Case Number: 3200052/2023

EMPLOYMENT TRIBUNALS

Claimant: **Monique Francois**

Respondent: **Stay Safe East**

Heard at: **East London Hearing Centre**

On: **05 - 08 June 2024**

Before: **Employment Judge Housego**
Members: **Ms M Daniels**
Dr J Ukemenam

Representation

Claimant: Rhys Johns, of Counsel
Respondent: Eleanor Mayhew-Hills of Croner

JUDGMENT

1. The claim of direct race discrimination succeeds.

2. The claim of harassment as race discrimination is dismissed.

3. The claim of direct disability discrimination is dismissed.

4. The claim of harassment as disability discrimination is dismissed.

5. The Respondent is ordered to pay the Claimant the sum of £7,500 as injury to feelings.

6. The Respondent is ordered to pay to the Claimant the sum of £1,150 as interest.

7. The claim under S13 of the Employment Rights Act 1996 succeeds. The Respondent made unauthorised deductions from the wages of the Claimant and is ordered to pay to the Claimant the sum of £ £5,874.96.

8. The Respondent failed to provide the statutory statement of employment particulars required by S1 of the Employment Rights Act 1996 and is ordered to pay the Claimant two weeks' pay, £629.46.

9. The Respondent failed to provide itemised pay statements as required by S8 of the Employment Rights Act 1996.

10. The claim under the National Minimum Wage Regulations is dismissed.

11. The total amount the Tribunal orders the Respondent to pay to the Claimant is £15,154.42.

12. The Respondent's representative, Croner, is ordered to pay £3,250 to the Claimant as wasted costs.

REASONS

Basis of claim and defence

1. The Claimant describes herself as of Afro-Caribbean heritage. She has an auto-immune condition, Systemic Lupus Erythematosus commonly known as "SLE/Lupus". She has had this since long before she started work for the Respondent.

2. In July-August 2022 she was taken ill with SLE/Lupus while in the Caribbean, which persisted on her return. She was paid SSP only for an 8 week absence. She asked to see her contract of employment. She pointed out the dates were wrong and that she had three years' service and should have had full pay. The Respondent agreed and paid the difference.

3. The Claimant noted that her hours were shown as 17.5 a week and she considered that she worked 19 hours a week. She claims pay for the 1.5 hours a week for which she says she has not been paid.

4. She says that payslips were not provided as the law requires.

5. She says that the underpayment brought her pay below the National Minimum Wage level.

6. She says that the contractual documentation supplied when she started work was deficient and did not meet the minimum standards required by the Employment Rights Act 1996.

7. She claims all these things are both disability discrimination and race discrimination. In particular, she claims:

    7.1. Direct disability discrimination;
    7.2. Direct race discrimination;
    7.3. Harassment related to disability, and
    7.4. Harassment related to race.

8. The Respondent says that the sick pay was an error in recording the start date, and the difference made good promptly. Their Grounds of Resistance denied the rest of the claims, without giving any detail.

Law

9. Race and disability are characteristics protected by the Equality Act 2010[1]. The Claimant asserted that the treatment she received was direct race discrimination[2].

10. The test for a claim that the Claimant has suffered unlawful discrimination is whether or not the Tribunal is satisfied that in no sense whatsoever was there less favourable treatment (compared to someone else) which was tainted by race discrimination. It is for the Claimant to show reason why there might be discrimination, and if she does so then it is for the Respondent to show there was none. The Tribunal has applied the relevant case law[3], and has fully borne in mind, and applied, S136 of the Equality Act 2010. Discrimination may be conscious or unconscious, the latter being hard to establish and by definition unintentional. It is the result of stereotypical assumptions or prejudice.

11. The claim of harassment is brought under S26 of the Equality Act 2010. This defines harassment:

    (1) A person (A) harasses another (B) if—

    (a) A engages in unwanted conduct related to a relevant protected characteristic, and

    (b) the conduct has the purpose or effect of—

    (i) violating B's dignity, or

    (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

12. The burden of proof is different to that for direct discrimination. It is set out fully in Bakkali v. Greater Manchester Buses (South) Ltd (t/a Stage Coach Manchester) (HARASSMENT - Religion Or Belief Discrimination) [2018] UKEAT 0176_17_1005

13. The law about unlawful deduction from wages is in S13 of the Employment Rights Act 1996.

14. An employer is required by S1 of the Employment Rights Act 1996 to provide a statutory statement of principal terms and conditions of employment. The remedy for failure to do so is two weeks' pay with discretion, if the Tribunal thinks it just and equitable to do so, to award four weeks' pay[4].

15. Employers are required by S8 of the Employment Rights Act 1996 to provide itemised pay statements to workers.

[1] S11 Equality Act 2010
[2] S13 Direct discrimination: (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.
[3] The law is comprehensively set out in Royal Mail Group Ltd v Efobi [2021] UKSC 33 (23 July 2021)
[4] S38 Employment Act 2002

16. For reasons that follow the Tribunal did not consider the claim that the Claimant was paid less than the National Minimum Wage.

The hearing

17. On 09 June 2023 this hearing was listed for four days starting on 04 June 2024. That is, plainly, almost a year ago. Directions were given. These were Orders of the Tribunal, and compliance was not optional. The Claimant said at that hearing that she wished to amend her claim.

18. On 02 August 2023 the Regional Employment Judge wrote to the Claimant to point out that the longer time went on the less likely it was that leave would be given to amend, and on 30 August 2023 the Tribunal required an amendment application to be made by 22 September 2022. No such application has been made.

19. On 02 October 2023 the Regional Employment Judge required the Respondent to set out its position on disability. It has never done so. However, the Claimant has not provided her GP notes as the Order required her to do.

20. On 13 October 2023 there was a further Case Management Order. This noted that the directions given previously had not been complied with and provided a further timescale. Those were Orders. They too have not been complied with.

21. The first Case Management Orders set out a clear Lists of Issues, reproduced below.

22. Nothing of significance happened for months, other than that on 07 December 2023 the Claimant filed a second claim (due for a Case Management Hearing later this month). This has not been consolidated with this claim, as on 02 February 2024 Regional Employment Judge Burgher decided that it was to be managed separately. Accordingly, it is no reason to adjourn this hearing.

23. By 18 March 2024 the Claimant wrote to say that she had been dismissed and would be filing a third claim. She has not yet done so, and so that is no reason to adjourn this case.

24. On 10 May 2024 the Claimant pointed out that there was no document bundle.

25. Immediately before this hearing the Respondent applied for an adjournment and the Claimant did not object. There was not time for this to be considered by an Employment Judge before 04 June 2024.

26. The Claimant instructed a solicitor last week, and at the start of the hearing was represented by Counsel.

27. The Respondent has throughout been represented by Croner. Ms Mayhew-Hills was not in attendance, but fortunately the hearing was recorded as a video hearing and so she was able to join the hearing.

28. The Tribunal has great sympathy for Ms Mayhew-Hills. She was handed the file only yesterday. A Mr Hussain was handling it. Ms Mayhew-Hills does not know why he is no longer handling it. There are no witness statements and there is no document bundle. The Respondent has not given its position on disability, though ordered to do so on 02 October 2023.

29. Giving Ms Mayhew-Hills the file was a classic “hospital pass” or requiring her to “take one for the team”. Ms Mayhew-Hills was both apologetic and transparent. It is not her fault.

30. The Claimant sent in her witness statement on 24 May 2024 by post. On 04 May 2024 she had obtained an extension of time until 20 May 2024 to file it from Regional Employment Judge Burgher. She did so not long after that date.

31. The witness statement is not on the file, and Ms Mayhew-Hills does not have it either. (The Claimant had a proof of posting and a copy of the document, and the Tribunal does not doubt that she sent it.)

32. The parties should not assume that the Tribunal will vacate a four-day hearing at the last moment, particularly when the reason for asking is failure to progress the matter. Croner should know of the overriding objective and their obligations to the Tribunal and to the other side. Orders of the Tribunal are not optional. That is why they are called Orders. A four-day hearing will have a substantial cost to the taxpayer, wasted if the case is adjourned. Cases in London East are taking a very long time to be listed – well into 2025 – and if this case is adjourned another case will not have that four-day listing and be pushed even further into the future.

33. It would have been open to the Tribunal to strike out the Grounds of Resistance for failure to progress the case and for failure to comply with Tribunal Orders.

34. However, the Claimant has also been in breach of the Tribunal’s Orders. She did provide a witness statement recently, but still has not provided a Schedule of Loss. Nor did she provide her GP records as required by Case Management Orders. She said that she was to call two other witnesses but has provided no witness statements for them. Her claim under the National Minimum Wage Regulations remains only a headline. The Tribunal indicated that it was not minded to consider this claim for that reason. Counsel indicated that he understood why the Tribunal would be dismissing that claim.

35. The Claimant’s case is otherwise clear from the Particulars of Claim. She has sent a witness statement, and it is not her fault that it was not received. The Respondent is not disadvantaged by late sight of the witness statement because what her claim is about has always been clear.

36. The Tribunal decided that as the hearing was listed for four days because of the number of witnesses – Claimant plus two and three for the Respondent – and now there would be fewer it was possible to conduct the hearing in the allocated time.

37. The Tribunal required Mr Rogers to provide a Schedule of Loss, and an electronic copy of the Claimant's witness statement, to Ms Mayhew-Hills. He was ordered to do this by 09:00 on 05 June 2024.

38. The Respondent's representative Croner (Ms Mayhew-Hills will need some assistance) was ordered to prepare a document bundle and to send it to the Claimant and to the Tribunal. The Respondent was ordered to do this by 09:00 on 05 June 2024.

39. The Respondent was told that if they wished to call witnesses they must consult Counsel for the Claimant. If he agrees there was no issue. If he did not, then the Respondent would have to make an application to the Tribunal. (In the event the Respondent said that no witnesses were available and so no application was made.)

40. The Tribunal thought that it might be that the current human resources person might be helpful to everyone, as it was that person's predecessor who dealt with the sick pay issue, and there did not appear to be any allegation about the current human resources person.

41. If there are no witnesses for the Respondent then the Respondent will have to rely on cross examination of the Claimant, the documents and submissions.

42. The Tribunal ordered that the case start at noon on 05 June 2024. This gives the parties the rest of the day to prepare documents and time for preparation before the start of the hearing. The Tribunal will read all the documents on the file (claim form, response, case management orders and Claimant's witness statement) today. The document bundle will be perused by the Tribunal from 10:00 on 05 June 2024 and the parties will have some time on 05 June 2024 to conclude preparation for the hearing. Ms Mayhew-Hills will re-arrange the rest of the work she was scheduled to do this week and will attend the Tribunal for the remainder of the hearing.

43. Counsel for the Claimant agreed that this was fair.

44. The Tribunal indicated that it was for the Claimant to show why she said that anything that happened was causally linked to either disability or to her race (she describes herself as Afro-Caribbean).

45. Ms Mayhew-Hills also agreed that this was fair. The Tribunal might have struck out the Respondent's Grounds of Resistance and this was a realistic assessment.

46. The Tribunal indicated that it will not be entertaining any late application by the Claimant to amend.

47. The Tribunal pointed out that presently disability was not conceded. The Claimant had failed to provide her GP notes. Given that the Respondent's Grounds of Resistance stated that it employed almost exclusively people with disabilities and given that there was no dispute that the Claimant has the condition she says she has – the auto immune condition of Systemic Lupus Erythematosus commonly known as "SLE/Lupus" there can be little

room for doubt about this. The Tribunal indicated that unless the Respondent provides good reason otherwise it will find that the Claimant is disabled with SLE/Lupus. The Respondent has always known that the Claimant has this condition.

48. The Claimant also claims that she has Reynauld's Syndrome (a condition where the fingers go white and cold), but does not say how this affects her, and the absence causing her to claim sick pay (the basis of a race discrimination and disability discrimination claim) was not connected with that condition. In the absence of any medical or other evidence about this or the effect of it the Tribunal indicated that it will not be found to be a disability affecting the Claimant.

49. The Tribunal also required the Respondent to write to the Regional Employment Judge to explain in detail why it, a large and well-known company holding itself out as expert in the conduct of Employment Tribunal cases had come to fail to deal with this case for a period approaching a year. The Tribunal made clear that this letter was to come from a senior lawyer and manager because it was not appropriate to require Ms Mayhew-Hills to explain when she was not in a position to do so.

50. The Claimant's witness statement was re-sent by email on 04 June 2024.

51. On 05 June 2024 there was no document bundle. The parties had agreed terms of settlement during the afternoon of 04 June 2024 but on 05 June 2024 the terms of the draft COT3 revealed a miscommunication. The parties still hoped for a resolution, which would also include a second claim lodged by the Claimant, not linked to this claim, and the third claim she was about to lodge, of unfair dismissal.

52. In addition, Ms Mayhew-Hills had travelled from Northumberland to London for the hearing. In the morning of 05 June 2024hHer child had suffered what might be a serious injury at school and (entirely understandably) Ms Mayhew-Hills had returned to Northumberland. (The Tribunal had requested her attendance, not knowing of her geographic location.)

53. The Respondent having failed to provide a document bundle the Tribunal considered whether to strike out the response. It decided not to do so, as that would make the case an "appearance not entered" case with the Respondent having no case before the Tribunal, unable to cross examine the Claimant or make submissions without the leave of the Tribunal. The Tribunal would give such leave, because even without a responses the Claimant still has to prove her case, and cross examination will be necessary part of the process by which the Tribunal can deliver a fair outcome. It seemed to the Tribunal best not to strike out the Response, so that the Response is the framework against which to examine the Claimant's case.

54. However, since the Respondent is not calling any oral evidence and has provided no documents, should the Claimant prove facts from which an inference of race or disability discrimination could be drawn it will be impossible for the Respondent to rebut it.

55. In these circumstances the Tribunal decided to start the hearing at 10:00 on its 3rd day, Thursday 06 June 2024, as with the limited evidence to be heard it was still possible to conclude the hearing, if not to deliver judgment, by the end of the 4th day, Friday 07 June 2024. This would also enable Ms Mayhew-Hills time to deal with her domestic emergency or to brief a replacement.

56. Unfortunately, the parties were not able to agree, and so the Tribunal commenced the hearing at 10:00 on Thursday 06 June 2024. At 09:40 on 06 June 2024 Ms Mayhew-Hills emailed the Tribunal to set out the Respondent's position:

> "There is no completed bundle. I asked for the assistance of two colleagues to make the bundle whilst I travelled from Northumberland to London on the first day of the hearing. However, it has not been possible for them to complete it as it appears to be over 600 pages. There are no witnesses available to attend for the Respondent. I am aware that it falls to Croner for the lack of preparation, and I have passed on this message to my manager. Until I was instructed on the first day of the hearing, I was not aware that the case had been left unprepared. My manager did not realise that the case was not prepared until the day before the first day.
>
> I can only apologise to the Tribunal, the Claimant, and the Claimant's representative that this is the case."

57. The hearing started at 10:15 on 06 June 2024, with the Claimant's evidence. Given the email above, there was no other oral evidence.

58. There was no bundle of documents, as set out above. The Claimant's witness statement referred to documentary exhibits, but none were attached. Accordingly, the Tribunal made its decisions based on the pleaded cases and consideration of the Claimant's evidence, taking into account the submissions made.

59. The oral evidence of the Claimant took until 11:40, and time was given to prepare submission, Mr Johns to go first. The Tribunal enquired of Ms Mayhew-Hills as to whether this was a long enough time for her, given her particular circumstances. Ms Mayhew-Hills said that she was content with that interval.

60. Submissions concluded at 13:00 and the Tribunal retired and gave this judgment on liability at 10:00 on Friday 07 June 2024, then dealing with remedy.

Evidence

61. The Tribunal heard oral evidence from the Claimant. For the reasons set out above there was no other evidence. Counsel had no part in the preparation of the Claimant's witness statement and so asked extensive supplemental questions to enable more detail to be given. Nothing not presaged in the Particulars of Claim, or the witness statement, was asked. There was no-one from the Respondent to cross-examine the Claimant. While not entering the arena the Tribunal asked further questions to probe

the Claimant's account. The Tribunal found the Claimant a truthful witness of fact. Much of her evidence was, however, opinion, and while not doubting the sincerity of her opinions the Tribunal did not agree with those opinions concerning her claim of harassment related to a protected characteristic.

Issues

62. These were set out in the Case Management Order of 09 June 2023 as follows:

1. Disability

1.1 Did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:

1.1.1 Did she have a physical or mental impairment: SLE/Lupus?

1.1.2 Did it have a substantial adverse effect on her ability to carry out day-to-day activities?

1.1.3 If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

1.1.4 Would the impairment have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures?

1.1.5 Were the effects of the impairment long-term? The Tribunal will decide:

1.1.5.1 did they last at least 12 months, or were they likely to last at least 12 months?

1.1.5.2 if not, were they likely to recur?

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

2.1 Did the respondent do the following things:

2.1.1 Failing to pay the claimant 8 weeks sick pay and paying her statutory sick pay;

2.1.2 Failing to offer the claimant a discretionary payment.

2.2 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 she was treated worse than someone else would have been treated.

The claimant says she was treated worse than others with a different particular disability e.g. others with Autism or Multiple Sclerosis. She says that she was treated worse than: (i) Alex Irving, who has Autism and is white and (ii) Miriam Adler, who has Autism and is white.

Alternatively, she relies on a hypothetical comparator.

2.3 If so, was it because of disability?

2.4 Did the respondent's treatment amount to a detriment?

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

3.1 The claimant is Black.

3.2 Did the respondent do the following things:

3.2.1 Failing to pay the claimant 8 weeks sick pay and paying her statutory sick pay;

3.2.2 Failing to offer the claimant a discretionary payment.

3.3 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 she was treated worse than someone else would have been treated.

The claimant says she was treated worse than others with a different race. She says that she was treated worse than: (i) Alex Irving, who has Autism and is white and (ii) Miriam Adler, who has Autism and is white.

Alternatively, she relies on a hypothetical comparator.

3.4 If so, was it because of race?

3.5 Did the respondent's treatment amount to a detriment?

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

4.1 Did the respondent do the following things:

4.1.1 Send an email referring to the amount of sick leave taken;

4.1.2 Threaten to refer the claimant to occupational health for a

capability report.

4.2 If so, was that unwanted conduct?

4.3 Did it relate to disability?

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

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

5.1 Did the respondent do the following things:

5.1.1 Send an email referring to the amount of sick leave taken;

5.1.2 Threaten to refer the claimant to occupational health for a capability report.

5.2 If so, was that unwanted conduct?

5.3 Did it relate to race?

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

6. Remedy for discrimination

6.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend? *[no longer possible as the claimant is no longer an employee of the respondent.]*

6.2 What financial losses has the discrimination caused the claimant?

6.3 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

6.4 Should interest be awarded? How much?

7. Unauthorised deductions

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

7.2 The parties agree that the claimant has been paid for 17.5 hours a week, and that the issue is whether she should have been paid for 19.5 hours a week or (as the respondent says) 17.5.

8. Failure to provide a written statement - Schedule 5 Employment Act 2002 cases include cases regarding unauthorised deductions

8.1 When these proceedings were begun, was the respondent in breach of its duty to give the claimant a written statement of employment particulars or of a change to those particulars?

8.2 If the claim succeeds, are there exceptional circumstances that would make it unjust or inequitable to make the minimum award of two weeks' pay under section 38 of the Employment Act 2002? If not, the Tribunal must award two weeks' pay and may award four weeks' pay.

8.3 Would it be just and equitable to award four weeks' pay?

9. Failure to provide a written itemised pay statement

9.1 Did the respondent fail to provide a written itemised pay statement to the claimant for the months of August and September 2022?

9.2 If so, should the tribunal order the employer to pay the worker a sum not exceeding the aggregate of the unnotified deductions made (s.12(4) Employment Rights Act 1996)?

Submissions

63. The submissions can be read in my record of proceedings by a higher Court if required. Many of those of Mr Johns find their way into this judgment. Ms Mayhew-Hills's submissions were necessarily brief given that she was bereft of instruction. In essence, mistakes were made, and that was regrettable, but a mistake is not discrimination as by its very nature it is inadvertent. The existence of a discretion does not confer a right, Ms Mayhew-Hills accepting that the absence of any evidence or documentation from the Respondent limited the submission she could make in this regard.

Facts found

64. The background is set out above, and forms part of the Tribunal's findings of fact.

65. The organisation is very diverse in its makeup and has many disabled staff.

66. Ms Francois has long suffered from SLE/Lupus. She disclosed it when she applied to work for the Respondent. It is disabling. This is abundantly clear from the case papers and Ms Francois' oral evidence.

67. Ms Francois may have Reynaud's syndrome, but she has provided no evidence from which the Tribunal could find that it was or is a disability.

68. Ms Francois' witness statement refers to chemotherapy for stage 4 kidney disease, but this has not been mentioned before and is not a disability for the purposes of this claim

69. SLE Lupus is not a visible disability save when it flares up and Ms Francois then needs to use walking aids.

70. The Respondent is a charitable organisation providing services to assist

women with disabilities. Most of its employees are women and present with impairments which come within the ambit of the Equality Act 2010. It employs 18 staff.

71. The Claimant commenced her employment with the Respondent on 23 April 2019, as a trainee Independent Disability and Domestic Abuse Advocate.

72. The Respondent provided her with a letter confirming employment. The letter did not comply with S1 of the Employment Rights Act 1996 as it did not set out her place of work, holiday entitlement, sick pay arrangements, notice period, information about disciplinary and grievance procedures, or pensions[5].

73. No written contract was supplied to her. She was not alone in that regard.

74. Ms Francois started employment with the Respondent on 23rd April 2019. She worked Tuesday – Thursday from 10am – 4.30pm. This is 6.5 hours a day for 3 days which is 19.5 hours a week. She must have had a lunch break. If that was half an hour for lunch and was unpaid that accounts for the difference. The Respondent says that her role was half a full-time job, she job-sharing a role of 35 hours a week, and so the break was unpaid.

75. The Working Time Regulations give the right only to an unpaid break and so whether payment is due or not for the lunch period depends on the contract.

76. Neither party provided that document. The burden of proof is on the Claimant, but the Respondent was ordered to prepare and provide a bundle of documents which would include it. The Tribunal therefore finds against the Respondent because their failure to comply with Tribunal Orders deprived the Tribunal and the Claimant of sight of it (the Tribunal taking full account of the fact that the Claimant could have provided it.)

77. Ms Francois was clear that she worked Tuesday, Wednesday and Thursday each week, from 10:00 to 16:30 and the Tribunal so finds.

78. In the absence of any evidence that the break was unpaid, notwithstanding the fact that the Working Time Regulations do not require breaks to be paid,

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[5] (3) The statement shall contain particulars of—
(a) the names of the employer and worker,
(b) the date when the employment began, and
(c) in the case of a statement given to an employee,**]** the date on which the employee's period of continuous employment began (taking into account any employment with a previous employer which counts towards that period).
(4) The statement shall also contain particulars, as at a specified date not more than seven days before the statement (or the instalment of a statement given under section 2(4) containing them)**]** is given, of—
(a)the scale or rate of remuneration or the method of calculating remuneration,
(b)the intervals at which remuneration is paid (that is, weekly, monthly or other specified intervals),
(c)any terms and conditions relating to hours of work including any terms and conditions relating to—
(i)normal working hours,
(ii)the days of the week the worker is required to work, and
(iii)whether or not such hours or days may be variable, and if they may be how they vary or how that variation is to be determined.
(d)any terms and conditions relating to any of the following—
(i)entitlement to holidays, including public holidays, and holiday pay (the particulars given being sufficient to enable the worker's entitlement, including any entitlement to accrued holiday pay on the termination of employment, to be precisely calculated),
(ii)incapacity for work due to sickness or injury, including any provision for sick pay, ...
(iia)any other paid leave, and**]**
(iii)pensions and pension schemes…

the Tribunal finds that Ms Francois was entitled to be paid between her start and finish times.

79. The judgment of the Tribunal is therefore that the contracted hours were 19.5 weekly. The Respondent agrees that it paid the Claimant for 17.5 hours a week, and so there was a series of deductions of 2 hours every week. The hourly rate was £16.14. When Ms Francois raised this, in September 2022, her pay was increased to 19.5 hours a week. Her payslips showed an hourly rate, but she never thought to check the arithmetic and so did not notice that she was paid for 17 hours not 19.5 hours a week until she read the written contract provided for her.

80. No time point is taken about the claim under S13.

81. In her witness statement Ms Francois refers (§4) to the death of her step-father in March 2020, he being resident in a care home and an early victim of Covid-19. She complains of the treatment by her manager, Alex Irvine, at this time. This is not an issue in this case. It was not mentioned before the witness statement of 24 May 2024. It was out of time when the claim was started on 12 January 2023, and it would not be just and equitable to extend time even were an application made to amend during this hearing. The possibility of an application to amend was raised by Ms Francois earlier on, and she did not make such an application within the time specified by the Tribunal.

82. In §6 of her witness statement Ms Francois complains further about Alex Irvine, saying that he failed to put her on a training contract at the end of her probationary period, October 2019, until August 2021. This statement has the same difficulty. It is not an issue in this case, for the same reasons. Ms Francois states that another manager put her on that training course in September 2021.

83. On 19 May 2022 a maternal aunt of Ms Francois passed away. She was close to her aunt. On16 June 2022 the Claimant went to the Caribbean to the funeral. Her disability can become worse in times of stress. This occurred and she was signed off by a doctor there for four weeks, extended by another four weeks by her GP when she returned to the UK.

84. The Respondent paid her only SSP, on the basis, stated in August 2022, that she started work on 19 December 2019 and that she was only paid SSP because she had not been employed for three years (the period after which full pay was paid during sickness absence).

85. Ms Francois found this a financial strain and she had to use food banks and rely on family. There is no obligation on an employer to make discretionary payments to a sick employee who has financial difficulty. However, where an employer has a discretionary scheme the reasons for exercising, or not exercising that discretion cannot be tainted by considerations of a protected characteristic.

86. On 03 August 2022 the Respondent agreed that Ms Francois would be paid full sick pay until 01 August 2022 (after 8 weeks' full pay) when she would go to SSP. This was what she was asking for.

87. In August or September 2022 and at her request, the Respondent provided the Claimant with a precedent document which they said was the relevant contract. It was not signed by either Ms Francois or the Respondent. Others who had no written contracts were also given written contracts at the same time.

88. On 01 September 2022 the Respondent wrote in an email to Ms Francois that the issue with the sick pay was caused by Aurora Tadisco, who had incorrectly recorded Ms Francois' start date in the records. Ms Tadisco had by that time left the Respondent's employment. Ms Francois does not think this is correct, because Ms Tadisco started work for the Respondent only on 01 September 2021, long after Ms Francois started.

89. Ms Francois' new manager (who had put Ms Francois on the training course) Ioanna Hanis sent Ms Francois a new contract dated September 2022, signed by Ms Hanis. Ms Francois says that she has never had a contract signed by her previous manager Ruth Bashall from her start date on 23 April 2019.

90. The obvious answer, on the balance of probabilities, is that when Ms Francois started work the paperwork did not extend beyond the original letter, and that when Ms Tadisco started, she brought the records up to date, and made a mistake in doing so. The Tribunal so finds.

91. The contract Ms Francois had been sent by Ms Hanis specified Ms Francois' hours as 17.5 a week. Ms Francois said that she worked 19.5 hours a week. In an email of September 2022 the Respondent denied this.

92. On the evidence provided to the Tribunal, the Tribunal finds that, on the balance of probabilities, Ms Francois worked 19.5 hours a week, as she claims, and was entitled to be paid for all those hours (for reasons given above).

93. In September 2022, the Claimant requested from the Respondent her payslips for the months of July and August 2022. The Respondent did not provide the payslips at the time of request but did so in December 2022.

94. The Claimant returned to work on a phased return starting 04 October 2022. It was suggested that occupational health may be able to help. Ms Francois considers this was harassment by reason of her disability and race. The Tribunal finds otherwise. This was not the start of a capability process intended to lead to dismissal, but an attempt to help her return to work and to see what reasonable adjustments could be made.

95. There was an issue with payslips (set out in §5-8 of Ms Francois' witness statement). This caused her difficulty with her housing benefit, because she had no documents to give the local authority. This difficulty increased when she got the payslips. She had managed to resolve the housing benefit issue without the payslips, but when they came, and she supplied them to the housing authority, it became clear she had been overpaid. All this is most unfortunate, and on Ms Francois' own account was simply error. She was supplied with all payslips, but not at the time the pay was paid. That is all

that is required to succeed in a claim relating to failure to provide itemised payslips[6].

96. In her witness statement Ms Francois claims that she is subject to stereotypical tropes concerning black people and anger. This has not been raised before, lacks any form of detail and the Tribunal did not consider that part of her witness statement for those reasons.

97. Also in her witness statement Ms Francois says that her manager Alex Irving treated her less favourably over giving her training. This was in 2020, is not part of a series of events and was not raised before the witness statement. The Tribunal did not consider this allegation for those reasons.

98. Ms Francois says:

    98.1. she was not paid other than SSP until she objected and it took a long time to resolve this;

    98.2. in 2020 a white colleague, AS[7], who had neurodiverse conditions was paid full pay for a period of nine months, but she was not;

    98.3. she was never told that there was a discretion to pay full pay not SSP;

    98.4. in 2022 she received an email about the amount of sick leave she had taken, but all of it was Covid-19 related, and this was harassment;

    98.5. that Ana Hanis, on a date Ms Francois did not specify, "threatened her" with a referral to occupational health and this was harassment;

    and that this was race discrimination or disability discrimination or harassment on one or other grounds, and that a white female manager would not have been treated the way she was – SSP only after the contractual period of full pay expired and taking a long time to rectify it.

99. The Tribunal had no information before it other than Ms Francois witness statement and oral evidence about these matters. She is right about the SSP being paid not contractual pay, but the Tribunal finds, on the balance of probabilities that this was no more than an error.

100. There is nothing in the allegation that Ms Francois was "threatened" with a referral to occupational health. Occupational health usually suggests things to help and signposts the fact that a person qualifies as disabled for the purposes of the Equality Act 2010.

101. There is nothing in the email (which the Tribunal has not seen, there being no documents at all) about sickness absence. An employer ought to be engaging with an employee about sickness absence of it becomes extensive.

[6] Employment Rights Act 1996 S8(1) A worker has the right to be given by his employer, at or before the time at which any payment of wages or salary is made to him, a written itemised pay statement.

[7] Her name is not given in full as this would be a disproportionate interference with her Article 8 rights, and the initials enable the parties to know the identity of the individual.

102. This leaves Ms Francois not being told there was a discretion to pay sick pay at full pay once the contractual amount had expired. Ms Francois was belatedly paid the contractual sick pay, but then reverted to SSP.

103. The conclusions below also set out some findings of fact – to put those facts here would mean the conclusions would duplicate them.

Conclusions

104. The Respondent failed to provide a statutory statement of principal terms and conditions to Ms Francois, contrary to S1 of the Employment Rights Act 1996. A statement was later provided with which Ms Francois does not disagree (other than the number of hours a week), and so there is no need to specify what ought to have been in the S1 statement (as S12 provides), this claim being a reference under S11 of that Act.

105. The Tribunal does not consider that this is a matter where more than the two week's pay should be awarded. This was an omission, not a deliberate act. The Tribunal rejected the submission made on Ms Francois' behalf, that this should be seen in context as part of a series of events. It was a standalone error at the start of Ms Francois' employment.

106. A week's pay was £16.14 x 19.5 = £314.73 and so the award is £629.46.

107. The Respondent failed to provide itemised payslips when paying Ms Francois, as set out above. The reference to the Tribunal under S11 is this claim, and this judgment is the declaration that this occurred which is the remedy under S12 of the Employment Rights Act 1996.

108. The Respondent paid Ms Francois at 17.5 hours a week. They should have paid her for 19.5 hours a week. There was, therefore, a series of deductions from her wages, contrary to S13 of the Employment Rights Act 1996.

109. That amount is £5874.96. The Respondent does not dispute the calculation (which is of 2 hours a week at £16.14 an hour from 23 April 2019 - September 2022).

110. The Tribunal decided that there was evidence sufficient to prove primary facts from which the Tribunal could infer that either race discrimination or disability discrimination was tainting any action or inaction of the Respondent. It bore in mind that:

    110.1. The absence of the contract was an error. It just was not sent, doubtless as it was never prepared.

    110.2. The payment of SSP not full pay arose from the same error – Ms Tadisco wrongly recorded the start date, so that the payment of SSP only accorded with the records of the Respondent. They corrected it when she pointed it out.

    110.3. There is nothing to suggest that the payment of 17.5 hours not 19.5 hours is anything other than relying on a job share, and while Ms Francois was at work 19.5 hours a week, the issue of a paid or

unpaid lunchbreak means it is most unlikely to be other than a misunderstanding. As Ms Francois was working 3 days a week from 10:00 to 16:30 that is 19 ½ hours a week. She had half an hour for lunch. That is the difference between 17 hours a week and 19 ½ hours a week. The Respondent never told Ms Francois that her lunch breaks were to be unpaid. Her payslips had an hourly rate in them, but Ms Francois never thought to check the calculation.

110.4. Ms Francois named comparators: Alex Irvine and AS. There is no cogent comparison between Ms Francois and Mr Irvin for the reasons given above.

110.5. While every case is determined on its individual facts, the Respondent is an organisation most of whose staff are disabled. It is less likely that they would engage in disability discrimination when they go out of their way to support disabled people by employing them. It is a diverse workforce, and again that makes it less likely that race discrimination would occur. The Tribunal is aware that there are many different forms of race discrimination, and diversity does not preclude a specific prejudice, and took this into account also.

110.6. Referral to occupational health is an opportunity not a threat.

111. However, the Tribunal accepted that three white people, Ioanna Hanis, Ruth Bushell and Jo Reed (all of whom have differences in nationality or ethnicity but have in common the fact that they are white were the decision makers. AS is white also. For her, a white person with a neurodiverse condition, the discretion to pay full pay was exercised for some nine months. For Ms Francois, a black person with a disability evidencing itself physically discretion was not exercised, and Ms Francois was not told that there was such a discretion.

112. Ms Francois says AS is white and neurodiverse and was paid discretionary full pay for 9 months. This is the only argument put forward that could justify a finding of disability discrimination or race discrimination.

113. The Tribunal finds that it is a primary fact that leads the Tribunal to infer that this was race discrimination unless the Respondent can prove otherwise[8].

114. This is a classic case of looking after someone who is like you, but not looking after someone who is different. This certainly applies to race, which is sufficient for the claim of unlawful discrimination to succeed.

115. Because the Tribunal does not know what, if any, disabilities the people who made the decisions have it is not possible for the Tribunal to find facts which could lead to a finding of disability discrimination.

116. As Ms Francois pointed out, management knew that she was in great financial hardship, using food banks and borrowing from relatives, but they did not tell her there was a discretion to pay more than sick pay, or exercise

[8] See the section on burden of proof towards the start of this judgment.

that discretion. Plainly they knew of that discretion as it had been exercised for AS in the recent past.

117. This is unconnected with the error in paying SSP only, but the fact was that it was SSP only being paid and that should have prompted consideration of discretionary payments to Ms Francois as the Respondent knew of her financial difficulty – she told them of it.

118. The Respondent had not considered the exercise of the discretion. It had not given cogent reasons why that discretion would not have been exercised in favour of Ms Francois.

119. As these were facts from which the Tribunal could infer that there was race discrimination the burden of proof therefore passed to the Respondent. There was no evidence from the Respondent and so they could not do so. Therefore, the claims for direct race discrimination succeeds.

120. For the reasons given above the Tribunal did not find that any action of the Respondent was conduct which had the purpose or effect of violating Ms Francois' dignity, or create an intimidating, hostile, degrading, humiliating or offensive environment for her.

121. The only award possible for discrimination is injury to feelings.

122. The claim was lodged on 12 January 2023. The *Vento*[9] bands for cases lodged in that year are set out in Presidential Guidance. It is the 5th amendment which applies (the 6th had effect for cases lodged on or after 06 April 2023).

123. The guidance states:

"In respect of claims presented on or after 6 April 2022, the Vento bands shall be as follows: a **lower band of £990 to £9,000** (less serious cases); a **middle band of £9,900 to £29,600** (cases that do not merit an award in the upper band); and an **upper band of £29,600 to £49,300** (the most serious cases), with the most **exceptional cases capable of exceeding £49,300**."

124. The Tribunal has assessed the award in line with case law guidance[10].

125. The Tribunal first considered into which band this race discrimination fell. This was unconscious bias leading to a failure to consider exercising a discretion to pay more than SSP. (The error of not paying full pay was not race discrimination but simply an error.) The Tribunal considers this falls into the lower Vento band (of £990 - £9,000).

126. The Tribunal accepted Ms Francois' evidence about injury to her feelings. In particular she was emotionally devasted by her need to access the food bank as her job involved issuing food bank vouchers to service users. There was a severe effect on her mental health. The Tribunal accepted this

[9] Vento v Chief Constable of West Yorkshire Police [2002] EWCA Civ 1871
[10] HM Prison Services & Ors v Johnson [1996] UKEAT 1033_95_1902 & Ministry of Defence v Cannock & Ors [1995] 2 All ER 449

evidence although none of the exhibits to her witness statement (to which she referred in her oral evidence) were supplied to the Tribunal. This was a point made by the Tribunal at the start of her evidence on 05 June 2024.

127. Ms Francois' oral evidence is recorded in my record of proceedings and the detail is not set out here as this judgment is a public document. It was plain that even now she feels a deep sense of anger at how she was treated by the Respondent, and she found listening to the submissions difficult.

128. However, not all of it was down to race discrimination. Ms Francois was also very affected by the other matters of which she complained, but the Tribunal cannot award injury to feelings for those matters. The Tribunal has to work out a fair amount for the injury to feelings attributable to the race discrimination. This is an assessment not an arithmetic calculation.

129. Counsel for Ms Francois sought £20,000 and the middle band. Having decided that the case falls into the lower band the Tribunal then had to decide where in that band this case falls. The Tribunal's assessment of injury to feelings takes into account both the fact that it is within the lower band, and that some of Ms Francois' injury to feelings is not compensatable as it was caused by matters that were not race discrimination.

130. Ms Francois is blessed with a robust personality, as she said in her evidence, but even so there has been a great impact on her. The amount awarded for injury to feelings attributable to race discrimination is in the lower band and the Tribunal assesses the figure at £7,500.

131. The Tribunal also assessed interest on this amount[11]. Interest is discretionary. The Tribunal saw no reason not to award interest and it was not submitted that there should be no award of interest.

132. The calculation is to take the rate on judgments (8%) and apply it to the award from the start date[12]

133. The issue about not paying a discretionary payment arose in July 2022. That is 23 months. The calculation is therefore £7,500 x 8% ÷ 12 x 23 = £1,150.

134. The case has been determined in three days of the four-day listing. The first day was wasted solely because the Respondent's representative had failed to prepare for the hearing. The Claimant has therefore incurred the cost of the 4th day entirely because of the failures of the Respondent's representative.

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[11] The Industrial Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996

[12] The Industrial Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996
Calculation of interest
6.—(1) Subject to the following paragraphs of this regulation—
(a)in the case of any sum for injury to feelings, interest shall be for the period beginning on the date of the contravention or act of discrimination complained of and ending on the day of calculation;
(b)in the case of all other sums of damages or compensation (other than any sum referred to in regulation 5) and all arrears of remuneration, interest shall be for the period beginning on the mid-point date and ending on the day of calculation.

135. The Tribunal applied Rule 80:

> "When a wasted costs order may be made
>
> 80. (1) A Tribunal may make a wasted costs order against a representative in favour of any party ("the receiving party") where that party has incurred costs—
> (a) as a result of any improper, unreasonable or negligent act or omission on the part of the representative; or
> (b) which, in the light of any such act or omission occurring after they were incurred, the Tribunal considers it unreasonable to expect the receiving party to pay.
> Costs so incurred are described as "wasted costs".

136. Plainly that applies to this case, and Ms Mayhew-Hills understandably could not argue to the contrary.

137. The Tribunal therefore made an award of costs against the Respondent's representative, Croner, of the whole of that day's cost to the Claimant.

138. Ms Mayhew-Hills did not dispute the figures out forward by Mr Johns. The costs of the extra day were £3,250 (£2000 Counsel, £250 solicitor costs and £1,000 chasing documents before the start of the hearing). The Tribunal orders Croner (not the Respondent) to pay that sum to the Claimant.

Employment Judge Housego
Dated: 07 June 2024