EMPLOYMENT TRIBUNALS

Claimant: Mr Dick Sibanda

Respondent: Lufthansa Technik Landing Gear Services Ltd

Heard at: Bury St Edmunds Employment Tribunal (by CVP)

On: 25, 26 and 27 March 2024 (3 days)

Before: Employment Judge Hutchings
Mr Davie (Tribunal Member)
Mr Grant (Tribunal Member)

Representation
Claimant: Mrs Winstone of counsel
Respondent: Mr Leach of counsel

RESERVED JUDGMENT

1. The claim of unlawful deduction from wages was not presented within the applicable time limit. It was reasonably practicable to do so. The claim of unlawful deduction from wages is therefore dismissed.

2. The complaint of direct race discrimination is not well-founded and is dismissed.

REASONS

Introduction

1. The claimant, Mr Dick Sibanda, was employed by the respondent, Lufthansa Technik Landing Gear Services Ltd ("Lufthansa"), a company providing landing gear maintenance facilities, from 11th September 2006, initially as a Trainee Electro Plater. At the time of the events in issue he was a Leading Handler and is still employed by the respondent. Early conciliation started on 16 May 2022 and ended on 18 May 2022.

2. By claim form presented on 30 May 2022 the claimant makes the following complaints:

   2.1. Unlawful deduction from wages of £2,928 plus interest for the period 1

November 2019 to 31 October 2021; and

2.2. Direct race discrimination regarding the recruitment of a team leader role (acting and full time).

3. By grounds of response dated 27 July 2022 the respondent denies the claims. The respondent asserts that the claimant did not have a contractual entitlement to additional wages for the period claimed and he was properly paid during this time. The respondent's position is that an "ND certificate" indicating qualification at this level is not determinative of pay scale and differentials in pay could be explained by different skills, qualifications and a TUPE transfer. The respondent denies that it discriminated against the claimant due to his race, submitting that he did not come forward to show interest in the acting up team leader role, it had reasons not related to the claimant's race for not choosing him for this role and that he did not get the permanent team leader role as he did not reply to the advert which, the respondent says, was properly advertised.

Procedure, documents, and evidence

4. The claimant was represented by Mrs Winstone of counsel who called sworn evidence from the claimant.

5. The respondent was represented by Mr Leach of counsel, who called sworn evidence on behalf of the respondent from:

   5.1. Karl Warren, Chief Operations Officer;
   5.2. Lukasz Szmalenberg, Engineering Manager – Process and Surface Technology; and
   5.3. Catherine Maltby, Head of Human Resources.

6. Ms Maltby did not attend the hearing as she is no longer employed by the respondent. To the extent the Tribunal took account of her evidence in deliberations, we did so mindful that Mrs Winstone did not have the opportunity the ask her questions and challenge the evidence.

7. The hearing was before a full Tribunal. We considered documents from a 134-page joint, agreed hearing file and a supplemental 10-page hearing file submitted by the claimant, and accepted as evidence by the respondent. The Tribunal also considered a cast list and chronology; to the extent the chronology was not agreed, dates in dispute will be determined by the Tribunal if relevant to the issues. Mr Leach provided a written skeleton argument and authorities. Mr Leach and Mrs Winstone made closing statements.

8. At the start of the hearing on 25 and 26 March the parties informed the Tribunal that the following additional evidence had been submitted and sought the Tribunal's consent to admit the evidence. Neither party objected to these late admissions. Having read the documents, we consider the contents relevant to the issues in dispute. The documents were admitted, on condition that witnesses will be given time during the hearing to read the documents. We consider this approach proportionate as the documents were single pages.

   8.1. An email exchange between the claimant and Mr Szmalenberg dated 16

and 17 January 2020;
8.2. An email dated 11 January 2022 notifying staff of a change in Union representative; and
8.3. Jonathan Worsley's CV.

9. No reasonable adjustments were required by the witnesses. We took regular breaks throughout the virtual hearing. The claimant is a nightshift worker. At the end of the hearing on 25 and 26 March Mr Leach confirmed that the claimant would not be required to work his nightshift, given the hearing would continue the following day, and that he would be paid for these shifts.

10. The Tribunal heard evidence as to liability only.

Preliminary matters

11. At the start of the hearing on 25 March 2024, we agreed the following timetable, which was broadly followed:

    11.1. Day 1: preliminary matters, Tribunal reading and claimant's evidence.
    11.2. Day 2: further evidence from the claimant (if required), respondent's evidence (Mr Warren, and Mr Szmalenberg).
    11.3. Day 3: closing statements and oral judgment (if time).

12. There was insufficient time on the 3rd day for Tribunal deliberations and oral judgment. Parties were informed after closing statements that judgment was reserved, and a written judgment would be issued by the Tribunal.

13. We agreed that the issues in dispute remain as recorded by Judge Craft in the case management order issued following the hearing in July 2023. They are set out in detail in the "issues" section of this Judgment. In summary.

    13.1. Unlawful deduction from wages of £2,928 plus interest for the period 1 November 2019 to 31 October 2021; and
    13.2. Direct race discrimination regarding 3 events:
        13.2.1. The appointment of Jonathan Worsley as acting team leader;
        13.2.2. The timing of the advertisement for the role of permanent team leader; and
        13.2.3. The appointment of Jonathan Worsley as permanent team leader.

14. In his skeleton argument Mr Leach raised the issue of jurisdiction for the wages claim, specifically that this claim was out of time. It is incumbent on the Tribunal to consider jurisdiction at a final hearing, even if it is not considered at the case management hearing. Accordingly, the list of issues below sets out the tests we must apply to determine whether the wages claim is in time.

Findings of fact

15. The relevant facts are as follows. First, the Tribunal makes a general finding on oral evidence. We found the claimant keen to assist the Tribunal; however, on occasion his oral evidence was contradictory, and he was unable to recall the precise order of events on which his claim is based (we note the particular details below). Mr Warren and Mr Szmalenberg were subject to rigorous

questioning from Mrs Winestone. Mindful the hearing is an unfamiliar forum for the witnesses, the Tribunal explained that for claims concerning alleged race discrimination robust cross examination is important to test the mindset of the witness. On occasion Mr Warren and Mr Szmalenberg added facts which were not referenced in their witness statements, in response to questions asked by Mrs Winestone. In assessing credibility, we have taken account in our findings of fact that it is almost 2 years since many of the events in dispute occurred.

16. Mr Sibanda was employed by Lufthansa from 11 September 2006 starting as a Trainee Electro Plater. His employment contract confirms that he was contracted to a 40 hour per weeknight shift from 8.30pm to 6.30am with a half hour unpaid break. He was entitled to, and paid, a night shift uplift of 33.3% on his basic salary. The claimant's employment contract entitles him to a discretionary bonus scheme, non-specified discretionary benefits and he has the right to claim expenses. The claimant does not have a contractual right to salary increases by reference to qualifications held or obtained.

Development

17. During his employment the claimant gained additional qualifications and was promoted: relevant to his claim is that he obtained an 'ND' qualification in April 2009, was promoted to 'Skilled Plater' in November 2013 and at the time of the issues in dispute he had been promoted to Leading Hand.

18. The claimant complains that the respondent did not support his career development, specifically that it failed to support him in the way Mr Szmalenberg supported Mr Worsley in January 2017 to get his ND stamp in the manner recorded in the exchange of emails between the claimant and Mr Szmalenberg on 16 and 17 January 2020. We find the claimant's complaint misplaced, not least by his own admission that he had achieved the ND stamp in April 2009 while employed by the respondent and was subsequently promoted. The 16 and 17 January emails do not evidence the failing alleged. Indeed, Mr Szmalenberg's email of 17 January refers to an imminent annual assessment for Nital etch to sustain the claimant's own qualification. There is no written or contemporaneous evidence of the claimant complaining to Mr Szmalenberg that support, or career development, is lacking.

19. Indeed, the claimant does not explain in his witness evidence how the respondent failed to develop his career. In fact, he acknowledges that there "is not a lot of opportunity for promotion". We have considered the claimant's 2022 PDR. It records "future goals and objective" and "development and development opportunities". We find that the claimant did progress in his career and was supported by the respondent.

Wages

20. Sometime in 2018 the claimant found out that a colleague in a similar role was being paid more. When he sought to find out why, he was told that he was being paid the correct amount at this time. In November 2021 Mr Warren conducted a pay structure review in the context of challenges to the respondent's business as a result of Covid. Mr Warren told us that in early 2020 he reviewed the entire business as a result of Covid, including a cost review and potential redundancies. A pay review in November 2021 resulted

in an increase to the claimant's salary; the claimant accepts that he has been properly paid since 1 November 2021.

21. The claimant complains he was underpaid from 1 November 2019 to 31 October 2020. He did not bring his claim until 30 May 2022. He decided not to start proceedings earlier as he "felt the situation could be resolved" following emails he sent to Rita Vidal (HR Business Partner) in November 2021, Karl Warren in January 2022 and Lukasz Szmalenberg in February 2022. We have considered these documents. Rita Vidal replied on 15 November 2021; she clearly states that the increased salary is not backdated. Therefore, we find that at this time the claimant knew the issue was not resolved. The claimant takes no further action until January 2022 when, on 24 January, he emails Mr Warren asking whether the increase should be back paid. We find that there is no reason why the claimant could not have taken action, including emailing Karl Warren or commencing proceedings, between 15 November 2021 and 24 January 2022.

22. Mr Warren replies on 28 January 2022, identifying the claimant's lack of Chrome certification as a reason for differences in pay with colleagues. The claimant emails Mr Szmalenberg on 1 February 2022 asking for clarification about his pay. Mr Szmalenberg replies on 2 February referencing a companywide salary revision. After this the claimant does not raise the issue with his managers again, telling us he that after Mr Szmalenberg's response he "took a few months to think about [whether] to take company to court and [that he] only started to think about a claim on return from holiday in January 2022", making the decision to pursue the employment tribunal "after [his] holiday and reflection."

23. We find that Ms Vidal, Mr Warren and Mr Szmalenberg replied to the queries raised by the claimant in a timely manner. He did not query their responses directly. He did not bring the claim during this correspondence as he was hoping for a resolution. He did not bring the claim after the reply to his final query on 1 February 2022 as he was on holiday and reflecting on a decision to start proceedings. By his own admission at the hearing, the claimant did not start proceedings in January 2022 "because [he] was pursuing resolution with the company [and] wanted to have a good resolution in company before pursuing law".

24. The claimant accepted that he could have spoken to the trade union representative to discuss his concerns about his salary. He told us he was unable to do so as the company "spent a significant period without a union representative during the period of the complaint" and he could not send emails to the union as he had no access to the union email address. The claimant's recollection is misguided. On 11 January 2022 the incumbent union representative, Rob Moore, sent an email to the respondent's group email address "LTLGS_ALL" informing recipients of his intention to step down with immediate effect and seeking expressions of interest for a replacement. The email states: " in the meantime your unite contact for any advice, questions or support is…" followed by the name and telephone number of the unite representative. We find that there was not a period when company employees were without union support. The claimant has not suggested he was not included in this email group. We find he was, particularly given the length of his employment. If he was not aware of the union contact it was because he did not read this email. He accepted he had access to the internet throughout

the period he was querying his wages; we find he had access to union support throughout this time too.

25. The grievance process is referenced in the claimant's employment contract; the claimant demonstrated to the Tribunal that he has knowledge of company policies. He did not raise a grievance about his wages.

26. The claimant took no further action about his wage concerns until he contacted ACAS on 16 May 2022. Consultation with ACAS concluded on 18 May 2022 and the claimant presented his claim form on 30 May 2022.

Acting up team leader role

27. Maciej Twardzik, night shift team leader, resigned by letter to Steve Ridges, section director, on 11 March 2022 (a Friday). Phil Austin, head of production is told of the resignation on 14 March (a Monday). The claimant was aware Mr Twardzik resigned, acknowledging in evidence that he knew a replacement would be needed. He also acknowledged that he could have expressed an interest in this role, telling us he did not do so as the company policy did not obligate him to do so. While this is indeed what the policy states, we find it is curious that someone so upset by a decision not to ask him to act up relies on a policy to explain why he did not express an interest in taking on the role, given his years of experience and stated wish to this Tribunal to do so. Given the claimant's evidence that he was unaware of: the position with the change of union leader; timescales; and details of the equal opportunities policy, we do not find it credible that he had the level of knowledge of recruitment policy at the time of Mr Twardzik's resignation that he suggests to this Tribunal. A more credible explanation is the claimant became aware of this policy after learning of Mr Worsley's appointment and the policy created a narrative to explain why he did not express an interest.

28. Policy aside, no-one had an obligation to express an interest in the acting up role. Mr Worsley did so of his own volition; in response Mr Szmalenberg asked him to take on the acting up role, as someone he found trustworthy and communicative. Mr Szmalenberg suggests the claimant did not share these characteristics. In reaching this conclusion, we find Mr Szmalenberg relies on hearsay and gossip. There is no evidence, contemporaneous or subsequent, that the respondent's managers had any concerns with the claimant's attitude, values or communication skills. The claimant's 2022 PDR does not address any concerns. Indeed, Mr Szmalenberg and the claimant both told us they considered that they had a good working relationship. In the absence of any evidence to the contrary, we find at the time they did. The claimant was a long standing, valued and conscientious employee.

29. The reason Mr Worsley was offered the acting up role was because he stepped forward. The decision to ask Mr Worsley to act up was driven by the fact that Mr Twardzik had left quickly and Mr Worsley was the only person to express interest interim. The respondent took the option presented to it, given Mr Szmalenberg had no concerns about Mr Worsley's work. We find that any concerns Mr Szmalenberg had with the claimant did not inform his decision to appoint Mr Worsley.

30. We make the observation that it would have been prudent of the respondent, when Mr Worsley expressed an interest, to ask the other 3 colleagues in the

team whether they were interested before deciding who should act up interim; it did not. That is unfortunate. Given Mr Worsley's expression of interest, no-one else on the team was considered for the acting up role.

31. The decision to appoint Mr Worsley interim with effect from 21 March 2022 was notified to all staff on 25 March 2022. The claimant says this was the first he became aware of this decision. There is no evidence that Mr Worsley told anyone on the team; there is no evidence identifying when Mr Worsley was told he would be acting up. We find that the claimant was not aware of this decision until the announcement on 25 March 2022. The announcement identifies the role is "acting up". We find that the claimant would know from that announcement that a decision had not been made about the permanent role. Despite the keenness expressed to the Tribunal to take on the permanent role, he did not make any enquiries about the timing or recruitment process for this, nor did he express any interest to his managers in applying for the permanent role.

32. Overall, the claimant was passive in his approach to the acting up and permanent roles. Of course, there is no obligation on an employee to express an interest in a vacant role until that role is advertised (confirmed in the respondent's own policy). However, it is difficult to reconcile the devastation expressed by the claimant in his witness statement at not getting either role to the fact that at no time after Mr Twardzik's resignation did he share his wish and enthusiasm to be promoted to the team leader position.

Team leader advert

33. As his line manager Mr Szmalenberg acknowledged he authorised the claimant's holiday and was aware he was away following the end of his night shift on 31 March 2022 until his return for his nightshift on 25 April 2022. Authorisation must have taken place before Mr Twardzik resigned as the claimant exchanges emails about his holiday with Carl Spragg on 9 February 2022.

34. Mr Phil Austen was aware of Mr Twardzik's resignation from 14 March 2022, when he receives an email from Steve Ridges. There is no evidence Mr Austen or Mr Ridges knew the claimant's holiday dates. They were not directly involved in the management of the claimant. For these reasons we prefer the respondent's position that they did not know about the claimant's holiday.

35. On 29 March 2022 Mr Austen sends members of the HR team and the managing director (Christian Rodarius) a personnel requisition to recruit for a permanent team leader role. It is sent to Mr Rodarius as his authorisation is required before any role can be advertised. In seeking this approval Catherine Maltby asks for approval as soon as possible so that the advert can be launched. Neither Mr Warren nor Mr Szmalenberg input into the approval process to recruit a permanent team leader. The approval sat solely with the managing director. He provides approval 2 days later on 31 March 2022. The advert link is sent to all staff in an email later that day, along with a second role. Both adverts are live for 3 weeks, closing on Friday 22 April 2022.

36. The claimant has not provided any explanation, other than his belief, as to why he considers the timing of the advert aligning with the timing of his holiday was due to his race.

37. There is no evidence Mr Austen (responsible for the sending the requisition request to recruit) or Mr Rodarius (responsible for the approval allowing it to be advertised) were aware of the claimant's holiday. We find they were not and the timing of the advert was due to the timing of the request and approval; in no did the timing of the claimant's holiday influence when the advert went live. It could not have done as those involved in approving ad placing the advert had no knowledge the claimant was on holiday. The fact the two periods align is a coincidence.

Permanent team leader role

38. The claimant says he "only knew the permanent position had been advertised and filled as we got another email notification when Jonathan was appointed the role. After seeing that I went onto the intranet and check the job posting and that is when I saw the opening and closing dates." This explanation is simply not feasible. The announcement was made on 9 June 2022. The claimant returned from his holiday on 25 April 2022. On his return the email sent to all staff (LTLGS_ALL) on 31 March 2022 with the link to the job adverts was in the claimant's email inbox. The email is titled "New Job Opportunities". Had the claimant read this email he would have known on 25 April 2022, or shortly thereafter, that the permanent role had been advertised. He should have known; as part of his job he was required to read his emails. We find the claimant did not know on his return in April 2022 because he did not read the email.

39. The claimant did not raise any concerns at the time about the timing of the advert. He did not raise any concerns or a grievance complaining that given the timing he could not apply. He did not raise concerns when he became aware of the advert that he was prevented from applying due to his race.

40. We find that the claimant was not successful in obtaining the permanent team leader role as he did not apply for the role.

Issues for determination by the Tribunal

41. We set out below the issues for the Tribunal to determine, as agreed by the parties in response to the case management order dated 17 October 2022, with the additional of timing, which was raised by Mr Leach at the final hearing.

Time limits: unlawful deduction from wages

42. Was the unauthorised deductions claim made within the time limit in section 48 of the Employment Rights Act 1996? The Tribunal will decide:

    42.1. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the date of payment of the wages from which the deduction was made?
    42.2. If not, was there a series of deductions and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?

42.3. If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

42.4. If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

Unlawful deduction from wages

43. Did the respondent make unauthorised deductions from the claimant's wages and if so, how much was deducted?

Direct race discrimination (Equality Act 2010 section 13)

44. The claimant's race group is Black British

45. Did the respondent do the following things:

45.1.1. Failure to offer the claimant the "acting up" position of Nightshift Team Leader, or the opportunity to apply for it;

45.1.2. Deny the claimant the opportunity to apply for the permanent post of Nightshift Team Leader (para.11); (

45.1.3. Offer the permanent post of Nightshift Team Leader to a white colleague the claimant says was less experienced and less qualified.

45.1.4. Was that less favourable treatment? The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's. If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether s/he was treated worse than someone else would have been treated. The claimant says s/he was treated worse than Jonathan Worsley.

45.1.5. If so, was it because of race?

Law

Time limits

46. Section 23 of the Employment Rights Act 1996 provides that an Employment Tribunal shall not consider a complaint of unlawful deduction from wages unless it is presented before the end of the period of three months beginning with the date of the failure to pay the wages or, where that payment is part of a series of similar acts or failures, the last of them, or within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

47. The fundamental question for a Tribunal is: was it reasonably feasible to present the complaint to the [employment] tribunal within the relevant three months? It will frequently be necessary for it to know whether the employee was being advised, or could have been advised, at any material time and, if so, by whom.

48. In *Porter v Bandridge* [1978] IRLR 271 at [12*],* the Court of Appeal held: "The onus of proving that it was not reasonably practicable to present the complaint within a period of three months was upon the applicant. That imposes a duty upon the applicant to show precisely why it was that he did not present his claim. He has to satisfy the Tribunal that he did not know of his rights and that there was a reason why he could find out about his rights during the period when the claim arose. "Reasonably practicable" does not means "physically possible", but "reasonably feasible": *Palmer & Saunders v Southend-on-Sea Borough Council* [1984] IRLR 119 (CA) (per May LJ at para.34).

49. While ignorance of the relevant right and/or time limit may constitute an impediment making it not reasonably practicable to present the claim, that ignorance must itself be (objectively) reasonable. It is incumbent upon a claimant to make reasonable enquiries as to his rights: *Wall's Meat Co Ltd v Khan* [1978] IRLR 499 (CA) per Brandon LJ at para.44. The advent of the internet since Khan, has made the objective reasonableness of any such ignorance, much harder to establish: *Cygnet Behavioural Health Ltd v Britton* [2022] IRLR 906 (EAT) (at paras.56-58).

50. Smith J in *Nolan v Balfour Beatty Engineering Services* EAT 0109/11 (unreported) held that:

'In summary, when deciding what would have been a reasonable time within which to present a late claim, employment tribunals plainly require to bear in mind the context, namely a primary time limit of three months and the general principle that litigation should be progressed efficiently and without delay. They then require considering all the circumstances of the case, an exercise which will inevitably include taking account of what the claimant did and what he knew about time limits, what he, reasonably, ought to have known about them, and they require to ask themselves why it was that the further delay occurred."

51. Accordingly, the power to dis-apply the statutory time limit is very restricted. In particular, it is not to be exercised, for example, *"in all the circumstances*" nor even when it is *"just and reasonable"* nor even where the Tribunal *"considers that there is good reason' for doing so."* The onus of proving that presentation in time was not reasonably practicable lies on the claimant *Porter v Bandridge* [1978]ICR 943.

Direct race discrimination

52. Under section 13, Equality Act 2010 ("EqA") direct discrimination is defined as:

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

53. The protected characteristics are set out in section 4 EqA and includes race, sex and disability. Direct discrimination occurs where the employer treats the employee less favourably because of a protected characteristic.

54. Section 23 of EqA provides for a comparison by reference to circumstances in a direct discrimination complaint. The Tribunal must consider whether the employee was treated less favourably than they would have been treated if they did not have the protected characteristic. One way of testing whether or

not the employer would have treated them better if they did not have the protected characteristic is to imagine a "hypothetical comparator". There is no actual comparator in this case; therefore, the test of hypothetical comparator is applied. The circumstances of a comparator must be the same as those of the claimant, or not materially different: see section 23 of EqA. The circumstances need not be precisely the same, provided they are close enough to enable an effective comparison: *Hewage v Grampian Health Board* [2012] UKSC 37.

55. The important thing to note about comparators (whether actual or hypothetical) is that they are a means to an end. The crucial question in every direct discrimination case is: What is the reason why the claimant was treated as he/she was? Was it because of the protected characteristic? Or was it wholly for other reasons? It is often simpler to go straight to that question without getting bogged down in debates over who the correct hypothetical comparator should be: *Shamoon v Royal Ulster Constabulary* [2003] UKHL 11.

56. The Tribunal must consider the "mental processes" of the alleged discriminator: *Nagarajan v London Regional Transport* [1999] IRLR 572. The protected characteristic need not be the *only* reason for the less favourable treatment. It may not even be the main reason. Provided that the decision in question was significantly (that is, more than trivially) influenced by the protected characteristic, the treatment will be because of that characteristic and discrimination would be made out.

57. The burden of proof provisions are contained in section 136 of EqA:

> (2) If there are facts from which the [tribunal] could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the [tribunal] must hold that the contravention occurred.
> (3) But subsection (2) does not apply if A shows that A did not contravene that provision.

58. Section 136 prescribes two stages to the burden of proof: Stage 1 (primary facts) and Stage 2 (employer's explanation). At Stage 1, the burden of proof is on the claimant *Ayodele v Citylink Ltd & Anor* [2017 EWCA Civ 1913. Stage 2 considers the employer's explanation. Has the employer proved on the balance of probabilities that the treatment was not for the proscribed reason. In a direct discrimination case, the employer only has to prove that the reason for the treatment was not the forbidden reason. There is no need for the employer to show that they acted fairly or reasonably.

59. The Court of Appeal in *Igen Ltd v Wong* [2005] EWCA Civ 142 sets out guidelines on the burden of proof. Therefore, the process a Tribunal must follow is:

59.1. Establish if there are facts from which a Tribunal can determine that an unlawful act of discrimination has taken place;
59.2. If the Tribunal concludes that there are, the burden of proof shifts to the respondent to provide a non-discriminatory explanation for the conduct.

Conclusions

60. We sets out our conclusions by reference to the agreed list of issues for each claim.

Time limits: unlawful deduction from wages

61. We have found that the claimant claims a series of deductions ending on 31 October 2021 (the last date the claimant alleges his wages were incorrect). Therefore, we conclude the deadline for the claimant to file his ET1 claim form was 30 January 2022 (3 months less a day from 31 October 2021). This deadline is not extended by the ACAS consultation between 16 and 18 May 2022 as consultation started after the January 2022 deadline. We conclude that the claim is 4 months out of time.

62. We have found that the claimant was hoping for an internal resolution. Ms Vidal, Mr Warren and Mr Szmalenberg replied to the email enquiries the claimant made to them in November 2021, January 2022 and February 2022 respectively. This line of communication ceased at the beginning of February 2022. The claimant accepted he had access to the internet. We have found that that there was no time during the period about which the claimant complains when he could not access union support. He was a union member, received the email notifying him of the change of union representative and providing details of the interim representative. Advice was available to him throughout.

63. The fact the claimant worked the night shift and was hoping for resolution does not preclude the fact that it was reasonably practicable for him to obtain information from the internet and advice from his union and submit his claim to the Employment Tribunal by no later than 30 January 2022.

64. Therefore, we conclude it was reasonably practicable for the claim to be made to the Tribunal before the deadline of 30 January 2022. As we have found it was reasonably practicable for the claim to be made to the Tribunal within the time limit, we do not need to consider whether it was made within a further reasonable period.

65. As the claim is out of time the Tribunal does not have jurisdiction and we cannot consider whether the respondent made unauthorised deductions from the claimant's wages.

Direct race discrimination (Equality Act 2010 section 13)

66. The respondent did not offer the claimant the acting up position of Nightshift Team Leader. The position was given to Mr Worsley. We have found the reason for giving Mr Worsley the acting up role was the fact he expressed an interest in doing so following the resignation of Mr Twardzik.

67. The claimant has the initial burden of proof to identify facts on which a Tribunal could conclude discrimination could be present in this decision. We conclude the claimant has not done so. He does not present any facts to support his belief he was not offered the acting up role because of his race. Indeed, his case is to challenge the explanation offered by the respondent in these proceedings (Mr Worsley's skillset by comparison to the respondent's alleged view of his skillset) rather than offer an explanation as to why he considers the decision was informed by his race. To shift the burden of proof it is not sufficient for the claimant to prove a difference in protected characteristic (Mr Worsley is White British, the claimant is Black British) and a difference in treatment (Mr Worsley was

given the acting up role, the claimant was not). Something more is needed and, is this case, is lacking on the facts. We have found there is no evidence, contemporaneous or subsequent, that the decision to act on Mr Worsley's expression of interest and to not ask the claimant whether he was interested in acting up is related to the claimant's race.

68. Indeed, we conclude that appointing Mr Worsley was not less favourable as Mr Worsley's circumstances were not materially the same as the claimant's. Mr Worsley expressed an interest in the role following Mr Twardzik's resignation; the claimant did not. We conclude that race was not a factor in the respondent's decision to give the acting up role to Mr Worsley. The decision was a response to Mr Worsley's expression of interest.

69. We have found there is no evidence that the claimant was denied the opportunity to apply for the acting up role. The respondent did not offer the role widely to the team, unfortunate as that may have been given hindsight; it responded to an employee expressing interest. In this regard the respondent's actions were passive, not active.

70. We have found that the timing of the advert aligning with the timing of the claimant's holiday was coincidence. The managers responsible for the request to advertise and authorisation of the advert (Mr Austen and Mr Rodarius respectively) did not know the dates of the claimant's holiday. The claimant has not provided any evidence as to why the managers and HR employees responsible for the approval and timing of the advert were influenced in that timeline by the claimant's holiday dates or race. We have found there is no evidence that the timing of this advert was linked to the claimant's holiday or his race. We conclude that the claimant's race was not a factor in the timing of the advert.

71. We have found that the claimant should have been aware of the advert on his return from holiday (25 April 2021). If he was not, it was because he did not read his emails. The coincidental timing of the advert meant the deadline had closed on his return. As a result, he did not apply for the job, nor did he ask he if could be considered, given the timing of the advert. As he did not apply for the job, he could not be offered the job. Race played no part in the claimant not getting the permanent role of team leader. If follows if you do not apply for a job (for whatever reason, and here we have found the reason to be a coincidence of timing), you cannot be successful in securing the job. This claim is completely misguided for this reason.

72. The claimant is, perhaps understandably, frustrated that a colleague who had joined the respondent's business more recently and who the claimant had conscientiously supported with training and knowledge was promoted, when he was not considered. This is, of course, disappointing for a long standing and committed employee. However, there is no evidence before this Tribunal that the reason for this outcome was the claimant's race. This is reflected in the claimant's own witness statement: "I do not know why they picked Jonathan over me, although I believe it was because of my race". A belief is not sufficient to establish race discrimination; there must be some factual evidence. There is none. The claimant did not secure the acting up role as he did not express an interest in it, and it was the interest expressed by a colleague which led to that colleague being asked to step up interim. The

colleague applied for the permanent role while the claimant did not, nor did he challenge the coincidental timing of the advert, authorised by people with no knowledge of his holiday dates. The claimant did not get the permanent role because he did not apply for it.

73. Therefore, we must conclude there is no evidence that race was a factor in the decisions made by the respondent to find a replacement Team Leader.

74. For these reasons, the complaint of direct race discrimination is not well-founded and is dismissed.

Employment Judge Hutchings

4 April 2024

JUDGMENT & REASONS SENT TO THE PARTIES ON
9 April 2024

FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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.

Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/