Case No. 1403123/2022

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mrs J Percival	AND	Mr Ian Day and Mrs Joanna Day (Trading as St Omer Residential Home)

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Exeter **ON** 17 June 2024 (and in Chambers on 18 June 2024)

EMPLOYMENT JUDGE N J Roper **MEMBERS** Mrs R Barrett, Ms R Clarke

Representation
For the Claimant: In person, assisted by her husband Mr Percival
For the Respondent: Mrs I Day, Director

The Tribunal was assisted by a Tagalog Interpreter Mr G Babida.

RESERVED JUDGMENT

The unanimous judgment of the tribunal is that the claimant's claims for direct race discrimination and for accrued but unpaid holiday pay are not well-founded and they are hereby dismissed.

REASONS

1. In this case the claimant Mrs Jennifer Percival claims that she has been discriminated against because of a protected characteristic, namely her race. The claim is for direct discrimination. She also brings a monetary claim for outstanding holiday pay. The respondent denies the claims.
2. We have heard from the claimant. We have heard from Mrs Joanna Day the respondent, and we have also heard from Mrs Rachel Ansell on behalf of the respondent. We were also asked to consider statements from Ms Tracey Meloy, Ms Supaporu Williams, and Ms Rachel Botor Peck on behalf of the respondent, but we can only attach limited weight to these because they were not present to be questioned on this evidence.
3. There was a degree of conflict on the evidence. We found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and

documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

4. The Facts:
5. At all material times the respondent was a partnership of Mr Ian Day and Mrs Joanna Day together trading as St Omer Residential Home, which is situated in Torquay in Devon ("the Home"). The claimant Mrs Jennifer Percival is a Filipino national. She was employed by the respondent from 16 March 2022 until 28 June 2022 as a Night Carer, which unsurprisingly meant that she worked on the night shift.
6. The Registered Manager of the Home was Mrs Rachel Ansell, from whom we have heard. She wrote to the claimant by letter dated 9 March 2022 which was a formal offer of employment. That letter had attached to it a detailed written contract of employment. Clause 3 of that contract was headed "Probationary Period", and this provided that the first three months of employment would be a probationary period during which time performance and conduct would be monitored and appraised. It confirmed that the respondent: "… reserved the right to terminate employment before or on the expiry of the probationary period if you are found for any reason whatsoever to be incapable of carrying out or otherwise unsuitable for your job". It also provided that: "At the end of your probationary period, your employment will be reviewed within a reasonable time of this expiry and your probationary period will not be deemed to have been completed until the company has carried out its review and formally confirmed the position in writing to you."
7. These documents were all within a blue folder with which the claimant was issued. The claimant complains that another care worker, namely Tracey who is White British, only had to wait for two weeks to be offered a permanent contract. However, the claimant conceded in evidence that it was this blue folder which was given to Tracey within about two weeks. It is not the case that Tracey was told that her probationary period had been passed, and that she was upgraded to a permanent employee, within two weeks. She had the same probationary period as the claimant and all other care employees.
8. The respondent has a WhatsApp Messaging Group for all of its employees. This enables the respondent to communicate with all of them very quickly on work-related matters. The claimant denies that she was joined into this WhatsApp Group. Mrs Day's evidence was that the claimant was definitely a member of this group. Mrs Ansell's evidence was that she always joins new employees to the group and although she cannot categorically say that she did so with the claimant, she strongly suspects that she would have done, because it would have made sense to have done so, and it was her normal practice. In any event at staff meetings all members of staff discussed communications by this WhatsApp group, and at no stage did the claimant suggest that she was not part of it and that she should be allowed to join. On balance the weight of evidence is against the claimant for these reasons, and we find on the balance of probabilities that she was a member of the WhatsApp Group which included all of respondent's employees.
9. The claimant complains that she was "largely ignored" by Mrs Ansell her manager at work. Mrs Ansell explained that as Registered Manager she worked during the day, and that her hours did not overlap with the night-time hours which the claimant covered. As part of her duties Mrs Ansell would sometimes be required to arrange for emergency medicine, in which case she might have to work out of hours to deliver medicine to the Home when it was staffed by Night Carers. Her role was to deliver the medicine to the senior person on site and there is no reason therefore why she would have to interact with any of the Night Carers including the claimant. She recalled one instance only during the claimant's short period of employment when she attended at the Home and the claimant was present, and she accepts that she would have wanted to have delivered the medicine and returned home as quickly as possible, because it was not during her normal working hours. She denies that she ever ignored the claimant or was rude to her.
10. Mrs Day informed us that the claimant has made approaches to other members of the respondent's staff who are from racial minorities to support allegations that Mrs Ansell and/or the respondent generally was rude or unsupportive to non-British employees, and that they refused to do so. The statements we have seen from Ms Supaporu Williams, and Ms Rachel Botor Peck support the respondent as having been a good and helpful

employer, with specific reference to Mrs Ansell being a helpful and supportive manager. It is also the case that no stage during a short period of employment did the claimant raise any informal or formal complaint or grievance to Mrs Ansell the Registered Manager nor to Ms Meloy her Deputy.

11. The weight of evidence is also against the claimant on this point, and for these reasons we prefer the evidence of the respondent to the effect that Mrs Ansell was not rude or unsupportive of the claimant.
12. On Monday, 27 June 2022 the respondent discovered that two members of staff had tested positive for Covid-19 and were unable to work. It seems that a resident had also tested positive for Covid-19. We have seen an extract from the exchange on the WhatsApp Group in which Mrs Ansell messaged at 0819: “Urgent Request: is anyone available to help out this afternoon 14 – 20 or even 16 – 20? We have two members of staff that have tested positive for Covid and are now symptomatic this morning. Please could all staff ensure they do a LFD test prior to coming into work. All staff must wear a mask while in the home until we have received negative results.” Despite one employee then volunteering to do an extra shift, Mrs Ansell sent another message at 0855: “We are now three staff down. I will be enforcing our outbreak emergency protocol which means your rota for this week will change as per your contract in emergency situations. I will message everyone on here with an updated rota shortly.”
13. There is no record of the claimant having responded to this exchange, but she was due to work the following night, and on Tuesday, 28 June 2022 at 1638 she sent a text message to Mrs Ansell’s work phone as follows: “Hello Rachel, sorry I can’t come in tonight. I’m worried about the Covid. I have two little children, so sorry to cause you a problem.” Mrs Ansell replied: “I’m not able to cover you at such short notice Jennie. I have three staff off and no one to cover you. I will need you to come in tonight. As long as you wear your PPE, mask, gloves and apron if you come into contact with room 12 you will be protected.” The claimant claims that she was not a member of the WhatsApp group, but it is clear from her text to Mrs Ansell that she was fully aware of the Covid-19 outbreak at the Home in any event.
14. Immediately thereafter the claimant’s husband then telephoned Mrs Ansell. He questioned Mrs Ansell about Covid guidelines and PPE, and he became aggressive. He said that he would be seeking further advice and instructed Mrs Ansell not to contact his wife the claimant any further. Shortly thereafter the claimant then sent another text to Mrs Ansell as follows: “Hello Rachel, I understand my employment may be terminated but the risk of infecting my family is too great. I cannot return to work until St Omer is free of the virus. I am sorry, Jenny.”
15. Mrs Ansell then decided to terminate the claimant’s employment, on the basis that she was not available to work and had not successfully completed her probationary period. She wrote to the claimant by letter dated 5 July 2022 stating: “I will not be confirming your position as Carer at St Omer due to you not attending your allocated shifts … I must conclude from your actions that you do not wish to continue your employment at St Omer and I am therefore giving you one week’s notice of termination of your contract of employment effective from 28 June 2022.”
16. For some reason this letter took some time to reach the claimant. She sent a text to Mrs Ansell on 11 July 2022 stating: “Hello Rachel I have not heard from you, wondering if I’m still employed at St Omer, please let me know, thank you Jennie.” Mrs Ansell replied: “Hi Jennie I have been on annual leave so didn’t receive your message until today. I sent a letter to you on 5 July 2022, I’m sorry you haven’t received this yet. I will email a copy to you today.” The claimant asked for written confirmation of termination of employment which Mrs Ansell confirmed was included in the letter which had been sent as a paper copy but would also follow as an email.
17. The claimant’s final itemised pay statement was dated 25 July 2022. This recorded that the claimant was paid a final payment of 24 hours for night care, one week’s notice pay, and under the heading Night Care AL (for Annual Leave) it records 18 hours at £10.78 and a payment made in that respect of £194.04.

18. The claimant presented these proceedings on 27 September 2022. There were originally four claims: unfair dismissal; race discrimination; breach of contract in respect of notice pay; and for accrued but unpaid holiday pay. The unfair dismissal claim has already been dismissed because the claimant did not have sufficient continuity of service to bring the claim. The claim for notice pay was also dismissed on withdrawal by the claimant because this sum had already been paid. As noted below, the claimant's two remaining claims for direct race discrimination and for accrued holiday pay were then agreed and set out in a List of Issues in the Case Management Order of Employment Judge Livesey dated 19 July 2023 ("the Order").
19. Having established the above facts, we now apply the law.
20. The Law:
21. This is a claim alleging discrimination on the grounds of a protected characteristic under the provisions of the Equality Act 2010 ("the EqA"). The claimant complains that the respondent has contravened a provision of part 5 (work) of the EqA. The claimant alleges direct discrimination. The protected characteristic relied upon is race, as set out in sections 4 and 9 of the EqA.
22. As for the claim for direct discrimination, under section 13(1) of the EqA 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.
23. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. However this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.
24. The claimant also claims in respect of holiday pay for accrued but untaken holiday under the Working Time Regulations 1998 ("the Regulations"). Regulation 14 explains the entitlement to leave where a worker's employment is terminated during the course of his leave year, and as at the date of termination of employment the amount of leave which he has taken is different from the amount of leave to which he is entitled in that leave year. Where the proportion of leave taken is less than that which he is entitled, the employer is required to make a payment in lieu of leave in accordance with Regulation 14(3).
25. We have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as "s. 207A(2)") and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2009 ("the ACAS Code").
26. We have considered the cases of: Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 HL; Igen Ltd v Wong [2005] IRLR 258 CA; Madarassy v Nomura International Plc [2007] ICR 867 CA; Nagarajan v London Regional Transport [2000] 1 AC 501; Amnesty International v Ahmed UKEAT/0447/08/ZT; Ayodele v Citylink Ltd [2018] ICR 748 CA; and Field v Steve Pye & Co (KL) Ltd [2022] EAT 68.
27. The Issues to be Determined:
28. The issues to be determined in this case were set out in a List of Issues in the Case Management Order of Employment Judge Livesey dated 19 July 2023 ("the Order"). The are four claims of direct race discrimination, and one monetary claim for accrued but unpaid holiday pay. We deal with each of these in turn.
29. Direct Discrimination:
30. There are four allegations of direct race discrimination, and these allegations, and our findings, or as follows.
31. The first allegation is that the respondent "Failed to give the claimant a permanent contract". It is clear that the claimant was issued with the respondent's blue folder which included a contract of employment at the commencement of her employment, albeit it was subject to the probationary period. At this hearing the claimant confirmed that this allegation is effectively that the respondent did not confirm her successful completion of

the probationary period and confirm that she had a permanent contract, and that this was because she was a Filipino.

32. The claimant was unable to point to any direct comparator in this respect, namely someone in the same position as the claimant who is not Filipino and who did not have to wait until the expiry of the three months' probationary period before being informed of permanent employment. It was standard practice of the respondent to put all employees on a three months' probationary period. Although the claimant referred to another care worker namely Tracey, she was not treated any differently from the claimant or other care workers because she was given the same blue folder and had the same probationary period. She was not upgraded to permanent contract status before the expiry of the three months' probationary period in circumstances where the claimant was not. We cannot conclude that the claimant was treated less favourably than any actual or hypothetical White or British comparator was or would have been treated in the same circumstances. To the extent that this complaint relates to the failure to pass probation and is a complaint about dismissal, this is dealt with below.
33. The second allegation is that: "Mrs Ansell ignored her when she occasionally overlapped with the claimant". For the reasons set out above we accept the respondent's version of events, and we reject this allegation as being factually inaccurate.
34. The third allegation of direct race discrimination is that the respondent: "Failed to inform the claimant of a Covid-19 outbreak in the home on or about late June 2022. The claimant denies that she was a member of the WhatsApp group." For the reasons set out above we accept the respondent's version of events that the claimant was part of the WhatsApp group, and therefore was informed that two and then three members of staff had tested positive for Covid-19, and we also reject this allegation as being factually inaccurate.
35. The final allegation of direct race discrimination relates to the claimant's dismissal. It is clear that the claimant was dismissed. Mrs Ansell's evidence on this point is also clear, which is supported by the contemporaneous documents, namely that she decided that the claimant had not passed her probationary period, and that her employment would be terminated, because she was unwilling when instructed to complete her shifts. We accept Mrs Ansell's evidence that this was the reason for the claimant's dismissal. She was not dismissed because of her race. Similarly, the claimant has not been able to point to any comparator, that is to say an employee of a different race in the same circumstances who refused to work but was not dismissed.
36. With regard to the claim for direct discrimination, the claim will fail unless the claimant has been treated less favourably on the ground of her race than an actual or hypothetical comparator was or would have been treated in circumstances which are the same or not materially different. The claimant needs to prove some evidential basis upon which it could be said that this comparator would not have been dismissed and/or suffered the same allegedly less favourable treatment as the claimant.
37. As confirmed in Ayodele v Citylink Ltd, section 136 EqA imposes a two-stage burden of proof. Under Stage 1 the burden is on the employee to prove from all the evidence before the Tribunal facts which would, if unexplained, justify a conclusion not simply that discrimination was a possibility, but that it had in fact occurred. Under Stage 2 the burden shifts to the employer to explain subjectively why it acted as it did. The explanation need only be sufficient to satisfy the Tribunal that the reason had nothing to do with the protected characteristic.
38. For the burden of proof to shift in a direct discrimination claim, the claimant must show that he or she has been treated less favourably than a real or hypothetical comparator ("the less favourable treatment issue"). As confirmed in section 23(1) EqA there must be no material differences between the circumstances relating to the claimant and the chosen comparator. That means they are in the same position in all material respects, except that they do not hold the protected characteristic (Shamoon paragraph 110). "Material" means those characteristics the employer has taken or would take into account in deciding to treat the claimant and the comparator in a particular way (except the protected characteristic) (Shamoon paragraphs 134 to 137).

39. The bare fact of less favourable treatment than a comparator only indicates a possibility of discrimination. There must be something more for the tribunal to be able to conclude that there is a probability of discrimination such that the burden of proof shifts to the respondent (Madarassy). The focus should be on the employer's conscious or subconscious reason for treating the worker as they did (Nagarajan). Whilst the test is subjective, in cases where there is not an inherently discriminatory criterion, a "but for" test can be a useful gloss on, but not substitute for, the statutory test (Amnesty International v Ahmed). The protected characteristic needs to "significantly influence" the less favourable treatment so as to be causally relevant (Nagarajan). However, sight should not be lost of the fact that the less favourable treatment and reason why issues are intertwined and essentially two parts of a single question (Shamoon).
40. In Madarassy Mummery LJ stated: "The Court in Igen v Wong expressly rejected the argument that it was sufficient for the claimant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an act of discrimination". The decision in Igen Ltd and Ors v Wong was also approved by the Supreme Court in Hewage v Grampian Health Board. The Court of Appeal has also confirmed that Igen Ltd and Ors v Wong and Madarassy v Nomura International Plc remain binding authority in Ayodele v Citylink Ltd.
41. In this case, we find that no facts have been established upon which the tribunal could conclude (in the absence of an adequate explanation from the respondent), that an act of discrimination has occurred. In these circumstances the claimant's claim of direct discrimination fails, and it is hereby dismissed.
42. Accrued Holiday Pay:
43. It was noted in the Order that "the claimant was unclear as to the extent of any holiday pay claim and it will be set out in the Schedule of Loss filed in accordance with the Order above." There was no formal Schedule of Loss as such, but the claimant did specify that she claimed £483.84 for Holiday Pay. There was no explanation as to how this had been calculated, in the sense that the claimant has provided no information as to how many days or hours holiday had been accrued during the short period of her employment; how many days or hours holiday had actually been taken against this entitlement; and how the balance of any hours or days allegedly due is said to have been calculated.
44. On the other hand, the respondent's payroll system did make this calculation and determined that the claimant was owed 18 hours of accrued holiday pay. At her contractual rate of £10.78 per hour this is a total of £194.04 This sum was clearly paid in the claimant's final salary payment which under the heading Night Care AL (for Annual Leave) it records 18 hours at £10.78 and a payment made in that respect of £194.04
45. The burden of proof is on the claimant to establish first exactly how much accrued holiday pay is due to her, and secondly that this sum has not been paid, and in our judgment the claimant has failed to do this. Accordingly, the claimant has not made out a successful claim that she has not been paid for any accrued holiday pay due, and this claim is also dismissed.

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Employment Judge N J Roper
Dated 18 June 2024

Judgment sent to Parties on
10 July 2024 By Mr J McCormick

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