EMPLOYMENT TRIBUNALS

Claimant: Mr M Raji

Respondent: Time4U Limited

Heard at: London South (by CVP) **On:** 25, 26 and 27 June 2024

Before: Employment Judge D Wright
Tribunal Member R Effeny
Tribunal Member M Cann

Appearances
For the claimant: In person
For the respondent: Ms J Fairclough-Haynes, Consultant.

JUDGMENT

1. The claimant was automatically unfairly dismissed under section 100(1)(e) Employment Rights Act 1996.

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

3. The complaint of breach of contract in relation to notice pay is well-founded.

REMEDY

4. The respondent to pay the claimant the sum of £1,807.58 (this sum having been calculated net of tax) in respect of the unpaid notice pay.

5. The respondent to pay the claimant the sum of £16,311.64 (this sum having been calculated net of tax) in respect of loss of earnings.

6. The claimant having been employed for less than a year at the time of dismissal, the basic award is nil.

WRITTEN REASONS

7. This is a claim for direct race discrimination, breach of contract and automatic unfair dismissal brought by the claimant, who represented himself against the Respondent, represented by Miss Fairclough-Haynes. The claimant was employed by the respondent as a Support Worker, and latterly, as a Senior

Support Worker. The respondent is a company that provides supported living in a residential setting.

8. The claimant says that he commenced work on 21 September 2021 and the respondent says 25 October 2021. His employment came to an end on 31 August 2022 when he was dismissed without notice for gross misconduct. Therefore, on either start date the claimant had under a year's service.

9. The claimant says that he was unfairly dismissed notwithstanding having less than two years' service in breach of section 100(1)(e) of the Employment Rights Act 1996. The discrimination claim relates to the decision to take disciplinary action against the claimant and to dismiss him. At a preliminary hearing, the claimant sought to amend his claim to include allegations of discrimination on the basis that the respondent did not provide him with accommodation and refused to advance him salary in the sum of £6,000. These amendments were not allowed at the preliminary hearing. We did not take those allegations into account in the final hearing.

10. The claimant began early conciliation on 11 October 2022 and this ended on 7 November 2022 with the claim form being presented on 1 December 2022.

11. By way of background, on 22 August 2022 the claimant was supporting a new service user who had a history of violence. His care plan said that he needed the support of two people when in the community. This is called "two to one support". On that day, the claimant accompanied the service user on a bus on his own. He says that he had no choice but to do so, because the service user's bus pass only allowed one carer to accompany him. The claimant says that he reasonably believed that there was a risk of danger if he did not accompany the service user, noting his history of violence and his discussion about knives earlier that day.

12. On 24 August 2022 an investigation meeting was held, and the claimant was dismissed for gross misconduct on 31 August 2022. The claimant says that the other staff member on duty at the time, Sam, was not disciplined. He also says that there are other occasions where colleagues failed to follow the care plan for this particular service user, and those colleagues were not disciplined either. The claimant says that the disciplinary process and subsequent dismissal amounts to less favourable treatment because of race, specifically his Nigerian nationality.

13. The respondent agrees that the claimant was dismissed. They say that the reason for dismissal was gross misconduct, namely, that the claimant took a service user into the community by himself, even though the service user's care plan said that he needed two to one support. The respondent says that the claimant was not treated less favourably because of his race.

14. It was said in the preliminary hearing that the claimant's colleague, Sam is not an appropriate comparator, as he did not take the service user on a bus, although the respondent's case before us in the hearing was that Sam was not an appropriate comparator because they were managed or supervised by the claimant. The respondent also says that there are other employees of the respondent of other nationalities who have been dismissed for the same reason as the claimant.

15. To succeed on the automatic unfair dismissal point, the claimant needs to show that the reason, or principal reason for dismissal was that the claimant, in circumstances of danger which he reasonably believed to be serious and imminent, took or proposed to take appropriate steps to protect himself or other persons from the danger.

16. The basic facts leading to this dismissal, that the claimant took the service user on a bus on his own without another member of staff, are agreed, although there is a dispute over the level of handover given to the claimant prior to starting with the service user.

17. The respondent says that on the morning of 22 August, the management team had an online meeting to discuss this new service user. The claimant was not invited to this meeting, but he was at the same property as Sam Simmons when she dialled in, and therefore he came into part of the meeting.

18. We heard from Tracy Edgar, who said she was certain that she saw him on the call, but she couldn't confirm what part of the call he was present for and exactly what he would have heard. The claimant denies being present at this meeting and says that he was at home at this point where he received a call from Mr. Harris to attend the service user’s property.

19. We can see from the appeal notes that Miss Edgar was under the impression that Sam Simmons, the claimant’s line manager, would pass on the relevant information as she was at the same property as him. But we've also heard from the claimant that Sam Simmons told him she did not have the care plan at this point, and this was not challenged. So, in any event, whether the claimant was present at this meeting, or for part of this meeting, or not, we find that he would not have been given much information in that meeting if he were present.

20. It's then alleged by the respondent that there was a further meeting at the service user’s property where Tracy Edgar was already present, and she did a verbal handover and gave the claimant the care plan. Again, to a large extent that's accepted. The claimant accepts he had a conversation with Ms. Edgar and that he was given the care plan. However, it's also agreed that at the time the conversation was happening between the claimant and Ms. Edgar, she was

cleaning the property and putting items away from bags that had been delivered to the site already.

21. The degree of cleaning required is in dispute, but it's not in dispute that some cleaning was ongoing, and Ms. Edgar was doing multiple tasks this point. Ms. Edgar also says that she spoke to Sam, the claimant's colleague, first of all, who arrived on site first, and then to the claimant second, and it's possible that the conversations merged in her mind. But we find that the claimant was given the opportunity to read the care plan.

22. We find that there was cleaning ongoing and some maintenance taking place at this point. It's accepted that a medicine cabinet had to be installed at some point on that morning. So there would have been some distractions to the claimant whilst reading the care plan, but he did have access to it. The entire care plan was not included in the bundle, but we did have pages, 104 and 105, the relevant parts dealing with the service user's access to the community.

23. The claimant says that this is inconsistent. On page 104 there is a section which says why the person needs a support worker in this area, including what the risks were if this support was not provided. In this section the service user told Tracy Edgar, who wrote the plan, "*I access the community alone. I am safe and enjoy being out. I may not be able to know my way around a new area very well, and will require support. I like to walk when I am angry, and would normally want to do this alone, although suggesting staff come with me made me realise I would like this. I can keep myself safe when I'm the community, but not in a new location. I need clear rules and boundaries when I move and keep in contact with my staff. I know that when I move, I will have support staff with me all the time, and I am in agreement with this, as I feel it would benefit me to have someone there learning the new area*".

24. The respondent's position is that this section details what the service user would like. Further on down, on page 104 there is another section called "How to support the person in this Area", which is the respondent's assessment of what care is required. This said "*Staff to encourage me to accept support, to access the community, staff to ensure a risk assessment is completed for any vehicle used to support out in the community, staff to ensure that two to one is the only support offered to the service user to access community safely. Staff should report any incidents of police involvement or threats to members of the public to the house manager or on-call manager, if out of hours and must complete an incident report, which must be sent electronically to the house manager within 24 hours of the incident. All staff are responsible for completing incident reports and submitting those to the house manager within 24 hours of the incident*", and then moving over to page 105 "*staff should not prevent the service user from accessing the community. Staff should not neglect to provide support in this*

area, and staff should not neglect to report any concerns or incidents to the house manager".

25. The claimant says that there's a degree of inconsistency here. At one point, the care plan saying that the service user must have two to one support. At another part, it's a says that he's not to be denied access to the community, and that he is safe to go out if he's familiar with the area. It also says that on page 104 "staff to **encourage** (our emphasis) the service user to accept support to access to the community". And it also says that the service user is to be encouraged to tell staff of his whereabouts, which suggests that he's able to go out on his own.

26. It's not contested that the respondent had quite a battle with the local authority in relation to this service user to obtain funding for two to one care, and that is a key element for the respondent's position here, but we find that the care plan contains some potential inconsistencies as to the actual level of care required.

27. It was also suggested in evidence that there would be a phone on site, although the claimant says that there wasn't a business phone provided on this day, and no one else that we heard from could be sure that a phone was present. We note that the introduction of this service user as a client was a somewhat rushed affair and, on this day other things weren't quite ready. That the house was still being cleaned, medicine cabinets were still being installed and Ms. Edgar accepts that some documents that she should have brought weren't there, and she had to go back to get them.

28. We find that there was no phone on site on this day from the company. Once the service user arrived and was placed into the care, the service user wanted to go into town to buy some items for his property. The service user, along with the claimant and his colleague, walked into the town and went round the shops, but were unable to find what the service user wanted.

29. At this point, the service user said that he was going to go to B&Q to buy it. He had been told by other shops that B&Q would have it and that required the use of bus. It's not contested that the service user's bus pass only allowed one carer to travel with him, and therefore there were a number of options open to the claimant.

    29.1 He could have allowed the service user to get on the bus on his own and no one go with him.
    29.2 He could have got on the bus with the service user and sent his colleague back to the property.
    29.3 He could have gone back to the property himself and allowed his colleague to go on the bus with the service user.
    29.4 They could both have gone on the bus, one of them having to use their own money to purchase a ticket.

29.5 They could have tried to physically restrain or otherwise convince the service user not to get on the bus.

30. The service user, from the care plan, clearly gets agitated if he doesn't get his own way and if he's prevented from accessing the community, and the service plan is clear that he shouldn't be prevented from accessing the community. As such, we find that trying to encourage him not to get on the bus or trying to physically prevent him from so doing, would not be a reasonable solution.

31. The claimant felt that allowing the service user to travel on his own presented a risk. The service user had a history of violence, of getting agitated when not having his own way, and had been discussing earlier that morning his desire to get some knives, and the claimant, therefore felt there was a risk, either to the general public, the service user or to staff, if the service user returned to the property with some knives that they were unaware of.

32. Based on the circumstances before us and the evidence we heard, we find that this belief was reasonable and that the claimant satisfies the first element of the test under Section 100(1)(e).

33. We then have to look at whether the steps the claimant took were appropriate. Miss Edgar said that he should have let the service user get on the bus and then telephoned ----------to report him as a missing vulnerable person, and the police would have gone and found him.

34. Mr. Valkov, in his evidence, said that the claimant should have phoned either his manager or the on-call manager, depending on the time. But as we've already found, the claimant's manager, Sam Simmons, had said she hadn't read the care plan at this point.

35. We do have significant doubts whether the police in this situation would have treated this as an emergency and gone and instantly picked the individual up with just a concern that somebody who doesn't have any legally mandated two to one or even one to one supervision had gone off on his own.

36. We also note that the claimant, as we've already found, did not have a business phone with him on this day, and there's no evidence whether he had his personal phone with him at this moment. The alternative option put forwards by Mr. Valkov was that the claimant could have used personal money to buy the ticket and then have it reimbursed. But Sam Simmons, the claimant says, had previously told him that he shouldn't be doing that, and this evidence was not contested.

37. We were not directed in the evidence to any policy dealing with the use of personal money to travel with a service user and how that should be reimbursed,

and in the absence of any positive obligation to use your personal money for business use, we find that that's not necessarily a reasonable step for the claimant to take.

38. One key factor here is that we heard different evidence from Ms. Edgar and Mr. Valkov as to what the claimant should have done. One witness saying he should have phoned the police, the other saying he should have phoned the office or used his personal money, and that to us is a strong indicator, there is no clear policy as to what the claimant should have done in this situation.

39. Furthermore, it was suggested that the care plan told him he should have phoned the police in these situations, but that's not what the care plan says. The care plan says staff should “report any instance of police involvement”, so if the police were involved that should be reported to the management. It doesn't say that staff should report incidents to police. We've not been provided with any policy in writing as to what the claimant should do in this situation where somebody on two to one supervision puts themselves in a situation where two to one supervision is not possible, nor have we been directed or shown evidence of any training that is provided to staff on that situation.

40. We also note that the night after this incident happened, the service user went on his own to visit his mother despite the care plan being clear that he should not be allowed to go and see his mother without it being pre-arranged. On this instance, the night staff contacted the manager who authorised this visit, which suggests that you can go off the care plan when necessary.

41. We also note that the claimant was not suspended during the investigation, and no safeguarding referral was made in the circumstances. We find that the claimant reasonably believed there was a risk posed by the service user going off on his own. We find that he conducted a dynamic risk assessment and took appropriate steps to reduce that risk by ensuring that a member of staff was with him. Therefore, we find that the claimant satisfies both limbs of Section 100(1)(e) and that he was automatically unfairly dismissed.

42. We moved on then to consider the discrimination point. In the preliminary hearing, the claimant said that he compared himself to people who were not Nigerian, and we heard evidence as to the makeup of the staff at the respondent. At present there are about 450 staff, of which about 250 are on tier two sponsorship. Of those who are on a tier two sponsorship, probably about 60% come from Zimbabwe.

43. We were told by the HR manager that one of the reasons for this is that she's from Zimbabwe. She understands the education system in Zimbabwe, and therefore it makes it easier to recruit applicants from there. However, they do take staff from all over Africa, and indeed from Europe and the United Kingdom.

It is possible, albeit not directly relevant, that there may be some discrimination, direct or indirect, in the hiring process, but we do find hiring was made across the board. However, we are looking at the disciplinary process for discrimination claim.

44. The claimant said in his witness statement that there were other Nigerians dismissed around the same time, but there was limited information on this, and we can give little weight to it. We also heard from the HR manager in her witness statement, and this was not challenged, that other people were dismissed under similar circumstances as the claimant, once again limited information as to what those similar circumstances were.

45. We were told those ex-employees ranged in age from 25 to 57. There were three females and five males with ethnicities ranging from white British, Czech, Kenyan, Zimbabwean, Dutch and Cameroonian. We note that Zimbabweans were dismissed under similar circumstances, as it would appear, and they are the ones who form the bulk of the overseas workers.

46. The respondent also says that the direct comparator, Sam, the claimant's colleague on duty that day with him is not an adequate comparator because he was junior to the claimant. The claimant was a senior member of staff. He said that everyone on a tier two certificate of sponsorship was employed at the same level as he was, and that would tend to tie in with what we heard from the HR manager as to the level of pay they received and the minimum requirements for sponsorship.

47. Therefore, it's more likely than not that in terms of job title, the claimant was on the same level as Sam. However, where everyone in a setting has the same job title, this does not always mean that they are all equal. It is often possible for someone to be first amongst equals, and we find that the claimant in this situation was the first amongst equals.

48. We are supported in this by the notes of the investigation meeting at page 128 of the bundle, where the claimant accepts that he was the "senior at the site", and he holds his hand up that mistakes were made. Therefore, we find that Sam is not a direct comparator, because he went back to the property having been told to go back by the person with seniority over him.

49. Moving to consider the night staff who allowed the service user to visit his mother. We don't know exactly what their level is and relationship in terms of line management to the claimant, but we find that they did contact the on-call manager when a situation arose who then authorised the deviation from the care plan, and that puts them in a slightly different situation to the claimant who didn't make contact with anyone.

50. Therefore, whilst we do have some concerns about the fact that the claimant is the only person who had any disciplinary action taken against him, no action taken against the night staff or the on call manager, and the only action taken against Sam at most could be said to be a noted conversation, we're not satisfied that the claimant has shown sufficient evidence of discrimination to shift the burden of proof to the respondent.

51. However, even if the burden had been shifted to the respondent, we find that the principal reason the respondent dismissed the claimant was that they had had a battle with the local authority over two to one care. They wanted to protect their business, to ensure that funding streams continued and that they did not get in trouble with the local authority charging for two to one care and not providing it, and that was the principal reason for the dismissal. As set out above we don't accept that that was reasonable and we have already found that that was an unfair dismissal, but we find that that was the principal reason for the dismissal, and not because of the claimant's national origins or race.

52. Therefore, we find that the claimant was automatically unfairly dismissed, but that the respondent has not discriminated against the claimant and on grounds of race.

53. The breach of contract claim is allowed to the extent that the respondent did not pay the claimant his contractual notice pay.

WRITTEN REASONS - REMEDY

54. It is agreed that the claimant's salary at the time of his dismissal was £25,600 per year. We have found that he should have been entitled to a month's notice pay. Using the online salary calculator for that tax year his net monthly take home pay would have been £1,807.58 pence, and that's what we award for the notice pay element.

55. In terms of the loss of earnings, the claimant says it took him 10 months to obtain a new job. We've already made an award of unpaid notice pay which would cover one of those months so there's a further nine months for which the claimant seeks an award.

56. The claimant did not put in any documentary evidence before the tribunal of applications that he made for jobs, although he gave very clear evidence orally that he made a number of applications. He said that he applied within the care industry, as a labourer, as a teaching assistant, and having formally worked as a solicitor in Nigeria, he'd also applied for legal roles in the UK, but he was unable to get any work.

57. The claimant says that the main reason for this, he believes, is that he was having to declare that his previous role had terminated on the grounds of gross misconduct, and people were reluctant to employ him as a result. Eventually, he managed to speak to a care company in the same area who were aware of the respondent and who accepted that he had probably been treated unfairly in his dismissal and were prepared to give him a chance.

58. We found that the claimant gave clear and honest evidence on this point of searching for alternative jobs. We also take into account that during this period, there were some medical complications and the claimant's wife gave birth to a child. Both of these would reasonably cause disruption and make it somewhat more difficult searching for a new role, although that is only those are only minor points when it comes to weighing up our decision.

59. We heard from the respondent that they received a request for a reference in December 2022, and the reference that was given was a relatively neutral one. It had the dates of employment but didn't give a reason for the end of the employment. But we also heard from the claimant that he was having to tell people the reason for his termination in his applications.

60. Certainly within the care service industry, the tribunal notes that somebody having been dismissed for gross misconduct is going to raise warning flags for any potential employers and make it difficult for some time to find a job. The respondent suggested that because the appellant is an intelligent man he should have realised sooner that he was going to struggle in the care industry and managed to find another job elsewhere. It was put to him, that he should have tried applying for roles such as a cleaner.

61. We find that the timescales involved and the number of jobs in industries he was applying to that such a step would be unreasonable at that stage. It was submitted by the respondent that three to six months would be appropriate, which, considering we've already compensated for one of those months, would be two to five months.

62. When we weighed everything up, we found that the 10 months total that was required for claimant to find a new job was reasonable, and therefore we would award a further nine months income. That does go over two tax years where the tax bracket changed, and according to the online salary calculator, the first seven months of that award would be at £1,807.58 and the final two months would be at £1,829.29 so the total net pay that we'd be awarding for loss of earnings is £16,311.64.

63. In terms of any basic award for unfair dismissal, the claimant had been employed for less than a year at the time of the dismissal, even if we were to add on the one month notice pay to that time, he would still have been just under

a year. This means that the multiplier for any base award is nil, and we award nothing for the basic award.

64. The claimant has also asked for additional compensation for automatic unfair dismissal, which we have already covered under the loss of earnings and basic award.

65. He mentioned in submissions injury to feelings, however, that is something that is not available in an unfair dismissal claim. It is available in a discrimination claim but we have dismissed that element of the claim.

66. The claimant also sought £8,000 for breach of contract but where have found the only breach of contract relates to notice pay which we have already dealt with above.

67. Furthermore, the claimant sought aggravated damages and Acas uplifts. The respondents, it would be fair to say, did not cover themselves in glory in their initial investigation. There's no real evidence of interviews with Sam or with other people, and there's arguably some inconsistencies in the reasons given in the invite letter and the dismissal letter. However, despite not having two years' service, the claimant was given the opportunity to appeal this with an external body overseeing the appeal, and we would find that if there were any breaches of the ACAs code in the initial stages, they were remedied by the appeal process and the claim having the opportunity to raise the points at that stage. As such we don't find that there should be any award of aggravated damages or of an uplift for a failure to follow the ACAS code.

Employment Judge Wright
20 August 2024

Sent to the parties on
Date: 21 August 2024