EMPLOYMENT TRIBUNALS

Claimant: **Mr JA Vashkar**

Respondent: **(1) Voyage Care**
(2) Voyage 1 Limited

Heard at: **Leeds by CVP** **On: 23 April 2024**

Before: **Employment Judge Maidment**

Representation
Claimant: **In person**
Respondent: **Mr L Ashwood, Solicitor**

JUDGMENT having been sent to the parties on 24 April 2024 and written reasons having been requested by the claimant (who is not on the record as acting for any other individual) in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claimant complains of direct discrimination based on race. He withdrew his claim of unfair dismissal understanding that he did not have the required 2 years of continuous employment to bring a claim of ordinary unfair dismissal. There was no claim of automatic unfair dismissal.

2. In the Equality Act 2010 direct discrimination is defined in Section 13(1) which provides: "(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." In terms of a relevant comparator for the purpose of Section 13, "there must be no material difference between the circumstances relating to each case".

3. The Act deals with the burden of proof at Section 136(2) as follows:-

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

(3) But subsection (2) does not apply if A shows that A did not contravene the provisions".

4. In Igen v Wong [2005] ICR 935 guidance was given on the operation of the burden of proof provisions in the preceding discrimination legislation albeit with the caveat that this is not a substitute for the statutory language. The tribunal also takes notice of the case of Madarassy v Nomura International Plc [2007] ICR 867.

5. It is permissible for the tribunal to consider the explanations of the respondent at the stage of deciding whether a prima facie case is made out (see Laing v Manchester CC IRLR 748). Langstaff J in Birmingham CC v Millwood 2012 EqLR 910 commented that unaccepted explanations may be sufficient to cause the shifting of the burden of proof. At the second stage the employer must show on the balance of probabilities that the treatment of the claimant was in no sense whatsoever because of the protected characteristic. At this stage the tribunal is simply concerned with the reason the employer acted as it did. The burden imposed on the employer will depend on the strength of the prima facie case – see Network Rail Infrastructure Limited v Griffiths-Henry 2006 IRLR 865.

6. The tribunal refers to the case of Shamoon v The Chief Constable of the Royal Ulster Constabulary [2003] ICR 337 for guidance as to how the Tribunal should apply what is effectively a two-stage test. The Supreme Court in Hewage v Grampian Health Board [2012] UKSC 37 made clear that it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. However, they have nothing to offer where the tribunal is able to make positive findings on the evidence one way or the other.

7. A complaint of discrimination should only be struck out as having no reasonable prospect of success in the most obvious and plainest of cases, it being recognised that discrimination cases are generally fact sensitive – Anayanwu v South Bank Students' Union and South Bank University [2001] IRLR 305. Nevertheless, a tribunal is entitled to strike out the claims which are so inherently improbable that they can be regarded as "fanciful" and "baseless" – Ahir v British Airways Plc [2017] EWCA Civ 1392. In that case the Employment Judge came to a calculation that there was no reasonable prospect of the claim succeeding partly because of its inherent implausibility and partly because the claimant pointed to no material which might support his case. The Court of Appeal considered that this was a permissible basis for his conclusion. It was said that employment tribunals should not be

deterred from striking out the claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence is not being heard and explored. In Anyanwu it was recognised that the time and resources of employment tribunals ought not to be taken up having to hear evidence in cases that are bound to fail.

8. The respondent provides care and support for people with learning and physical disabilities including brain injuries and autism at specialist residential accommodation. The claimant was employed as a support worker and required to care for the "people we support".

9. In his grounds of complaint, the claimant maintains that he was shown photographs by the respondent which he had taken on a person we support's camera. At a subsequent meeting, he was told that he had taken photos which were inappropriate. In the service user's support plan it was mentioned that he liked to ask people to take photos of him. The claimant was also shown a service user,s device which it was said he had used for personal purposes. The claimant accepted that he used the device (in fact a diabetes monitoring device) to access the internet to search for some material which had being mentioned by the service user. The manager was said not to have investigated the incident properly and to have judged everything "by her racist attitude." The claimant said that he had always felt insecure working under this person's management, saying that other foreign staff had noticed that racist attitude. When he appealed against his dismissal, he was told that he had no right to lodge an appeal.

10. The respondent, in its response, states that on 8 October 2023 it became aware that a person we support had on his mobile phone photographs of himself engaging in a sexual activity. The photographs showed him having pulled his top up with his hands and, in some photographs, a silk bag down his pants. An example of one such photograph, cropped to hide the identity of the person we support, was copy and pasted into the grounds of resistance. When the claimant was spoken to, he confirmed having taken some of the photographs of the person we support, including another image pasted into the grounds of resistance. The claimant also, it was recounted, said that he had used the service user's device to look at "the cricket and the weather". He accepted that doing so was a mistake. The respondent decided to terminate the claimant's employment with immediate effect for taking the photographs and the use of the person we support's device.

11. There is no dispute that the claimant took photographs of the service user, including the one included within the grounds of resistance. There is no dispute that the claimant used the service user's device to access the internet.

12. The claimant's submission at this preliminary hearing was that the service user had a habit of asking for pictures to be taken of him. However, the support plan had not said that it would be inappropriate to comply with a

request of the service user to take pictures of him with his hands down his pants. The claimant says that he had experienced difficulties in passing his initial probation period due to not following support plans so had, once he had passed his probation, ensured that he did follow support plans. The situation he was faced with was not, however, referred to in the plan. The support plan said that the person we support rubbed himself and exposed his genitals, but he said that it ought to have been specific that, when he was doing so, photos ought not to be taken of him.

13. The claimant said that "everyone" took pictures of the service user. However, he told the tribunal that he didn't know if anyone else had taken photographs of this nature or if such conduct by any other members of staff had ever been brought to the respondent's attention. He queried whether the person we support might only have asked "foreigners" to take photos of him when he was engaged in a sexual activity. The claimant described himself as Bangladeshi in terms of ethnicity/national origin and 2 other members of staff, who were also dismissed at around the same time for similar conduct to the claimant, as Nigerian. He maintained that other nonwhite/non-British employees could give evidence that they had faced a general racist attitude from management.

14. The claimant pursues a complaint of direct race discrimination based on his colour, national origin or nationality. The only act complained of is his dismissal. Whilst strictly a submission made by another claimant, the respondent is said to prefer white British staff and to target non-white staff who are disproportionately subjected to dismissal or put in a situation where they choose to leave the respondent. No complaint of indirect discrimination has been articulated.

15. The claimant admits that he took photographs of the person we support on that individual's camera. He admits that he took photos of him simulating or actually rubbing his genitals. The person we support has severe learning disabilities (a mental age of a very young child) and the claimant was employed as a support worker for him in a care setting. The tribunal, as described, has seen an image taken by the claimant of the service user. There is no room for doubt as to the type of activity the person we support is shown engaging in. He is masturbating or simulating that act – certainly that was the obvious and reasonable assessment of the respondent.

16. The respondent says that the taking of photos of this type was inappropriate conduct and was the reason for the claimant's dismissal. The tribunal would indeed be astonished if anyone doing the same thing as the claimant would not have been dismissed. Against that background, the tribunal would, in a complaint of less favourable treatment because of race, require significant evidence before it for the claimant to be able to shift the burden of proof and for a tribunal to be in a position where it could, absent the respondent's explanation, possibly infer less favourable treatment because of race.

17. The claimant will say that there were failings in the support plan not saying expressly that photographs of the person we support engaging in this type of activity should not be taken, but no care worker should need to be told

that. It ought to have been obvious and in any event all employees had to work with the same support plan.

18. The claimant has said, as referred to, that perhaps the person we support only asked those of colour to photograph him in this activity but, if so, (and the claimant later rather retreated from this position), that is not an example of any action of the respondent.

19. He is unable to point to any white British employee who took similar pictures. He certainly does not say that the respondent was aware of any. He did not tell the respondent that this practice was more widespread.

20. Otherwise, the claimant is left only with an assertion that the respondent and the home manager in particular had a racist attitude and disproportionately dismissed non-white employees. The accusation is unspecific, but, in all the circumstances, any statistical anomaly in the number of non-white employees dismissed would be very unlikely to cause the tribunal to question why this claimant was dismissed. The claimant says that the photograph taken of the service user was not going to be published, it was taken at the service user's request on the service user's camera and without any senior member of staff having checked to see what photos were being taken on the camera. These are effectively said to have been factors pointing to the appropriateness of a sanction short of dismissal. The tribunal does not believe that the tribunal at a final hearing is at all likely to agree.

21. As referred to, there are public policy reasons why complaints of discrimination should be allowed to be heard. This is not, however, a case where many facts are in dispute. Taking the claimant's case at its highest, a claim that his dismissal was because of his race is hopeless – applying the requisite test, it has no reasonable prospect of success. Claims with no merit should not be allowed to proceed and this claim, on the arguments the claimant will seek to advance, is doomed to fail.

Employment Judge Maidment

Date 14 May 2024

REASONS SENT TO THE PARTIES ON

15 May 2024

FOR THE TRIBUNAL OFFICE

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