience of either lagging or duct fitting work;*
   - *2.1.5 pay Mr Bodocan a bonus*

   2.2 If so, what was the reason why Mr Dos Santos was treated as he was?

2.2.1 Was it that he is black?
2.2.2 Was it that he is not Eastern European?
2.2.3 Or was it wholly for other reasons?

2.3 So far as the claim is based on the actual difference in treatment between Mr Dos Santos and his named comparators, the tribunal will also decide: Were Mr Dos Santos's circumstances the same as, or not materially different from, the circumstances of the comparators?

3. Time limits for discrimination claims

In respect of each act of less favourable treatment:

3.1 When was the act done? Was it on or after 21 October 2021?

3.2 If not, was it part of an act extending over a period which ended on or after 21 October 2021?

3.3 If not, would it be just and equitable to extend the time limit?

4. Deduction from wages – September and October 2021

4.1 Were wages properly payable for 8 hours in each working day irrespective of the number of hours worked? Or were the properly – payable wages limited to wages for the actual time Mr Dos Santos spent working on site?

4.2 If the latter, how many hours did Mr Dos Santos spend on site in September and October?

4.3 What hourly rate of pay was properly payable?

4.4 What gross wages was Mr Dos Santos actually paid?

5. Deduction from wages – holiday pay

5.1 Was there an agreement providing for the start date of the leave year?

5.2 Was it a relevant agreement within the meaning of regulation 2 of WTR?

5.3 How many days' paid annual leave did Mr Dos Santos take during the leave year, including Bank Holidays?

5.4 For how much accrued annual leave was Mr Dos Santos paid at the termination of his employment?

Findings of Fact

Mr Dos Santos' Background and Recruitment

7. Mr Dos Santos has worked in a variety of roles, including as a labourer and electrician. Prior to working for the respondent, he had no specific experience with ventilation work. Mr Dos Santos saw the role of "Trainee

Ventilation Installer" advertised on the Indeed website and applied for the role through the website. The comparators (we will say more about them below) responded to the same or very similar advertisements. We note that the job advert stated that it was preferable that candidates be able to speak either English, Romanian or Polish. Mr Dos Santos speaks English to a good level, but he is not a native speaker. He does not speak Romanian or Polish. The advertisement said that the role was subject to a bonus scheme, although the details were unspecified and that it offered "*a clear path of progression for the right, hard working fitter*".

8. Mr Dos Santos had a telephone interview with Mr Lee Hughes of the respondent on 10 August 2020. He was offered the role, and this was confirmed in an email the same day. The email records that the first six months were to be a probationary period. We accept Mr Dos Santos evidence that it was agreed during the interview that he would be paid £10 per hour during the probationary period and that this would increase following successful completion of probation.

Contract and Terms

9. The first key dispute between the parties arises as to whether Mr Dos Santos was then issued with a contract of employment. The respondent has produced an unsigned contract which Mr McCann says 'would have been' posted to Mr Dos Santos by Carla Knight, the office manager.

10. We accept Mr Dos Santos' evidence that he did not receive the contract. We also make a finding that the reason it was not received was because it was not, in fact, sent. We take account of the following matters:
    10.1 it is unusual, nowadays, for contractual documentation to be posted.
    10.2 there is evidence of at least one of the comparators being sent his contract by email.
    10.3 the respondent had no process for chasing to obtain a signed contract back.
    10.4 Despite Mr McCann assertions about what 'would have' happened, Ms Knight was not called to give evidence about the issuing of contracts.

    For all of those reasons, we conclude that the respondent not only failed to issue Mr Dos Santos with written particulars of employment, but in fact took no steps to try to do so.

11. Although there was no written contract in place, Mr Dos Santos proceeded to work for the respondent. He did so under an implied contract. The terms of the contract can be gleaned in part from the 10 August email from Mr Hughes (which was in effect an offer letter) and terms under which Mr Dos Santos and his colleagues worked in practice on a day-to-day basis. As to the latter, the terms of the written contracts of the comparators provide some evidence.

12. One term which cannot be implied from practice is the date of the holiday year for the purposes of the Working time regulations 1998 ("WTR"). We will return to this in our conclusions below.

13. We turned next to consider terms as to contractual hours and pay. This was disputed between the parties, and is relevant for the unauthorised deductions claim. The written contracts provided for Mr Dos Santos and his comparators all say that the basic working hours are 40 hours per week, working Monday to Friday. It also says that workers will receive a 30 minute unpaid break in shifts of over 6 hours. There is no more detail given as to actual working hours or times.

14. The parties agree that Mr Dos Santos was asked to attend work by 7.30am on his first day. The respondent says that this was an on-going requirement. Mr Dos Santos says that the on-going requirement was to attend by no later than 8am. We prefer Mr Dos Santos' evidence for these reasons:
    14.1 We find that Mr McCann was aware that Mr Dos Santos was regularly signing into the site between 7.30 and 8.00am from the very early days of his employment, but this was not seen as a problem.
    14.2 We can see from the various sign-in sheets that other employees also regularly signed in between 7.30 and 8am.

15. As to finishing time, we again accept Mr Dos Santos' evidence that this was dictated by the supervisor on the day. Once Mr Dos Santos (or another employee) had completed the work allocated to them then they would finish. This resulted in a variety of finishing times, although it would generally be around 4pm. We further accept that there was a practice of finishing early on Fridays, at around 3pm, which is evidenced by comments made in contemporaneous Whatsapp messages which formed part of the bundle.

16. We find that employees were paid based on the days that they worked, not according to the times they signed in and out of site. All the payslips that we have seen that employees were paid 'round' amounts reflecting payment for 8-hour shifts. We find that, as a matter of custom and practice, if an employee made himself available for work between 8am (at the latest) and 4pm for five days per week, and if he got the job done, he was entitled to be paid for 40 hours even though he may not have actually been required to work for the full 40 hours.

17. In preferring the evidence of Mr Dos Santos as to entitlement to pay we have taken account of the contemporaneous records in the form of the payslips, sign-in sheets and Whatsapp messages. We have also taken account of the fact that the respondent provided no direct evidence from workers or supervisors on site about the practice on site, nor did it provide evidence from Ms Knight, who operated payroll, about how wages were calculated.

18. When Mr Dos Santos started employment he understood that he was starting as a trainee and would be paid £10 an hour. He had an expectation, based on what the respondent had told him, that he would be trained on skilled ventilation installment work, and could expect to progress to a substantive role as a residential ventilation engineer at the end of his six-month probation period, with a commensurate increase in pay. Substantive residential ventilation engineers were paid at £12.50 per hour.

19. At the relevant time, the respondent employed significant numbers of Romanian employees. In particular, there were a number of Romanian

employees in supervisory roles in the area Mr Dos Santos was working in. The two senior contracts managers, who worked directly under Mr McCann were Marius, who was Romanian, and Marcin, who was Polish. The main supervisor who worked with Mr Dos Santos, Petru, was also Romanian.

20. In his evidence, Mr McCann recognised that there was a need to "guard against cliques", but there was no evidence of him taking active steps to do that. The lack of records kept by the respondent means that it was unable to evidence decisions made about recruitment, pay or promotion.

21. Mr Dos Santos was involved in a road accident which meant he was absent from work for about a month shortly after commencing employment. The respondent held his job open and he duly returned to work.

22. Mr Dos Santos' pay rate was increased from £10 to £11 in his December 2020 payslip i.e. the pay he received for work done in November. We find that this was in recognition of the fact that he was no longer a new starter. He remained a trainee.

23. Six months into Mr Dos Santos' employment would have taken him to mid February 2021. Allowing an extra month for the road accident, his probation might reasonably have been expected to be extended to mid-March. However, Mr Dos Santos was never given any indication that he had completed his probation (nor that he had failed it). He was not given any further pay rise, and was simply expected to carry on as before.

Findings as to comparators

24. It was difficult to make findings of fact in relation to the comparators as the respondent has either failed to keep records of its employees, or has failed to disclose them.

25. Mr Dos Santos has relied on three comparators:

    Constantin Sandu, who is agreed to be white and Romanian.
    Constantin Inculet, who is agreed to be white and Moldovan.
    Simion Bodocan, who is agreed to be white and Romanian.

26. We find that Mr Sandu and Mr Incelet started employment in late 2020. They were each given the substantive role of residential ventilation engineer and started on the full pay rate of £12.50. Mr McCann has provided some explanation as to why they started on a full rate, related to their earlier experience. The factors he points to are not particularly compelling and not evidenced in the documents.

27. In particular, Mr McCan has asserted that and Mr Inculet and Mr Sandu had experience/qualifications in fan-coil work and dry-lining work respectively. He accepts that this was not directly relevant to the respondent's work (for which he says there is no recognised qualification) but asserts that it was helpful, and put them in a good position to be able to pick up the trade quickly. We accept this evidence in broad terms. It explains, for example, why Mr Sandu and Mr Inculet were started at a higher grade than Mr Bodocan (see below). We find, nevertheless, that Mr Sandu and Mr Incelet

still required training in the specific work carried out by the respondent. It is notable that Mr Dos Santos formed the impression that they were acting as trainees, despite the fact that had the title and pay of the substantive role.

28. Mr Bodecan started in March 2021. The rate given in his contract is £10, although this was increased to £11 after five weeks at most. Mr Bodecan did lagging work. We accept Mr Dos Santos' evidence that this was a narrower role, and less skilled, than the general duct work being done by the others.

29. There is a discrepancy in Mr Bodecan's contract, in that he is not described as a trainee, but instead as an "engineer", but the pay rate set out in the contract is £10 per hour, which was the training rate.

Whatsapp messages

30. From November 2020 to April 2021 Mr Dos Santos was engaged in Whatsapp messages with a colleague called Stephen, who is also black. These messages record their complaints that Petru, the supervisor, was favouring Romanians and Moldovans and that they were being required to carry out labour instead of being given the training they are supposed to receive.

April 2021 email exchange

31. On 19 April 2021 Mr Dos Santos sent an email to Mr McCann. He raised several issues including being unclear which staff were supervisors (he felt that Romanian colleagues were giving him orders when they were not entitled to do so); concerns about the tools/equipment that were provided; and concerns about different rates of pay. As to the latter, he pointed out that he was now 8 months into the job and still "stuck on" £11/hour, whereas other people had started on £12.50 per hour despite "knowing nothing". In this context, Mr Dos Santos also said that "non-Romanians lag behind in everything" and that he did not think it was fair. We find that Mr Dos Santos waited until a point where he believed he was safely past the probationary period before sending the email, as he believed that would protect him from repercussions.

32. There was subsequently an exchange of emails with Mr McCann over the next few days. In his initial reply, Mr McCann set out pay grades as follows:
Grade 1 installer- New employees £10/hr
Grade 2 installer- can work unattended but unable to complete 1 plot per day £11
Grade 3 installer - Works unattended and can complete 1 plot per day 1/2/3 bed - £12.5
Installers with supervisor experience £13.5

33. We accept that this was an accurate summary of the payscale used by the business (although never disclosed to Mr Dos santos before this point). Mr Dos Santos had, in effect, been promoted to Grade 2 when he received his December pay rise.

34. In his reply, Mr Dos Santos stated that only one employee (Gabriel) was able to do one plot per day unsupervised and reiterated his concern that Romanians were starting on higher pay, or being promoted to higher pay more quickly, whilst non-Romanians lagged behind. Mr McCann dismissed this concern, stating "nationalities are of no concern" and "the office has the final say on who is on what grade". Mr McCann explained in evidence that "the office" was a reference to himself and that he determined pay rates in line with on-going discussions with Marius.

35. Mr McCann was asked how he would know if Marius wished to favour other Romanians, or to hold back the progress of non-Romanians. Mr McCann's evidence just was that it was not in Marius's nature to do so. We find that there were no checks and balances to stop this from occurring if Marius (or another supervisor) did choose to act in this way.

36. Returning to the email exchange, Mr Dos Santos replied stating that "we witness things differently". There were no further emails in this exchange and Mr Dos Santos continued to be paid at £11/hour until August 2021 when it went up to £11.50.

37. When asked about this increase Mr McCann said that people were happy with Mr Dos Santos' work and that Marius "would have" approached him and asked if the business could increase Mr Dos Santos' pay. Mr McCann could not explain why Mr Dos Santos was moved to a pay rate that was outside the grading structure he had set out in his email. When asked if there were examples of other employees being paid at rates outside this structure, Mr McCann was unable to say.

Training and conduct on site

38. Mr Dos Santos made allegations, which were elaborated on in his evidence, that he and other black employees were given more menial tasks on site (as he dramatically described it "treated like slaves") which the skilled work was more often reserved for Eastern Europeans and that this helped them to develop their skills. We have made our findings of fact about this in the 'Discussion and Conclusions' section below.

Termination of Employment

39. When he received his October 2021 payslip (for work done in September), Mr Dos Santos believed he had been underpaid by a significant amount. On 14 October 2021 he emailed Mr McCann and Ms Knight, having tried unsuccessfully to resolve the issue via Marius. A reply from Mr McCann on the same day suggested that there were three days missing where Mr Dos Santos had worked on a different site. He apologised for this. Although there had been an error in relation to those days, that did not account for the whole of the discrepancy. Further exchanges led to Mr Dos Santos explaining his calculations as to why he should have been paid for 168 hours in the month. The respondent only paid him for 146 hours (after the three day error was corrected).

40. In an email sent in the morning of 28 October 2021 Mr McCann stated "*You are paid off the gate times along with everyone else, seems you arrive late*

and leave early almost every day." The reference to "gate times" is a reference to the on-site signing in system, which is operated by the main contractor on each site for health and safety purposes. On some sites and electronic system would be used and on others a manual signing-in book. This was not data which was collected by the respondent itself, nor on its behalf.

41. Although copies of raw sign-in data has been reproduced in the bundle, the respondent has never produced any calculation to show how it gets to 146 hours using that data. In an email, Mr Dos Santos asserted that the overall discrepancy between his calculation and a calculation based on gate times would be in the region of two hours, rather than 22. In his oral evidence, Mr McCann suggested for the first time that Mr Dos Santos did not start work when he entered the site, as he was a cyclist and 'took a long time to get changed' after arriving on site. This appears to be an acknowledgement that the deduction made was in excess of what it would have been if the gate times had been used.

42. In any event, we find that the assertion in Mr McCann's email that "everyone" is "paid off the gate times" is factually incorrect. As recorded at paragraph 16 above, we find that employees were paid per shift, and not according to the actual times they signed in and out. It may indeed be the case that there were some concerns around Mr Dos Santos' timekeeping at this point, but Mr McCann did not take the effort to properly investigate this, nor did anyone speak to Mr Dos Santos about it.

43. Following this, Mr Dos Santos sent two emails on the evening of the 28th, one at 8.01pm to Mr McCann, copying Ms Knight and Marius, and another at the same time, to the same recipients, relating to a Skills Card which the respondent had applied for on Mr Dos Santos' behalf. In the first email, Mr Dos Santos reiterated his points about pay and also asked for a copy of his contract or employment, saying he should have got it last year.

44. The next day Mr Dos Santos went to the site office at the site he was working on. This was run by the main contractor, Telford Homes. Mr Dos Santos was raising concerns about the fact that Telford Homes had provided gate time data to his employer without his consent. Mr Dos Santos denies acting in an inappropriate way. The Telford Homes staff contacted Mr Dove, who worked for J S Wright M&E Services Ltd, who held the mechanical and engineering contract for the Nine Elms site. The respondent was a sub-contractor of J S Wright.

45. We accept Mr Dove's evidence that, as a result of what was said to him by the site office staff, he contacted Mr McCann and told him he wanted Mr Dos Santos to be removed from the site. The problem, from Mr Dove's perspective, was that Mr Dos Santos had "gone against protocol" by approaching the Telford Homes staff directly. At 9.04am, Mr McCann emailed Mr Dos Santos in these terms:

    "Joseval

    Leave our tools in the vault, you are no longer employed by AV Unibrak

Thanks

Keir"

46. Mr Dos Santos subsequently emailed Mr McCann to tell him that he would work until the end of his shift and to request his contract or employment, his skills card, the correction of his September salary and a termination of contract letter. Mr Dos Santos was not removed from the site by either Mr Dove or any of the respondent's employees and did in fact finish his shift.

47. By email at 10.40 on the same day, Mr McCann wrote "*Accept this email as termination of employment, you have not passed your probationary period to be offered a contract of employment. You've been told to leave site at 9am, you will not be paid and it will come out of your notice pay*."

48. We note that Mr Dos Santos subsequently received an apology from the parent company of Telford Homes, acknowledging that gate times information had been provided to the respondent in breach of their data protection obligations, and apologising for this.

49. In his final payslip, Mr Dos Santos was paid for 16 hours of accrued, untaken holiday pay. There was further communication between Mr Dos Santos and the respondent regarding his dismissal and the pay he believed he was owed, but it is not necessary to rehearse that in detail.

Relevant Legal Principles

Unfair dismissal

50. Mr Dos Santos does not have two years' service. If he did, the employer would be required to show that it had a potentially fair reason for dismissal, and that it had followed a fair process. Although some of the questions asked of Mr McCann seemed to have the aim of showing that there was no fair reason, and no fair process, those are not relevant considerations for us in this case.

51. The circumstances in which a claimant can successfully claim unfair dismissal with under two years' service are very limited. One such circumstance is where a claimant is dismissed for having asserted a statutory right. The relevant law is set out in s.104 Employment Rights Act 1996 ("ERA") which provides (as relevant to this case) as follows;

Assertion of statutory right

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee—

(a) brought proceedings against the employer to enforce a right of his which is a relevant statutory right, or

(b) alleged that the employer had infringed a right of his which is a relevant statutory right.

(2) It is immaterial for the purposes of subsection (1)—

(a) whether or not the employee has the right, or

(b) whether or not the right has been infringed;

but, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith.

(3) It is sufficient for subsection (1) to apply that the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.

(4) The following are relevant statutory rights for the purposes of this section—
(a) any right conferred by this Act for which the remedy for its infringement is by way of a complaint or reference to an employment tribunal,
…

52. The wording of the statute requires that, in order to show he has 'asserted' a statutory right, the employee must have made a complaint that his had been infringed, not simply asserted that he had such a right (see **Mennell v Newell and Wright (Transport Contractors) Ltd 1997 ICR 1039**.

53. In order to succeed in a s.104 claim, the assertion of the statutory right must be the reason for the dismissal. If there is more than one reason, it must be the principal reason. The burden of proof is on the employee to show that it was the reason or principal reason. The Tribunal is entitled to draw appropriate inferences from the surrounding facts when determining whether the assertion of the statutory right was the reason or principal reason.

Direct Race Discrimination

54. Section 13 of the Equality Act 2010 (EqA) provides that:

"A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

55. Section 39(2) EqA provides that an employer must not discriminate against an employee. It sets out various ways in which discrimination can occur, which includes by subjecting him to any other detriment.

56. Under Section 23(1) EqA, when a comparison is made, there must be no material difference between the circumstances relating to each case. The requirement is that all relevant circumstances between Mr Dos Santos and the comparator must be the same and not materially different, although it is not required that the situations have to be precisely the same.

57. Section 136 of the EqA sets out the manner in which the burden of proof operates in a discrimination case and provides as follows:

"(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But sub-section (2) does not apply if A shows that A did not contravene the provision".

58. At the first stage, the Tribunal must consider whether Mr Dos Santos has proved facts on a balance of probabilities from which the Tribunal could conclude, in the absence of an adequate explanation from the respondent, that the respondent committed an act of unlawful discrimination. This is sometimes known as the prima facie case. It is not enough for Mr Dos Santos to show merely that he was treated less favourably than his

comparator and there was a difference of a protected characteristic between them. In general terms "something more" than that would be required before the respondent is required to provide a non-discriminatory explanation. At this stage the Tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination, the question is whether it could do so.

59. If the first stage has resulted in the prima facie case being made, there is also a second stage. There is a reversal of the burden of proof as it shifts to the respondent. The Tribunal must uphold the claim unless the respondent proves that it did not commit (or is not to be treated as having committed) the alleged discriminatory act. To discharge the burden of proof, there must be cogent evidence that the treatment was in no sense whatsoever on the grounds of the protected characteristic.

60. In practice Tribunals normally consider, first, whether Mr Dos Santos received less favourable treatment than the appropriate comparator and then, second, whether the less favourable treatment was on the ground that Mr Dos Santos had the protected characteristic. However, a Tribunal is not always required to do so, as sometimes these two issues are intertwined, particularly where the identity of the relevant comparator is a matter of dispute. Sometimes the Tribunal may appropriately concentrate on deciding why the treatment was afforded, that is was it on the ground of the protected characteristic or for some other reason?

61. In most cases there is a need to consider the mental processes, whether conscious or unconscious, which led the alleged discriminator to do the act. Determining this can sometimes not be an easy enquiry, but the Tribunal must draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances (with the assistance where necessary of the burden of proof provisions). The subject of the enquiry is the ground of, or the reason for, the alleged discriminator's action, not his motive. In many cases, the crucial question can be summarised as being, why was Mr Dos Santos treated in the manner complained of?

62. The Tribunal needs to be mindful of the fact that direct evidence of discrimination is rare, and that Tribunals frequently have to infer discrimination from all the material facts.

63. The protected characteristic does not have to be the only reason for the conduct, provided that it is an effective cause or a significant influence for the treatment.

64. The way in which the burden of proof should be considered has been explained in many authorities including: **Barton v Investec Henderson Crosthwaite Securities Limited [2003] IRLR 332; Shamoon v Chief Constable of the RUC [2003] IRLR 285; Hewage v Grampian Health Board [2012] ICR 1054; Igen Limited v Wong [2005] ICR 931; Madarassy v Nomura International PLC [2007] ICR 867; Royal Mail v Efobi [2021] UKSC 33.** In **Hewage v Grampian Health Board** the Supreme Court approved guidance given by the Court of Appeal in **Igen Limited v Wong**, as refined in **Madarassy v Nomura International PLC**.

65. The explanation for the less favourable treatment does not have to be a reasonable one. Unfair or unreasonable treatment by an employer does not of itself establish discriminatory treatment: **Zafar v Glasgow City Council [1998] IRLR 36; Bahl v The Law Society [2004] EWCA Civ 1070**. It cannot be inferred from the fact that one employee has been treated unreasonably that an employee of a different race or sex or one who had not been on maternity leave, would have been treated reasonably.

66. Usually, an employee wishing to complain about discrimination must make their complaint within three months of the event they are complaining about (a period which is extended to take account of the early conciliation process). S. 1233(a) Equality Act 2010 provides that conduct extending over a period of time is to be treated as done at the end of that period.

67. Where a complaint has been brought "out of time" then a Tribunal may nevertheless hear the claim provided it has been brought within such other period as the Tribunal thinks just and equitable.

Unauthosied deductions from wages

68. The legal principles to be applied in the context of this case are simple. Section 13 ERA provides employees with a right not to suffer unauthorised deductions from wages. It is simply a case of determining whether Mr Dos Santos was entitled to be paid more than the respondent did pay him for the month of September 2021.

Holiday Pay

69. The disagreement over holiday pay in this case revolves around the dispute as to the dates of the leave year applicable to Mr Dos Santos.

70. Regulation 13 Working Time Regulations 1998 ("WTR") defines the leave year as starting from the anniversary of the employee commencing employment, unless a different date is specified by a "relevant agreement". A relevant agreement is defined in Regulation 2 as a workforce agreement or collective agreement incorporated into the contract, or any other agreement in writing legally enforceable between the employer and employee.

Submissions

71. Mr Ramsbottom, on behalf of the respondent, prepared a written skeleton argument which he elaborated on in oral submissions.

72. As a general point, Mr Ramsbottom emphasised that the respondent did not have an HR function and had recently engaged with HR consultants to try to improve their processes.

73. In relation to unfair dismissal, Mr Ramsbottom conceded that Mr Dos Santos had asserted a statutory right by alleging an unauthorised deduction from wages by his email 14 October. However, in his written submission he said that the email of 28 October, requesting a copy of his contract, did not fulfil the requirements of s.104 ERA. This was surprising as, at the outset of the

hearing, the Tribunal understood Mr Ramsbottom to have made this concession in relation to both emails. We will return to this matter below.

74. In any event, Mr Ramsbottom argued that the dismissal had nothing to do with the emails sent by Mr Dos Santos and was entirely prompted by Mr Dove's request to Mr McCann to remove Mr Dos Santos from the site.

75. In relation to discrimination, Mr Ramsbottom submitted that the position of the comparators was materially different, in particular that they had more relevant experience than Mr Dos Santos and were employed at a higher grade. It was argued that Mr Dos Santos himself lacked the skill and experience to assess the level at which other employees were operating and that his evidence about the performance of the comparators and the training they required was not reliable.

76. In relation to deductions, Mr Ramsbottom submitted that Mr Dos Santos had been properly paid in accordance with the gate times (although no calculation was put forward) and that he had been overpaid in respect of holiday pay on termination.

77. On behalf of Mr Dos Santos, Mr Barklem made oral submissions only.

78. In relation to unfair dismissal, Mr Barklem contended that Mr Dos Santos had asserted his statutory rights in relation to receiving his contract of employment and the pay dispute. Mr Barklem argued that the dismissal was not effective until Mr McCann sent his second email, in respect to Mr Dos Santos's request for a 'letter of terminaiton'. That meant that the content of the email in which Mr Dos Santos made the request was also an assertion of a statutory right which preceded the termination itself.

79. On Mr Dos Santos' case, the pay dispute had been "bubbling around" between Mr Dos Santos and the respondent for some weeks. Mr Dos Santos approached Telford Homes in relation to this issue. Being informed that he had done so was the final straw for Mr McCann who was in a "pressure pot situation" and this was a sufficient connection between the assertion of statutory rights and the dismissal.

80. Mr Barklem pointed to the contradiction between the reason for dismissal given in the ET3 (gross misconduct) and the reason given in Mr McCann's email (failing probation). He argued that there could be no misconduct as Mr Dos Santos was within his rights to query the data breach and Mr Dove's evidence did not suggest that he had acted inappropriately in his conduct towards the Telford Homes employees.

81. In relation to race discrimination, Mr Barklem submitted that Mr Dos Santos' view that there were pay differentials related to race was supported by his contemporaneous emails and Whatsapp messages. Although the higher pay of two of the comparators was explained by their higher status, that did not take the respondent very far as it was unable to justify, on the evidence, the decision to appoint Mr Inculet and Mr Sandu to higher grade roles. Mr Barklem emphasised the various inconsistencies and evidential holes in the respondent's recruitment and remuneration practices. He argued that these

left space for favouritism, cliques and, ultimately, racism, to play a part in determining remuneration, and that that was what had happened here.

82. In relation to unauthorised deductions, Mr Barklem submitted that Mr Dos Santos was entitled to be paid for his full shifts and that he was entitled to be paid holiday pay based on a leave year commencing on the anniversary of the start of his employment.

83. Both representatives made many additional points which we had regard to in reaching our conclusions.

Discussion and conclusions

Race discrimination

Failure to increase Mr Dos Santos' pay despite his experience increasing.

84. We find that Mr Dos Santos had a legitimate expectation that he would get a payrise and a promotion to a substantive position if he successfully completed his six month probation period. His December payrise showed that he was on track at that time. There were no complaints or performance issues throughout his probationary period and he was not told that he had failed the probation period nor that it needed to be extended.

85. Further, we accept that Mr Dos Santos thought that he had passed his probationary period because this was what gave him the confidence to raise his concerns in the April email exchange.

86. We find as a matter of fact that Mr Dos Santos and his comparators (Mr Sundu and Mr Inculet) were, at least by this point, doing broadly similar work and were of broadly similar levels of competency. The respondent has been unable to evidence the supposedly better or more relevant qualifications of the comparators. Mr Dos Santos' evidence as to the work being done and the competence of difficult individuals is supported by the views expressed contemporaneously on Whatsapp messages. The respondent submitted that, as a trainee himself, Mr Dos Santos would not be able to assess the competence of others. This might be true up to a point – for example he would not be able to 'sign off' the work done by other workers as safe or up to a particular standard. However, it is not credible to suggest that he would not have a general level of understanding about which workers on the site were efficient, well-regarded and experienced and which required training or were slower. Crucially, there was no evidence called by the respondent from Petru, Marius or anyone else with direct knowledge of the work being done by Mr Dos Santos and others alongside him on site. On that basis we accept the credible account given by Mr Dos Santos.

87. We take note of the fact that Mr McCann failed to engage with the concerns of racism which were raised by Mr Dos Santos in a persistent (but nonetheless polite and tempered) way in the April email exchange.

88. We find that by the end of Mr Dos Santos' probation period Mr Sandu and Mr Incelet were appropriate comparators. Even if they had some prior qualifications or experience which justified them being placed on a higher

starting salary, by this time we accept they were all working to broadly the same standard. Further, to the extent that there may have been deficiencies in the Mr Dos Santos' training, that was tainted by race as we accept Mr Dos Santos' evidence that the supervisors, and Petru in particular, had a tendency to require black Hispanic workers to do a bigger share of labouring work, to the detriment of their training.

89. Alternatively, we find that the appropriate hypothetical comparator would be a white British or Eastern European worker who had joined as a trainee at the same time as Mr Dos Santos, with his CV and skills, and who had started on £10 per hour.

90. We are satisfied that the facts established by Mr Dos Santos, as summarised above, are facts on which we could conclude that he was treated less favourably than his comparators by not being awarded a pay increase to £12.50 an hour at the end of his probation or, alternatively, that a hypothetical comparator as described above would have been promoted and given a pay rise at the end of the probation period. The burden of proof shifts to the respondent.

91. The respondent's explanation is that Mr Dos Santos was less experienced than Mr Sandu and Mr Inculet, as a result, he wasn't able to work unsupervised and wasn't able to do a flat on his own in a day. Mr Dos Santos says he could work at the same rate at everyone else and that his comparators also required training. We find that the respondent hasn't discharged the burden of proof – they didn't engage with the complaint when it was raised, they have failed to provide robust evidence (either documentary or witness evidence) of the comparators' experience or qualifications which caused them to be started as substantive engineers on a higher pay. The respondent failed to provide any communication to Mr Dos Santos at the time about the end of his probationary period, or any explanation was to why it considered that he had not reached the required standard.

92. On that basis, we find that the respondent discriminated against Mr Dos Santos by not raising his pay from mid-March 2021. We find that this was on the basis of both his skin colour and his nationality.

93. This was a contuinuing act of discrimination as Mr Dos Santos continued to be paid at a lower rate than a substantive residential ventilation engineer until his dismissal, notwithstanding a small payrise in August 2021. The claim is therefore in time.

94. However, even if we are wrong to view this as a continuing act, we find that it is just and equitable to extend time for the presentation of the claim. There has been no suggestion of any prejudice caused to the respondent by the delay in presenting the claim. The deficiencies in the respondent's documentation arise from the respondent's own failures to keep records and it has not been suggested that the respondent would have been better able to answer the case had it been presented earlier. Conversely, we consider that denying Mr Dos Santos a remedy for the discrimination that we have found to have taken place would be a significant prejudice to him in circumstances where this discrimination has had a material financial impact

as well causing distress, and where he had taken steps, whilst still employed, to draw attention to the problem, but has been 'fobbed off' by Mr McCann.

Starting Mr Sandu and Mr Inculet on higher rates of pay, and paying them a bonus, despite them having no prior experience

95. This allegation is related to the previous allegation, but it is not quite the same. We accept that the respondent's basic position was that new employees started on £10 per hour. Mr Sandu and Mr Inculet were treated more favourably because they started on £12.50 per hour. The evidence on this was thin, but we take note of the fact that Mr Bodecan was paid £10, then £11, at the start of his employment, so the reason for Mr Sandu and Mr Incelet's starting salaries are not entirely due to race. Mr Dos Santos has no positive evidence to show that Mr Sandu and Mr Incelet did not have the fan-coil/dry-lining experience that Mr MCann relied on. He has not shifted the burden of proof to demonstrate that their more favourable treatment can be equated to less favourable treatment of him on grounds of race.

96. Given the treatment of Mr Bodocan, we cannot be satisfied that a hypothetical Eastern European comparator with Mr Dos Santos experience would necessarily have started on a higher rate of pay.

97. In relation to the allegation in respect of bonuses. Mr Dos Santos' evidence on this was very vague, as were Mr Barklem's questions in cross-examination. We appreciate that Mr Dos Santos was to some extent disadvantaged by lack of disclosure from the respondent, but it remains his responsibility to put forward a positive case. Simply by asserting that some sort of bonus was paid, on some occasions, to the comparators, is not enough, particularly when Mr Dos Santos received a bonus on at least one occasion.

98. These allegations therefore fail.

Requiring Mr Dos Santos to do labouring work but not requiring Mr Bodocan to do it

99. We heard evidence from Mr Dos Santos, which is backed up to some extent by the contemporaneous Whatsapp messages, that he and other black employees were required to do more menial tasks than the Romanian employees, and particularly than Mr Bodocan. We accept that that perception was genuine and not fabricated.

100. As against that evidence, we have the assertions of Mr McCann, essentially arguing that it wasn't like that and everyone mucked in. That may well be how Mr McCann wished and intended things to operate, but he was on site only rarely. Even Marius, the supervisor, was not on site all of the time. Mr McCann had the opportunity to look into these allegations when Mr Dos Santos raised them in April, including the allegation that other Romanian workers acted like supervisors and gave orders, but he declined to do so.

101. We do not necessarily accept the extreme characterisation of these events by Mr Dos Santos, but we do accept that there was a "clique" in operation and that Mr Dos Santos was expected to do more than his share of the labouring work, and not supported to progress in the skills of the trade. Again, we base this on his evidence, which we found broadly credible, and on that Whatsapp messages and April emails.

102. In respect of this allegation, we conclude that Mr Dos Santos has shifted the burden of proof and the respondent has not discharged it This allegation succeeds.

103. We find that the respondent subjected Mr Dos Santos to a detriment by allocation a higher proportion of unskilled/labouring tasks to him than to other employees on site, particularly Mr Bodocan. We find that Mr Bodocan is an appropriate comparator as, although his job was slightly different, that was not related to the distribution of labouring work.We find that this was less favourable treatment due to his skin colour and his nationality.

104. On time limits, we find that the allegation amounts to a continuing act and therefore was made in time, or, alternatively, that it is just and equitable to extend time, for broadly the same reasons as set out above in relation to the pay allegation.

Starting pay rate of Mr Bodocan and Mr Dos Santos

105. The best evidence we have is that Mr Bodecan started on £10 per hour and very quickly, within around 5 weeks, moved up to £11 per hour. Mr Dos Santos was paid the same rates. Although it took him two and a half months to be moved up to £11, this can in part be explained by his time off due to his accident. We therefore do not find that there was a material difference in the starting rates for these employees. This allegation does not succeed.

Mr Bodecan was paid a bonus

106. We repeat our conclusion above that Mr Dos Santos has not met the evidential burden on him in respect of bonuses.

<u>Unfair dismissal</u>

107. Mr Dos Santos relies on the right to be given written particulars of employment terms and the right not to suffer from unauthorised deduction from wages. Both are relevant statutory rights for the purposes of s.104 ERA.

108. As noted above, Mr Ramsbottom conceded that Mr Dos Santos's email of 14 October 2021 made an assertion that the respondent had infringed his right not to have unauthorised deductions made from his pay, and that that assertion was repeated in other emails on 27 and 28 October. In his submissions, he argued that the email of 28 October (8.01pm, page

115) was merely a request for a copy of the contract, and not an assertion that the respondent had breached Mr Dos Santos's statutory rights by not providing it.

109. In discussing the Issues at the outset of the hearing, the Tribunal understood Mr Ramsbottom to have made a concession that Mr Dos Santos had asserted his statutory rights in relation to both the pay dispute and the failure to provide him with a contract for the purpose of s.104. This had also been Mr Barklem's understanding, and Mr Barklem pointed out that in his Further Particulars Mr Dos Santos had also relied on oral assertions, but Mr Barklem had considered it unnecessary to pursue this point in cross-examination due to the respondent's concessions.

110. Having checked the hearing notes and heard from both counsel, we were satisfied that there had been a concession. We allowed both parties to make oral submissions as to whether Mr Ramsbottom should be permitted to resile from it. For reasons given during the course of the hearing, we decided he should not be. When we adjourned to deliberate on the case, we also considered whether, absent the concession, we would have found the 28th October email to be an assertion that the respondent has infringed Mr Dos Santos's statutory right to be provided with a contract. Mr Dos Santos referred to the contract "that I should have got since last year" and, in our view, this is sufficient for the purposes of s.104.

111. We then had to consider whether Mr Dos Santos had shown that the assertion of statutory rights was the reason or principal reason for dismissal. It is clear, on the facts that we have found, that Mr Dos Santos's concern that he had been underpaid his wages led to him approaching the Telford Homes staff in the office, which led to his removal from site by Mr Dove and to his dismissal by Mr McCann.

112. We find that the respondent bears much responsibility for that sequence of events. Mr McCann was at fault for not engaging with Mr Dos Santos' concerns about his pay and failing, through a series of emails, to provide any calculation to support the figure of 146 hours that the respondent had ultimately used to pay Mr Dos Santos for September. Mr Dos Santos initiallyt did the right thing by raising his concerns about payment with Carla, Marius and Mr McCann. Having received the gate times, it is possible that Mr McCann had legitimate concerns about the amount of time Mr Dos Santos, and possibly other employees, were spending on site. It would have been legitimate to raise this with Mr Dos Santos, it would have been legitimate to make further investigations, and it may even have been legitimate to propose a deduction which accurately reflected the respondent's calculation of the short time. It was not legitimate to make a significant deduction to Mr Dos Santos's wage with no rationale or explanation.

113. When giving evidence Mr Dove and Mr McCann were challenged at length about the relatively minor nature (on Mr Dos Santos's case) of Mr Dos Santos's conduct, and about the legitimacy of his complaints about data privacy. They were not challenged on the fundamental points: that the incident had occurred; that Mr Dove wanted Mr Dos Santos removed from

site; that he had informed Mr McCann of that; and that Mr McCann's email of 9.04 on 29 October was sent after receiving that phone call.

114. We pause to note that that email constituted a clear express dismissal. The reason for dismissal is whatever was operating in Mr McCann's mind when he sent this email. Mr Dos Santos sent a subsequent email in which he again asserted his statutory rights, and also requested formal confirmation of termination. Mr Barklem had suggested that it is Mr McCann's reply to that second email which should be treated as the dismissal, but we reject that submission. Whatever Mr McCann thought of Mr Dos Santos's email of 29th, the decision had already been made.

115. There are some factors which could support the Mr Dos Santos' claim that he was dismissed due to having asserted his statutory rights. Primarily these are, (1) the close timing between the assertion of statutory rights and dismissal and (2) the fact that when he was subsequently asked for a reason for the dismissal, Mr McCann did not say it was because Mr Dove had asked for the Mr Dos Santos' removal, but instead said he had not passed his probationary period.

116. Despite those points, we are satisfied that it was Mr Dove's request to have Mr Dos Santos removed from site which was the principal cause of the dismissal. Mr Dos Santos' assertions provide the backdrop to the request, but it was the request which triggered the actual decision. Had Mr Dos Santos not gone to the Telford Homes office, it is possible that the wages dispute would have escalated in any event. It is equally possible that it would have passed over, as his complaints in April had. (There is a ring of truth in a comment made by Mr McCann that if he sacked every employee with a wages complaint there would be no one left.) Overall, we are satisfied that the dismissal email was sent because of, and as a reaction to, Mr Dove's request. Mr McCann claimed that it would not have been possible to redeploy Mr Dos Santos onto another site. Given the timing of the events, and Mr McCann's approach generally, we are not convinced that this is something he thought particularly hard about, but we cannot go so far as to say that redeployment would have been offered had it not been for the assertion of statutory rights.

117. In those circumstances, we find that assertions of statutory rights were not the sole or principal reason for dismissal and the unfair dismissal claim must fail. Mr McCann may not have had a 'fair reason' for the purposes of s.98 ERA, and may not have followed a fair process, but that does not assist Mr Dos Santos as he does not have the two years' service required to bring an 'ordinary' unfair dismissal claim.

Unauthorised Deductions

118. For the reasons we have set out above, we find that the wages properly payable to Mr Dos Santos were eight hours for each day that he worked, irrespective of the precise hours worked on each occasion.

119. Mr Dos Santos's evidence that he worked for 21 days in September 2021 was not challenged, and he was therefore entitled to be paid for 168 hours. The difference between the payment he should have received for

168 hours and the actual payment he received was an unauthorised deduction.

Holiday Pay

120. As we have found as a fact that there was no written contract in this case, there is no relevant agreement under the WTR, and the default applies. We therefore find that Mr Dos Santos's holiday year ran from 12th August each year.

121. This means that Mr Dos Santos was underpaid for accrued outstanding holiday on the termination of his employment.

Remedy

122. We were able to deliver an oral judgment to the parties on liability during the course of the hearing. Very sensibly, the representatives were then able to agree many of the elements of compensation, which are reflected in the figures set out in the short Judgment already sent to the parties.

123. The parties made submissions as to the appropriate award for injury to feelings damages in view of the discrimination that we had found to have taken place.

124. We reminded ourselves that the purpose of an injury to feelings award was to compensate Mr Dos Santos for the hurt and distress caused by discriminatory treatment, and not to punish the respondent. We had regard to the **Vento** bands (as updated) and the parties addressed us both as to the relevant band for the award in this case and the appropriate figure within that band.

125. We took account of the fact that this was a discriminatory situation which Mr Dos Santos was keenly aware of, and which was affecting him on a day to day basis from around November 2020 (having regard to the disparity in work allocation). It is clear that he found the way he was treated on site to be humiliating and frustrating, and understandably so. The situation became distinctly worse in spring when he expected to be given the payrise that we have found was withheld due to discrimination.

126. Although Mr Dos Santos was not demonstrative, we do not fully accept Mr Ramsbottom's submission that he was robust and resilient. The matter evidently concerned him, to the extent of making efforts to try to obtain support from Mr McCann even when that support wasn't readily forthcoming. In those circumstances, we find that Mr McCann's dismissal of his attempts to raise issues was perceived as a betrayal. Again, this was a justified reaction. Those feelings of humiliation, frustration and betrayal would, again, have been the daily experience of Mr Dos Santos as he attended work through to the date of his dismissal.

127. Set against that, is the fact that this treatment did not precipitate any health concerns, as it may have done for another individual. Mr Dos Santos was able to carry on with his life as before. We also keep in mind that we

have made no findings of harassment or overtly discriminatory acts, which might justify particularly high awards.

128. Taking those matters into account the conclusion of the Tribunal was that the appropriate aware was a figure in the middle band, and towards the middle of that band. We therefore made an injury to feelings award of £21,000.00.

129. We awarded interest on the discrimination damages, as set out in the Judgment.

Employment Judge Dunlop
Date: 22 September 2023

WRITTEN REASONS SENT TO THE PARTIES ON

25 September 2023

FOR EMPLOYMENT TRIBUNALS