



EMPLOYMENT TRIBUNALS

Claimant: Mr P W Matakanure

Respondent: Pro Support Limited

Heard at: Manchester

On: 2-5 December 2019
17 January 2020
(in Chambers)

Before: Employment Judge Ainscough
Miss S Howarth
Ms E Cadbury

REPRESENTATION:

Claimant: In person

Respondent: Mr D Bunting (Counsel)

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claim for unlawful deduction from wages contrary to section 13 Employment Rights Act 1996 between 20 January 2016 and November 2017 is stayed pending the Supreme Court judgment in the case of **Royal Mencap Society v Clare Tomlinson-Blake and others [2018] EWCA Civ 1641**.
2. The claim for unlawful deduction from wages contrary to section 13 Employment Rights Act 1996 between November 2017 to 23 December 2017 is unsuccessful and is dismissed.
3. The claim for direct race discrimination contrary to section 13 of the Equality Act 2010 is unsuccessful and is dismissed.
4. The claim for harassment on the grounds of race contrary to section 26 of the Equality Act 2010 is unsuccessful and is dismissed.

5. The claim for protection from suffering detriments on the ground of making a protected disclosure contrary to section 47B of the Employment Rights Act 1996 is unsuccessful and is dismissed.
6. The claim for unfair dismissal on the ground of making a protected disclosure contrary to section 103A of the Employment Rights Act 1996 is unsuccessful and is dismissed.

REASONS

Introduction

1. The claim was brought by way of a claim form dated 7 April 2018 in which the claimant claimed he had been subject to detriments and unfairly dismissed because he had made protected disclosures; that he had been subject to race discrimination and harassment and further, he had suffered an unlawful deduction in his wages. The claimant was a Support Worker with the respondent, initially in 2014 and then from February 2016 until his termination on 23 December 2017.
2. The response form dated 1 October 2018 defended the proceedings. The respondent contends that the claimant was employed on a zero hours contract, was not entitled to the National Minimum Wage for a sleeping night, was not subject to race discrimination and further, was dismissed for gross misconduct rather than because he had made protected disclosures.
3. In the initial response the respondent denied that the claimant was an employee. However, at the outset of the hearing and in closing submissions the respondent confirmed it was no longer pursuing this point.

Issues

4. Following a preliminary hearing before Employment Judge Feeney on 15 August 2019, the following issues were identified:

Unlawful Deduction of Wages

- (1) Was the claimant contractually entitled to be paid £67.50 from 20 January 2016 to November 2017, a loss of £42.50 per sleepover?
- (2) From November 2017 until his dismissal on 23 December 2017, a loss of £4.90 per week, being paid £62.60 instead of £67.50?
- (3) The claimant's claim has not been identified as a National Minimum Wage claim. However, the basis of the claimant asserting a contractual entitlement to £67.50 is that he should have been paid the relevant National Minimum Wage per hour for each hour of his sleepover duty; therefore, if the sleepover was nine hours long in 2016 this would have been paid at £7.20 per hour and in 2017 at £7.50 per hour (for

individuals over the age of 25). Is this the correct way of calculating the claimant's sleepover rate from January 2016 and/or November 2017?

Direct discrimination because of race – section 13 Equality Act 2010

- (4) The claimant complains of the following treatment:
 - (a) That clients called him racist names;
 - (b) That the respondent failed to deal with his complaints regarding this;
 - (c) That white employees were given more hours than black employees.
- (5) Was that treatment less favourable treatment i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others (comparators) in not materially different circumstances? The claimant relies on the following comparators and/or hypothetical comparator: *to be confirmed by the claimant.*
- (6) If so, was this because of the claimant's protected characteristic of race or because of the protected characteristic more generally?

Harassment related to race – section 26 Equality Act 2010

- (7) Did the respondent engage in conduct as follows: it allowed clients to racially abuse the claimant?
- (8) If so, was that conduct unwanted?
- (9) If so, did it relate to the protected characteristic of race?
- (10) Did the conduct have the purpose or (taking into account the claimant's perception and other circumstances of the case and whether it is reasonable for the conduct to have that effect), the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
- (11) Is the harassment described by the claimant third party harassment for which the respondent is not legally liable?

Protected Disclosures

- (12) Did the claimant make one or more protected disclosures as set out below: *the claimant is to provide further particulars of which the subsections of section 43B(1) he relies on.*
- (13) The respondent defends the claim on the following basis, in particular: that the claimant was not dismissed for making protected disclosures but for making malicious unfounded allegations versus the respondent and

threatening to “take him down” and seeking to involve other members of staff in this.

- (14) What was the principal reason the claimant was dismissed, and was it that he made a protected disclosure?
- (15) Did the respondent subject the claimant to any detriments as set out below? Included within this issue are the questions of what happened as a matter of fact and whether what happened was a detriment to the claimant as a matter of law.
- (16) If so, was this done on the ground that he had made one or more protected disclosures?

Disclosures

- (17) The alleged disclosures the claimant relies on are:
 - (a) Complaining on numerous occasions including on 29 April that the respondent was paying too low a sleepover rate;
 - (b) Making an allegation that a client had been sexually overt towards him;
 - (c) Making an allegation that three clients had made racist remarks to him;
 - (d) Advising the respondent that he had been threatened with a knife;
 - (e) Complaint to the respondent that the unpaid hours’ lunch was impossible to take and therefore the respondent had made an unlawful deduction from the claimant's salary.

Public Interest

- (18) The claimant states in respect of all these matters that it is in the public interest that care facilities are run in an ethical manner and that care workers are protected from sexist and racist abuse.

Detriments

- (19) The alleged detriments the claimant relies on are as follows:
 - (a) Failing to protect the claimant from being called racist names by clients;
 - (b) Reducing the claimant's hours after he complained on 19 October 2016.

5. Following a preliminary hearing on 15 October 2019 Employment Judge Ross clarified the above issues as follows:

- (1) For the purposes of the claimant's race discrimination claim, he relies on a hypothetical comparator.
- (2) For the purposes of section 43B Employment Rights Act 1996 in relation to his protected interest disclosure claims and his disclosures of information, the claimant relies on a breach of a legal obligation in relation to disclosures 1-5. He relies on a breach of health and safety for disclosure 5, and he relies on a criminal act that has been or is likely to have been committed for disclosures 2, 3 and 4.

6. In addition, the claimant confirmed that the detriments for making a protected disclosure were those as identified by Employment Judge Feeney and also that his allegation of race discrimination was similarly as described by Employment Judge Feeney in her Case Management Order.

Evidence

7. The parties agreed a joint bundle of written evidence running to 404 pages.

8. The claimant gave evidence and called John Abuga, a fellow support worker, as a witness. The respondent called five witnesses: Terence Edward, the Chief Executive of the respondent and the claimant's line manager; Sam Brown, a fellow support worker; Mark Simms, a fellow support worker; Hector Lawrence, a fellow support worker and Eze Uduma a fellow support worker.

9. At the outset of the hearing, it was agreed that the claimant's claim for unlawful deduction from wages, insofar as it related to a claim for non payment of a National Minimum Wage between 20 January 2016 and November 2017, would be stayed pending the outcome of the appeal in **Royal Mencap Society v Clare Tomlinson-Blake and others [2018] EWCA Civ 1641** ("the Mencap litigation") which is due to be heard by the Supreme Court in February 2020.

10. It was, however, agreed that the second part of the claimant's unlawful deduction from wages claim in regard to the loss of £4.90 per week from November 2017 until his dismissal on 23 December 2017 was capable of being determined by the Tribunal prior to the conclusion of the litigation.

Relevant Legal Principles

Unlawful Deduction from Wages

11. The unlawful deduction from wages claim was brought under Part II of the Employment Rights Act 1996. Section 13 confers the right not to suffer unauthorised deductions unless:

“(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker’s contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.”

12. A relevant provision in the worker's contract is defined by section 13(2) as:
- “(a) one or more written contractual terms of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or**
- (b) in one or more terms of the contract, (whether express or implied and, if express, whether oral or in writing the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.”**
13. A deduction is defined by section 13(3) as follows:
- “(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.”**
14. However, section 13(4) clarifies that there will not be a deduction following an error in computation:
- “(4) Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.”**
15. Section 27 defines wages which includes:
- “any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise.”**
16. In **Morgan v West Glamorgan County Council 1995 IRLR 68, EAT**, the Employment Appeals Tribunal determined that a deliberate, but erroneous deduction, was still a deduction for the purposes of section 13. It was only those ignorant or inadvertent deductions which would not fall within the scope of section 13.

Discrimination

17. Discrimination against an employee is prohibited by section 39(2) Equality Act 2010:
- “An employer (A) must not discriminate against an employee of A's (B) –**
- (a) as to B's terms of employment;**
 - (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;**
 - (c) by dismissing B;**
 - (d) by subjecting B to any other detriment.”**
18. Harassment during employment is prohibited by section 40(1)(a).
19. The protected characteristic of race is defined by section 9(1) as including colour, nationality or ethnic origins.

Direct Discrimination

20. The definition of direct discrimination appears in section 13 and so far as material reads as follows:

“(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”.

21. The concept of treating someone “less favourably” inherently requires some form of comparison, and section 23(1) provides that:

“On a comparison of cases for the purposes of section 13 ... there must be no material differences between the circumstances relating to each case”.

22. It is well established that where the treatment of which the claimant complains is not overtly because of race, the key question is the “reason why” the decision or action of the respondent was taken. This involves consideration of the mental processes of the individual responsible: see the decision of the Employment Appeal Tribunal in **Amnesty International v Ahmed [2009] IRLR 884** at paragraphs 31-37 and the authorities there discussed.

Harassment

23. The definition of harassment appears in section 26 which so far as material reads as follows:

“(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...

(4) In deciding whether conduct has the effect referred to sub-section (1)(b), each of the following must be taken into account -

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are ...race”.

Burden of Proof

24. The burden of proof provision appears in section 136 and provides as follows:

- “(2) 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.
- (3) But sub-section (2) does not apply if A shows that A did not contravene the provision”.

25. In **Hewage v Grampian Health Board [2012] ICR 1054** the Supreme Court approved guidance given by the Court of Appeal in **Igen Limited v Wong [2005] ICR 931**, as refined in **Madarassy v Nomura International PLC [2007] ICR 867** where Mummery LJ held that “could conclude”, in the context of the burden of proof provisions, meant that a reasonable Tribunal could properly conclude from all the evidence before it, including the evidence adduced by the complainant in support of the allegations, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment.

26. Importantly, at paragraph 56, Mummery LJ held that the bare facts of a difference in status and a difference in treatment are not without more sufficient to amount to a prima facie case of unlawful discrimination. Further, unfair or unreasonable treatment by an employer does not of itself establish discriminatory treatment: **Zafar v Glasgow City Council [1998] IRLR 36**. It cannot be inferred from the fact that one employee has been treated unreasonably that an employee of a different race would have been treated reasonably. However, whether the burden of proof has shifted is in general terms to be assessed once all the evidence from both parties has been considered and evaluated. In some cases, however, the Tribunal may be able to make a positive finding about the reason why a particular action is taken which enables the Tribunal to dispense with formally considering the two stages.

Time Limits

27. Finally, the time limit for Equality Act claims appears in section 123 as follows:

- “(1) Proceedings on a complaint within section 120 may not be brought after the end of –
- (a) the period of three months starting with the date of the act to which the complaint relates, or
- (b) such other period as the Employment Tribunal thinks just and equitable ...
- (2) ...
- (3) For the purposes of this section –
- (a) conduct extending over a period is to be treated as done at the end of the period;
- (b) failure to do something is to be treated as occurring when the person in question decided on it”.

Protected Disclosures

28. A protected disclosure is governed by Part IVA of the Employment Rights Act 1996 (“the Act”) of which the relevant sections are as follows:-

“s43A: in this Act a “protected disclosure” means a qualifying disclosure (as defined by Section 43B which is made by a worker in accordance with any of Sections 43C to 43H.

s43B(1): in this Part a “qualifying disclosure” means any disclosure of information which, in the reasonable belief of the worker making the disclosure is made in the public interest and tends to show one or more of the following:

- (a) that a criminal offence has been committed, is being committed or is likely to be committed,
- (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject...
- (c) ...
- (d) that the health or safety of any individual has been, is being or is likely to be endangered...”

29. The Employment Appeal Tribunal (“EAT”) (HHJ Eady QC) summarised the case law on section 43B(1) as follows in **Parsons v Airplus International Ltd UKEAT/0111/17**, a decision of 13 October 2017:

“23. As to whether or not a disclosure is a protected disclosure, the following points can be made:

- 23.1. This is a matter to be determined objectively; see paragraph 80, Beatt v Croydon Health Services NHS Trust [2017] IRLR 748 CA.
- 23.2. More than one communication might need to be considered together to answer the question whether a protected disclosure has been made; Norbrook Laboratories (GB) Ltd v Shaw [2014] ICR 540 EAT.
- 23.3. The disclosure has to be of information, not simply the making of an accusation or statement of opinion; Cavendish Munro Professional Risks Management Ltd v Geduld [2010] IRLR 38 EAT. That said, an accusation or statement of opinion may include or be made alongside a disclosure of information: the answer will be fact sensitive but the question for the ET is clear: has there been a disclosure of information?; Kilraine v London Borough of Wandsworth [2016] IRLR 422 EAT.”

30. The decision of the EAT in **Kilraine** was subsequently upheld by the Court of Appeal at **[2018] EWCA Civ 1436**. The concept of “information” used in section 43B(1) is capable of covering statements which might also be characterised as allegations.

31. The worker need only have a reasonable belief that the information tends to show the matter required by Section 43B(1) and that the disclosure is made in the public interest. A subjective belief may be objectively reasonable even if it is wrong, or formed for the wrong reasons. In **Chesterton Global Ltd and anor v Nurmohamed [2017] IRLR 837** the Court of Appeal approved a suggestion from

counsel as to the factors normally relevant to the question of whether there was a reasonable belief that the disclosure was made in the public interest.

32. In **Chesterton** Underhill LJ addressed the question of the motivation for the disclosure in paragraph 30, saying that:

“... while the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it: otherwise, as pointed out at paragraph 17 above, the new ss.49(6A) and 103(6A) would have no role. I am inclined to think that the belief does not in fact have to form any part of the worker's motivation - the phrase 'in the belief' is not the same as 'motivated by the belief'; but it is hard to see that the point will arise in practice, since where a worker believes that a disclosure is in the public interest it would be odd if that did not form at least some part of their motivation in making it.”

33. Sections 43C – 43G address the identity of the person to whom the disclosure was made. Section 43C provides that a disclosure will qualify if it is made to an employer. There was no suggestion in this case that the claimant made any alleged disclosures to anybody other than his employer.

Detriment in Employment

34. If a protected disclosure has been made the right not to be subjected to a detriment appears in Section 47B(1) which reads as follows:

“A worker has the right not to be subjected to any detriment by any act or any deliberate failure to act by his employer done on the ground that the worker has made a protected disclosure.”

35. The question of what will amount to a detriment was considered in the discrimination context by the House of Lords in **Shamoon v The Royal Ulster Constabulary [2003] ICR 337**: the test is whether a reasonable employee would or might take the view that he had been disadvantaged in circumstances in which he had to work. An unjustified sense of grievance cannot amount to a detriment.

36. The right to go to a Tribunal appears in Section 48 and is subject to Section 48(2), which says this:

“On such a complaint it is for the employer to show the ground on which any act or deliberate failure to act was done”.

37. In **International Petroleum Ltd and ors v Osipov and ors UKEAT/0058/17/DA** the EAT (Simler P) summarised the causation test as follows:

“...I agree that the proper approach to inference drawing and the burden of proof in a s.47B ERA 1996 case can be summarised as follows:

- (a) The burden of proof lies on a claimant to show that a ground or reason (that is more than trivial) for detrimental treatment to which he or she is subjected is a protected disclosure he or she made.
- (b) By virtue of s.48(2) ERA 1996, the employer (or other respondent) must be prepared to show why the detrimental treatment was done. If they do not do so

inferences may be drawn against them: see London Borough of Harrow v. Knight [[2003] IRLR 140] at paragraph 20.

- (c) However, as with inferences drawn in any discrimination case, inferences drawn by tribunals in protected disclosure cases must be justified by the facts as found.”

38. The case came before the Court of Appeal in October 2018 (**Timis and Sage v Osipov and Protect** [2018] EWCA Civ 2321). The main point in the appeal was that of vicarious liability, and the approach of the EAT to causation was not disturbed.

Unfair Dismissal

39. Section 103A of the Act deals with protected disclosures and reads as follows:-

“an employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure”.

40. In **Abernethy v Mott, Hay and Anderson** [1974] ICR 323, Cairns LJ said, at p. 330 B-C:

"A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."

41. In **Beatt** the Court of Appeal described the reason for dismissal as

“the factor or factors operating on the mind of the decision-maker which cause them to take the decision – or, as it is sometimes put, what 'motivates' them to do so...”

42. In **Royal Mail Ltd v Jhuti** [2018] ICR 982 the Court of Appeal considered situations where others are said to have influenced the decision maker. Only the mental processes of the decision-maker are relevant under section 103A (paragraphs 57 and 58), even where that person has been manipulated by a line manager of the claimant due to a protected disclosure (paragraph 61). Where the person motivated by protected disclosures undertakes the investigation (such as a disciplinary investigation) which causes the decision-maker to dismiss, that investigator’s mental processes may be part of the “reason” for dismissal (paragraph 62). The Court left open whether that would be the position where the manipulator was not an investigator but the person at the head of the organisation (paragraph 63)

43. In a case within section 103A the Tribunal has jurisdiction over the claim even though the employee has not been employed continuously for two years: section 108(3). However, in such cases it is for the claimant to establish that the Tribunal has jurisdiction, so the claimant bears the burden of showing that the sole or principal reason for dismissal was the protected disclosure: **Jackson v ICS Group Ltd** UKEAT/499/97.

Applications and Preliminary Issues

44. At the outset of the hearing the claimant was assisted by an interpreter who spoke Shona. The interpreter who assisted the claimant on the first day was in fact a replacement interpreter as the original interpreter was unable to attend on the first day of the final hearing. On the second day of the final hearing the original interpreter attended and assisted the claimant. At the end of the second day of the hearing the claimant indicated that he no longer required the assistance of an interpreter and the interpreter did not attend on the final day of the final hearing.

45. During the course of the hearing the claimant sought to amend his claim for race discrimination. In the list of issues the claim for race discrimination identified white co-workers as the correct comparators. The claimant sought to amend his claim to co-workers of Jamaican origin as the correct comparators. The claimant submitted that this had always been his complaint.

46. The respondent objected to this amendment on the basis that it was an attempt by the claimant to amend the claim half way through the final hearing. The respondent submitted that the identification of comparators of Jamaican origin had not been pleaded in the ET1 nor dealt with in the claimant's witness evidence. The respondent also submitted that the claimant did not correct the list of issues and even confirmed that he was relying on a hypothetical comparator at a second preliminary hearing.

47. The Tribunal considered both parties submissions. The amendment application amounted to a substantial amendment and therefore the principles as set out in the case of **Selkent Bus Co Ltd v Moore 1996** applied. The claimant had attended two case management preliminary hearings at which both presiding Judges sought to clarify his race discrimination claim. Employment Judge Feeney listed the comparators as white comparators and during the second preliminary hearing, the only clarification given by the claimant to Employment Judge Ross was that he intended to rely upon a hypothetical comparator.

48. Neither before the start of the final hearing, nor during the final hearing did the claimant give evidence about a comparator of Jamaican origin. It was only prior to cross examination of the respondent's witnesses that the claimant sought to amend his claim.

49. The respondent had not prepared a response to deal with such an amendment and applying the balance of hardship test, the claimant's application was refused on the basis that the respondent would face much greater prejudice in trying to respond to such an amended claim than the claimant would in not being able to amend his claim in this way. The claimant had pleaded and clarified his claim on two separate occasions and it was this claim on which the Tribunal had to determine.

50. Prior to the start of the cross examination of the respondent's witnesses, the claimant applied, under rule 43 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 to exclude the respondent's witnesses from the hearing room until it was their turn to give evidence. The claimant submitted that there was evidence of collusion amongst the respondent's witnesses as to whether the claimant was in attendance at an unauthorised staff meeting. The claimant believed that each witness would only give truthful evidence if they were excluded

from the room before they gave evidence and did not benefit from hearing the other respondent's witnesses evidence.

51. The respondent submitted that there had been no collusion and each witness had signed a statement of truth and would take the necessary oath. In addition, the respondent submitted that the only witness who would give evidence about the unauthorised meeting was in fact not in attendance until the following day.

52. The Tribunal considered whether it would be in the interests of justice to exclude the respondent witnesses until they gave evidence and concluded in accordance with the overriding objective that it was unnecessary as the only witness that dealt with the meeting was in fact not in attendance until the next day and would not benefit from hearing the evidence of the other respondent witnesses.

Relevant Findings of Fact

53. The claimant was a support worker for the respondent helping to care for adults in the community with mental health problems. The care can include 24 hour home care support which requires a support worker to stay overnight at the service user's home.

54. Up until November 2017 those support workers who stayed overnight at a service user's home, but did so whilst asleep (known as a sleeping night), received a flat rate payment of £25.

55. The respondent employed approximately 22 employees over six locations in Manchester and Rochdale.

56. Having previously worked for the respondent in 2014 during which time he was guaranteed 28 hours per week, the claimant returned to work for the respondent in February 2016 and was placed on a zero hours contract on 27 June 2016.

57. The respondent accepts that the claimant is an employee for the purposes of this claim and therefore the Tribunal has treated the claimant as an employee when making these findings.

58. On 29 June 2016 the claimant reported to the respondent that a service user had made threats to kill staff.

59. In 2016 the respondent was in discussions with the Local Authority and other service providers in regard to the Mencap litigation. In 2016 an Employment Tribunal had determined that the national minimum wage should be paid for a sleeping night shift. However, Mencap had appealed the finding and the appeal was listed for hearing at the Employment Appeals Tribunal in April 2017.

60. The Local Authority advised the respondent and other service providers that due to lack of funding, it would not pay the equivalent to the National Minimum Wage to those service providers to remunerate those employees who worked a sleeping night until the outcome of the Mencap litigation was known. The respondent

followed the lead of the Local Authority. As a result, the claimant and his colleagues remained in receipt of a £25 flat rate for a sleeping night.

61. On 9 October 2016 the claimant and Terence Edwards had a one-to-one in which it was noted that work was fine and everything was settled.

62. On 30 October 2016 the respondent asked the claimant to give two service users warning letters in regard to unacceptable behaviour which included consuming drugs and alcohol at the house.

63. On 9 November 2016 the respondent and the claimant had a 1:1 which included a discussion about the sleeping night rate. The respondent confirmed to the claimant that it was not yet mandatory to pay the National Minimum Wage and the respondent would wait for the outcome of the Mencap litigation.

64. During the same meeting the claimant asked to work only weekend hours, on a Friday, Saturday and Sunday, due to his study commitments during the normal working week. The claimant worked for another employer on a Thursday.

65. On 31 January 2017 at a 1:1 meeting, the claimant asked the respondent not to send him to the Entwistle house because he didn't like the smell of the dog that lived with a service user. The claimant also complained he had been taken off the rota because Laila Shah had a personal issue with him.

66. The respondent informed the claimant that staff were expected to work at all sites. The claimant was also told that he had been taken off the shift when Laila had received a text from the claimant asking not to work that particular shift. The claimant was informed by the respondent that shifts were allocated in accordance with service needs.

67. On 19 May 2017 the claimant complained that he had been underpaid by 27.5 hours. The claimant was told at the hearing that this claim was not contained within the ET1. This claim is out of time and is not an issue the Employment Tribunal will determine.

68. On 15 June 2017 the claimant complained of a disturbed night and sought payment for a waking night as opposed to a sleeping night. The claimant also asked for a 1:1 meeting with Terence Edwards. The respondent responded and agreed to arrange the 1:1.

69. In or around the same time, Hector Lawrence and the claimant had a meeting with other support workers at the Gorton House. During that meeting, Hector Lawrence was nominated as the representative to speak on behalf of the support workers in the sleeping night rate discussions with the respondent.

70. On 8 August 2017, Terence Edwards and Hector Lawrence had a supervision meeting. At this meeting Hector Lawrence asked for an update about the backdated payment of the sleeping night rate. Terence Edwards informed Hector Lawrence that he had not received any update about the Mencap litigation and would make enquiries.

71. On 12 September 2017 Terence Edwards instructed Richard Banks to write to the commissioner to seek an increase in funding so that there could be an increase in the sleeping night rate paid to support workers.

72. On 19 September 2017 the claimant reported the theft of his phone and tablet by a service user, to the respondent.

73. In November 2017 Eze Uduma held a meeting with other support workers at the Gorton House to discuss the sleeping night rate issue. The claimant was not at this meeting but he phoned Eze Uduma after the meeting to discuss what had been said.

74. On 1 November 2017 the respondent began consultation with support workers about moving from a zero hours contract to a guaranteed hours contract.

75. On 3 November 2017 the respondent announced a pay review which would take effect from 27 November 2017. Those on a zero hours contract were to receive a rate of £67.50 for a sleeping night and £7.50 per hour. It was also announced that from 1st January 2018, those working more than 7 hours would be required to take an unpaid rest break.

76. At this time the claimant sent emails to the respondent about the backdated payment of the sleeping night rate.

77. On 19 November 2017 the claimant sent an audio recording via WhatsApp to Terence Edwards to report an incident of one service user racially abusing another service user. Terence Edwards received the message but did not open it.

78. On 23 November 2017 the respondent announced at a team meeting that the result of the consultation process would be announced in the New Year.

79. On 18 December 2017 Terence Edwards and Sam Brown had a supervision meeting at which Sam Brown complained that the claimant was complaining to other support workers about the sleeping night rate and the issue of deduction of an hour for a rest break.

80. On 20 December 2017 Laila Shah phoned Terence Edwards and told him that the claimant was telling other support workers that he would bring the company down. Terence Edwards was told that a group of staff had met at a home to discuss the sleeping night rate and backdating of this payment.

81. Laila Shah subsequently provided a statement confirming what she had told Terence Edwards and also that Eze Uduma had told her about the staff meeting.

82. In December 2017 Sam Brown also provided a statement about the complaints he had made about the claimant at his supervisory meeting.

83. On 22 December 2017 Terence Edwards sent an email to support workers stating that he would deduct one hour's pay to cover the rest breaks each support

worker was required to take if they worked for more than seven hours. It was also confirmed that a shortfall in the payment of hourly rates would be rectified.

84. The claimant responded asking for cover from another member of staff in order to take a break and reminded Terence Edwards that the “sleep-in issues discussed last year” remained unresolved.

85. At 18:02 on the same day the claimant sent a WhatsApp message which said:

“Hi Guys. Do you know that the company is supposed to backdate sleep ins payment from October 2014 and it is your that may buy Christmas presents for ur family. I advice you all to join unison worker union company and you will be given advices, your rights as a support worker. We are supposed to be backdated lots of money and the company is sitting on it. The issue of ducting 1 hour break as lonely worker is unfair practice and the company is making mockery on the staffs. We need to talk to Terence and his managers about these things. Happy Christmas and happy New year to all.”

86. At 18:04 Terence Edwards read the WhatsApp message. At 18:48 the respondent sent the claimant a dismissal email.

87. At 18:52 Terence Edwards responded to the claimant's WhatsApp message to the rest of the group, disputing what the claimant had said and removed the claimant from the WhatsApp group.

88. On 5 January 2018 the claimant was paid a £60 flat rate for each sleeping night he had completed during that pay period.

89. On 26 January 2018 the claimant sought his P60 and letter confirming dismissal.

Respondent's submissions

90. The respondent submits that the claimant was subject to a lawful deduction between November 2017 and 23 December 2017 because the respondent was entitled to deduct a one hour rest break. The respondent maintains the claimant could have left the premises during this break.

91. The respondent contends it is not liable for service users calling the claimant racist names. It is also the respondent's case that any failure by the respondent deal with such complaints must be on the grounds of race, not simply a failure to deal. In any event, the respondent says the claimant has failed to prove he made any complaints and therefore there was nothing with which the respondent could deal. The respondent also submits that the claimant has not proven he received fewer hours than his white colleagues and the respondent believes, in light of the amendment application, that this part of the claim is no longer pursued.

92. The respondent also contends it is not liable for any third party harassment as a result of the repeal of section 40(2) and (4) of the Equality Act 2010. Similarly, if the harassment claim includes a failure to deal with any complaints of racist name

calling, the respondent contends that any such failure must amount to harassment within the meaning of the Equality Act 2010. The respondent submits that the claimant did not make any complaints about this issue.

93. The respondent contends that the conversation on 9 November 2016 is the only possible disclosure of information by the claimant to the respondent. The respondent denies that the claimant made any disclosures about sexually overt behaviour, racist name calling or threats to kill by service users. The respondent also does not accept that the complaint about unpaid rest breaks was information conveyed to the respondent. The respondent submits that the claimant did not have a reasonable belief that any disclosures were in the public interest, if they were made, they were made in the claimant's own interests. The respondent is of the view that there is therefore no need for the Tribunal to deal with the issue of causation.

94. If the Tribunal does deal with causation, the respondent submits that the claimant has not proven he suffered either detriment. The respondent submits that the claimant made no complaints of racist name calling and did not suffer a reduction in hours that wasn't of his own making. The respondent believes the claimant has not proven the reason or principal reason for his dismissal was protected disclosures. It is the respondent's case that the cause of the claimant's dismissal was the claimant's campaign to bring the respondent company down.

Claimant's submissions

95. The claimant submits that all the evidence he had about complaints of racist name calling were on his phone and tablet that were stolen in September 2017. In addition the claimant submits that there will be evidence of emails he sent to Terence Edwards on the respondent's computer system that have not been disclosed in these proceedings.

96. The claimant contends that he was in constant discussions with the respondent about the sleeping night payment. The claimant also contends he made a call to Terence Edwards that he had been subject to sexually over behaviour from a service user. The claimant says there is evidence on the respondent's computer system that complained about being threatened with a knife. It is the claimant's case that all disclosures were in the public interest because the company had problems and he made complaints so that managers would be aware of the difficulties he and his colleagues faced.

97. The claimant submits that he was subject to the alleged detriments because of his disclosures, but a lot of the evidence is on the respondent's computer system. The claimant admits he is open and honest and will not hide feelings and the WhatsApp message was a result of him "boiling up" as nobody was on his side and nobody was listening.

Discussion and Conclusions

Unlawful Deduction from Wages – section 13 Employment Rights Act 1996

98. The respondent advised the claimant that from 27 November 2017 the rate for a sleeping night would be £67.50. In fact, the claimant received £60 per sleeping night from 27 November 2017 until the termination of his employment on 23 December 2017. The payment was made to the claimant on 5 January 2018.

99. This amounted to five sleeping nights and therefore the claimant was underpaid by £37.50. The respondent contends this was in fact the deduction of a one hour rest break on each occasion. However, that policy was not due for implementation until 1 January 2018. On 22 December 2017 Terence Edwards acknowledged that there had been an error in the hourly rate which would be rectified by the next pay date. The claimant's pay was not subsequently rectified.

100. The Tribunal cannot determine that the same amounts to an unlawful deduction in order to remedy the claimant's position. Regulation 13(4) of the Employment Rights Act 1996 determines that where a deduction is attributable to an error by the employer affecting the computation of the gross amount of wages properly payable, this will not be treated as a deduction for the purposes of an unlawful deduction claim. In the case of **Morgan** the EAT confirmed that inadvertent deductions would not fall within the scope of section 13.

101. For this reason, the claim for unlawful deduction from wages for the period of 22 November 2017 to 23 December 2017 fails.

Direct Race Discrimination – section 13 Equality Act 2010

102. The claimant was unable to give evidence that he was:

- (a) Called racist names by service users;
- (b) That the respondent failed to deal with his complaints regarding this;
- (c) That white employees were given more hours than black employees.

103. The claimant sent a WhatsApp message to Terence Edwards on 19 November 2017 containing a recording of a service user racially abusing another service user. However, the Tribunal has not seen or heard evidence from the claimant that he made a complaint that he had been called racist names by service users. The Tribunal understands that the claimant's phone and tablet were stolen. It is the claimant's case that both devices contained such evidence.

104. The claimant was able to provide evidence that he made a complaint that service users had threatened to kill staff, and the respondent had warned service users about the use of drugs and alcohol in the house.

105. In the absence of any such evidence, the Tribunal finds that the claimant did not raise complaints that he was called racist names and therefore the respondent did not have an opportunity to deal with any such complaints.

106. The claimant did not provide any evidence to the Tribunal that white employees were given more hours than black employees. The claimant did seek to amend this part of the claim prior to cross examination of the respondent's witnesses but that application was refused.

107. The burden of proof did not shift in accordance with section 136 of the Equality Act 2020 because the claimant did not prove facts from which the Tribunal could decide in the absence of any other explanation that the respondent had contravened section 13 of the Equality Act 2010 and this part of the claim is dismissed.

Harassment – section 26 Equality Act 2010

108. The unwanted conduct about which the claimant complains is that the respondent allowed service users to racially abuse the claimant. This is a complaint of third party harassment.

109. On 25 April 2013 section 40(2) and (4) of the Equality Act 2010 was repealed. The relevant provisions provided:

“(2) The circumstances in which A is to be treated as harassing B under subsection (1) include those where—

(a) a third party harasses B in the course of B's employment, and

(b) A failed to take such steps as would have been reasonably practicable to prevent the third party from doing so.

(4) A third party is a person other than—

(a) A, or

(b) an employee of A's.”

110. As a result, a respondent is no longer vicariously liable for third party acts of harassment. The Employment Appeals Tribunal did confirm in **Bessong v Penine Care NHS Foundation Trust UKEAT/0247/18/JOJ** that a respondent can be liable if a failure to deal with any such complaints is itself related to race

111. However, even if this was not the case, the claimant has not proven facts from which the Tribunal could conclude that the respondent had allowed its clients to racially abuse the claimant. The Tribunal was not presented with any evidence that the claimant had made complaints of such racial abuse to the respondent.

112. Similarly, whilst the Tribunal did not understand that the harassment claim included the respondent's failure to deal with any complaints made by the claimant about this issue, because it finds that the claimant did not make any complaints of racial abuse by service users, the respondent was not given the opportunity to deal with the same. The claim of harassment is similarly dismissed.

Protected Disclosures

Disclosures

113. The claimant has not proven facts that he made a disclosure on 29 April 2016. Instead, this appears to be the date on which the Mencap litigation first became known to the claimant and his colleagues in the industry.

114. On 9 November 2016, the claimant had a one-to-one with Terence Edwards, his employer. During that meeting, the Tribunal finds that the claimant disclosed information that the respondent was paying the wrong rate for a sleeping night. It was not an allegation – the claimant knew the rate did not equate to the National Minimum Wage. Based on the Mencap litigation, the Tribunal finds that the claimant had a reasonable belief that the respondent was in breach of a legal obligation to those who worked a sleeping night. In fact, whilst the litigation had been in favour of the payment of the National Minimum Wage, it was by no means a final position because an appeal was pending. However, the claimant's other employer was dealing with the matter proactively and was paying the sleeping night rate in accordance with the National Minimum Wage.

115. The Tribunal accepts the claimant's argument that the disclosure was in the public interest because it not only affected him but also his colleagues who were being paid, via the respondent, by the public sector to look after vulnerable adults. As noted in **Chesterton** it is unlikely that this was the claimant's predominant motive, but the claimant was clear that this was a high-risk job, funded by the public and the respondent had a duty to act lawfully in all of its dealings.

116. On 22 December 2017 the claimant sent an email to Terence Edwards in which he disclosed information that he and his colleagues were entitled to a backdated payment for the sleeping nights prior to 27 November 2017 at the National Minimum Wage rate. In addition, the claimant challenged the respondent's policy of implementing unpaid rest breaks from 1 January 2018.

117. The Tribunal finds that the claimant had a reasonable belief in the first disclosure of information based on his dealings with his other employer and the concession made by the respondent, from November 2017, that the sleeping night rate should be paid at the National Minimum Wage. The claimant was of the view he was legally entitled to the back payment. In addition, it was the reasonable belief of the claimant that it would be impossible to take a rest break unless the respondent provided cover so that the claimant and his colleagues could leave the premises. The claimant was of the view that, without cover, there was no opportunity to take a

break and there would be a breach of a legal obligation if the respondent deducted his pay.

118. For similar reasons the Tribunal accepts that such disclosures were in the public interest because the claimant and his colleagues were working with vulnerable individuals, who could not be left alone, and funded by the public sector. The claimant and his colleagues were poorly paid in a high risk sector and the claimant and his colleagues genuinely felt short-changed when they were performing a critical job in protecting vulnerable people.

119. The disclosures made in the email of 22 December 2017 amount to qualifying disclosures.

120. The WhatsApp message sent to the group chat on 22 December 2017 dealt with the non payment of the backdated sleeping night rate and the unpaid rest break. The Tribunal finds that from the grammar and tone of that WhatsApp message that it was not a disclosure of information to the employer in accordance with section 43C of the Employment Rights Act 1996 albeit that Terence Edwards was included in the group chat. The WhatsApp message is inflammatory and a suggestion that his colleagues take a stand and join the union. The WhatsApp message did not amount to a qualifying disclosure.

121. The claimant has not proven that he complained to the respondent that a service user had been sexually overt towards him. On 31 January 2017 the claimant spoke to the respondent about this service user, but only to the extent the he didn't like the smell of her dog and that Laila Shah had removed him from shifts.

122. The claimant has also not proven that he made complaints that three service users made racist remarks about him. The claimant sent Terence Edwards a WhatsApp message on 19 November 2017 which contained a recording of a service user racially abusing another service user. The Tribunal was not provided with any other evidence about the claimant's own complaints.

123. On 29 June 2016, the claimant reported to the respondent that a service user had threatened to kill staff. The Tribunal finds that this was information and the claimant had a reasonable belief that it amounted to a breach of the respondent's legal obligation to protect staff in the workplace, as well as being a criminal act. The Tribunal also finds that the claimant had a genuine belief that the respondent company should operate safely and it was in the public interest that they do so.

Detriments

124. The claimant alleged that the respondent had failed to protect him from being called racist names and had reduced his hours following a disclosure made on 19 October 2016.

125. For similar reasons already identified in the earlier part of this Judgment, the Tribunal did not find on the facts that the respondent had failed to protect the claimant from being called racist names by service users. The claimant had not

made complaints to the respondent about service users calling him racist names and the respondent was therefore not given the opportunity to protect the claimant from the same.

126. The Tribunal also finds that the respondent did not reduce the claimant's hours after an alleged complaint on 19 October 2016. In fact, the Tribunal has not made a finding of fact that there was a complaint on 19 October 2016. On 9 October 2016 the claimant and Terence Edwards had a one-to-one meeting at which the claimant said that work was fine and everything was settled.

127. On 9 November 2016 the claimant asked to only work weekends to accommodate his study commitments and his work for another employer on a Thursday. This was the reason for the reduction in the claimant's hours.

128. Therefore, the Tribunal has not gone on to consider whether any such detriments were caused by the making of protected disclosures and the claim under section 47B of the Employment Rights Act 1996 is dismissed.

Dismissal

129. The claimant made qualifying disclosures on 29 June 2016, 9 November 2016 and again on 22 December 2017 in the email.

130. However, the Tribunal finds that the reason for the claimant's dismissal was in fact the inflammatory tone of the WhatsApp message sent to his colleagues on 22 December 2017, urging them to take a stand against the company in regard to the non payment of the backdated sleeping rate and the unpaid rest break.

131. The Tribunal does not find that the reason or principal reason for the claimant's dismissal was the protected disclosures. The respondent had evidence from the claimant's two colleagues that he had made derogatory comments about the respondent and the possibility of taking the company on about these issues. When faced with a public WhatsApp declaration against the company, the respondent acted swiftly removing the claimant from the WhatsApp group and advising him that he would not be provided with any further shifts with the respondent company.

132. The claim for dismissal following a protected disclosure contrary to section 103A of the Employment Rights Act 1996 is therefore dismissed.

Employment Judge Ainscough

Date: 17 February 2020

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

19 February 2020

FOR THE TRIBUNAL OFFICE

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