RM

EMPLOYMENT TRIBUNALS

Claimant: **Isaac Seopane**

Respondent: **J T Edwards Ltd**

Heard at: **East London Hearing Centre (by Cloud Video Platform)**

On: **28 – 30 September 2021**

Before: **Employment Judge Housego**
Members: **Mr P Quinn**
Mr S Woodhouse

Representation

Claimant: In person

Respondent: Anna Greenley, of Counsel, instructed by Astons Solicitors

JUDGMENT

1. **The Claimant was unfairly dismissed by the Respondent.**

2. **The Respondent is ordered to pay the sum of £39,114 to the Claimant, as detailed in Schedule 1.**

3. **The Respondent made unlawful deductions from the wages of the Claimant and is ordered to pay to the Claimant the sum of £2,349.00 (which is part of the sum above)**

4. **The Respondent failed to provide the Claimant with a statement of terms and conditions of employment and is ordered to pay to the Claimant the sum of £1,076, (also included in the sum above).**

5. **The claim of race discrimination is dismissed.**

6. **The Recoupment Regulations apply as detailed in Schedule 2.**

REASONS

Background

1. Isaac Seopane was dismissed. The Respondent accepts that the procedure was unfair, but says it was a genuine redundancy, and that a fair procedure would have resulted in dismissal in a short period. Isaac Seopane says that it was not a genuine redundancy as the work he was doing in a hospital was increased by Covid-19, and was unfair, and was direct race discrimination. This the Respondent denies. There is a claim for unpaid overtime. Other matters raised relate to one or other of these claims.

Claims made and relevant law

2. Isaac Seopane claims unfair dismissal and that the dismissal, as well as being unfair was direct race discrimination[1].

3. In respect of the claim for unfair dismissal, the Respondent has to show that the dismissal was for a potentially fair reason[2]. The Respondent says this was redundancy, which is one of the categories that can be fair[3]. It must be shown that the decision to dismiss was fair[4]. The employer must follow a fair procedure throughout[5]. It is not for the Tribunal to substitute its own view of what should have happened, for it is judging whether the actions of the employer were fair, and not deciding what it would have done.

4. In a redundancy situation there is usually consultation about the fact of redundancy, what the pool for selection will be, what the criteria will be, how those criteria are marked for the individual and whether there are any alternatives to dismissal for an affected person. Sometimes circumstances are such that this consultation is attenuated.

5. The burden of proof as to the reason for dismissal is on the employer, on the balance of probabilities. There is no burden or standard of proof for the Tribunal's assessment of whether it was fair to dismiss[6]. If the dismissal was procedurally unfair the Tribunal has to assess what would have happened if a fair procedure had been followed[7].

6. The Respondent accepts that the dismissal was procedurally unfair, and bases its defence on the assertion that had the procedure been fair the same result would inevitably have occurred, by reason of redundancy, and in a short time frame.

7. The Tribunal will have to consider uplift for breach of the Acas Code on dismissals, but only if the reason for dismissal is other than redundancy.

[1] Section 13 of the Equality Act 2010:
"13 Direct discrimination
(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."
[2] S98(2) of the Employment Rights Act 1996
[3] Also S98(2) of the Employment Rights Act 1996
[4] S98(4) of the Employment Rights Act 1996
[5] Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23 CA
[6] Section 98(4) of the Employment Rights Act 1996
[7] Polkey v AE Dayton Services Ltd [1987] UKHL 8

8. The Claimant asserts that his employment started in 2017, when he was treated as self-employed, and not in 2018 when he was taken on as an employee. While relating to workers, Uber BV & Ors v Aslam & Ors [2021] UKSC 5, paragraph 76[8] particularly, is of assistance in setting out the way this issue should be approached.

9. The test for a claim that the Claimant has suffered unlawful discrimination is whether or not the Tribunal is satisfied that in no sense whatsoever was there less favourable treatment tainted by such discrimination. It is for the Claimant to show reason why there might be discrimination, and if he does so then it is for the Respondent to show that it was not. The two steps are not hermetically sealed, and eliding them is not impermissible. The Tribunal has applied the relevant case law[9], and has fully borne in mind, and applied S136[10] of the Equality Act 2010. Discrimination may be conscious or unconscious, the latter being hard to establish and by definition unintentional. It is the result of stereotypical assumptions or prejudice.

Issues

10. These are:

Unfair Dismissal

1. Did the Respondent have a potentially fair reason for dismissing the Claimant? The Respondent says the reason for the Claimant's dismissal was redundancy (in line with s.98(2)(b) Employment Rights Act 1996).

2. If so, it is conceded that the procedure was unfair, but what would have happened had there been a fair procedure? The Respondent says dismissal soon after. The Claimant says that he would not have been dismissed at all.

3. For the basic award, the Claimant was employed for 2 full years. He was self-employed before, but claims that it was in reality employment and so he should get a basic award based on 3 years' service.

4. What period of compensation should there be?

5. Should there be an uplift in compensation of up to 25%?

Direct Race Discrimination

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[8] 76. Once this is recognised, it can immediately be seen that it would be inconsistent with the purpose of this legislation to treat the terms of a written contract as the starting point in determining whether an individual falls within the definition of a "worker". To do so would reinstate the mischief which the legislation was enacted to prevent. It is the very fact that an employer is often in a position to dictate such contract terms and that the individual performing the work has little or no ability to influence those terms that gives rise to the need for statutory protection in the first place. The efficacy of such protection would be seriously undermined if the putative employer could by the way in which the relationship is characterised in the written contract determine, even prima facie, whether or not the other party is to be classified as a worker. Laws such as the National Minimum Wage Act were manifestly enacted to protect those whom Parliament considers to be in need of protection and not just those who are designated by their employer as qualifying for it.

[9] The law is comprehensively set out in Royal Mail Group Ltd v Efobi [2021] UKSC 33 (23 July 2021)

[10] "136 Burden of proof
(1) This section applies to any proceedings relating to a contravention of this Act.
(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 subsection (2) does not apply if A shows that A did not contravene the provision.
…"

The Respondent dismissed the Claimant. Was this, at least in part because of the Claimant's race?

The Claimant relies on the following claimed differences to show that the dismissal was tainted by direct race discrimination:

- Two comments were made that had racial connotations (these are claimed as separate claims also, and as they are out of time that it is just and equitable to extend time).
- Two other people got new chairs and he did not.
- He was never paid a bonus.
- He was not paid overtime he claimed, and two named colleagues were.
- He was not furloughed when he had health concerns, but a white person was, without the GP letter he was asked to provide.
- He was made responsible for a theft at the workplace, but white colleagues were not.
- No one else was considered for redundancy.

11. The Respondent denies this, saying:

- James Edwards appointed him in the first place.
- James Edwards lent him £4,400 in the past.
- There was nothing wrong with the Claimant's chair, and he never asked for a new one.
- The Claimant had the most expensive company car.
- The Claimant had a new laptop and his old one was passed on to his (white) colleague.
- The thefts were because the Claimant had not followed guidance.
- The Claimant was the only person who could be made redundant, and that was the sole reason for dismissal.

12. Case law indicates that a list of issues is not a pleading, but a tool to facilitate a hearing, and could not be approached with the formality one might approach a commercial contract or pleading[11]. Nor must a Tribunal stick slavishly to a list of issues[12]. In this case this list of issues was clear early on, and set out in a case management order after a hearing on 14 September 2020. The matter of bonus is not a separate claim of race discrimination but is a background fact relied upon. There is dispute over the £4,400, but not as to the fact of its payment to the Claimant.

Evidence

13. Isaac Seopane thought the Respondent would go first. Counsel for the Respondent had no issue with this and so it was. James Edwards and Joe Dixon gave oral evidence for the Respondent, and the Claimant gave oral evidence. All the witnesses were cross examined.

[11] Leslie Millin v Capsticks Solicitors LLP and Others: UKEAT/0093/14/RN
[12] Saha v Capita UKEAT/0080/18/DM

14. There was a joint bundle of documents of 193 pages.

The Claimant's case

15. He had concerns about Covid 19 as he was working in a hospital and feared contact with people with the virus as he has asthma and a skin condition (eczema). He asked to be furloughed. A white man who was at risk as being very overweight was furloughed when he asked. The Claimant was not furloughed and required to produce a "shielding" letter, when he could not do so, as he was vulnerable but not extremely vulnerable. He had said that he could make use of the time, either by completing his masters degree or returning to Botswana for a period, but that was not the reason for asking. When he was dismissed he thought it was race discrimination, and thought back to not getting any bonus, and not getting a new chair when white colleagues did, even though he had a bad back which he realised was part of a pattern, including it being said that he would "cry race" as he had not got a new chair, and when ill a comment about a "green monkey disease" being made.

The Respondent's case

16. The Claimant asked to be furloughed for reasons unconnected with health – to be paid by the taxpayer while finishing his masters degree and spending time in Botswana. This was not a proper use of the scheme, as the work he was doing was unaffected by the pandemic. James Edwards had been very worried about the effect of the pandemic, and had been considering the Claimant's redundancy for some time. After making him redundant he had taken on the Claimant's role himself. Nothing that happened had any connection with race.

Submissions

17. Counsel spoke briefly to her full written submission prepared overnight. The Claimant made oral submissions of which I made a full typed record. Their substance appears from the findings and conclusions.

Facts found

18. The business is engaged in maintenance and refurbishment of services for schools and hospitals. Most is schools, and work peaks in school holidays, particularly summer.

19. The business had 6 employees (including James Edwards). James Edwards is managing director and owns the company. His wife Rachel does accounts and administration. Joe Dixon has electrical qualifications. Rob Gypps is a carpenter and works on projects. Clinton Abbott has a gas fitting qualifications. Isaac Seopane priced for tenders, and interacted with those asking for tenders. He was responsible for securing the work at Princess Alexandra Hospital, where he was working as lockdown started. The work the company does requires to be signed off by someone with qualifications, such that both Joe Dixon and Clinton Abbot are essential to the running of the business. Rob Gypps was engaged in practical work, and troubleshooting, and could also hang fire doors, which is part of the work

the company does. There are between 10 and 30 subcontractors at any one time.

20. James Edwards and Isaac Seopane knew one another (how was not part of the evidence). Isaac Seopane became a subcontractor from 02 April 2017. He worked full time for the Respondent. He was involved in obtaining work by submitting tenders. For one contract with a school he was named as the contractor. When visiting a school all those working for the Respondent have uniform and liveried vehicles to identify them with the Respondent.

21. Isaac Seopane comes from Botswana. He wanted to apply for a visa for his wife and children to come to the UK. He needed proof of income. He asked to become employed. James Edwards was aware of the possibility that HMRC would say that Isaac Seopane was an employee. He agreed, and without any change in what he was doing, on 16 April 2018 Isaac Seopane became an employee. It is accepted that there was nothing in writing about this.

22. The turnover of the business increased from about £1.5m a year to over £4.5m a year after Isaac Seopane joined it. Isaac Seopane's statement (in his witness statement at paragraph 14) that he had been responsible for pricing and securing projects to the value of £2m during his time with the Respondent was not challenged.

23. There was some discussion about bonus. Isaac Seopane asked about getting a bonus. James Edwards replied that he was open to discussion. There was no further discussion. This was temporising by James Edwards.

24. The Tribunal finds that there was never a promise to pay a bonus, nor any legitimate expectation (as opposed to hope) that one would be paid. This is in part by reason of the lack of any evidence of that and partly because of the overtime that was paid.

25. Early on in their working relationship James Edwards transferred £4,400 (in 2 payments, one of £2,000 one of £2,400) to Isaac Seopane. Whether this was a gift, or a loan is immaterial (and the Tribunal makes no finding of fact as to which as County Court action may follow this hearing). It is common ground that if it was a loan none has been repaid, and nor had there been any request for it to be repaid.

26. Isaac Seopane put in overtime claims, and was paid at time and a half for such hours. These were not checked in any way. They were variable but not more than 45 hours a month overtime. For the period 02-19 March it was 46 hours and that was paid. For the next period he claimed 174 hours for the period 19 March-24 April 2020 of which he was paid half. (This was the time Covid had full effect.)

27. The pandemic had two effects on the Respondent. First, work at schools dropped off – most projects were put on hold. Secondly work at the hospital increased greatly. The project Isaac Seopane was overseeing went from 2 toilets / hand washing faculties to 4, 8 and then 16, and showers for doctors to use were required.

28. Isaac Seopane claimed for many more hours overtime than before. James Edwards paid half of what was claimed. He thought there was no way that he could have worked all those hours. The Tribunal found credible the explanation from Isaac Seopane – the hospital's requirements steadily expanded. There was no preparation of plans, so he had to go in during the working day to find out where all the services went, plan, then direct the installation by subcontractors, all within the tight timeframes demanded by the hospital for whom it was urgent. Further, the claim he made set out with whom he worked on each occasion, and that was not checked. The Tribunal finds, on the balance of probabilities that the overtime was worked. Indeed, James Edwards said that it would be paid, in an email on 10 May 2020, set out below, once the contract was completed and the client had paid.

29. Rob Gypps is very overweight. He asked to be furloughed as he felt he was at risk. James Edwards agreed, without asking for any information from him.

30. Clinton Abbot asked to be furloughed and gave no reason. He was not furloughed.

31. Mr Seopane has asthma. He used an inhaler from time to time. He had a skin complaint – eczema on his hands. Also he is black, which appears to be a covid risk factor. The hospital had a lot of covid patients. His wife was very concerned about him working there.

32. The Respondent says that on 21 April 2020 on a walk round at the hospital the Claimant said to Joe Dixon that he wanted to be furloughed in order to work on his masters degree. This the Claimant denies. There was such a walkround. Isaac Seopane will undoubtedly have said that he would work on his masters degree if furloughed and that he wanted to be furloughed. The Tribunal finds that the reason he asked to be furloughed was because he was worried about Covid 19.

33. At the time, asthma was said to be an underlying health condition which increased risk of death from Covid19. The Tribunal accepted Isaac Seopane's evidence that he had brought his inhaler into the office on many occasions, and that James Edwards knew he had asthma. It was not disputed that the hospital had a lot of Covid patients.

34. When he asked if he could be furloughed James Edwards asked for medical evidence. Isaac Seopane said that he could not get any from his doctor, and he would not be getting a "shielding letter" as he was not highly vulnerable, but was within the group advised to work from home if possible. As it was not really possible for him to superintend work at the hospital from home he asked to be furloughed.

35. James Edwards thought this a misuse of the furlough scheme. He had asked Isaac Seopane what he would do. Isaac Seopane had said that he would use the time to finish his masters degree online. He had hoped to go to Botswana to see his family (he had a trip booked long before, to go there in April 2020).

36. James Edwards asked Isaac Seopane to come to a meeting, which he did, on 04 May 2020. James Edwards covertly recorded the first part of it as he

wanted to get proof that Isaac Seopane was seeking furlough to study for his masters, while being paid by the taxpayer, which was what he thought was Isaac Seopane's intention. Only the first few minutes were recorded (84), and included this:

"Isaac: So in terms of me going on furlough, on the other part that I'll be honest on, was if the workload is minimal at this time, the masters course that I was doing on line that and if I get time to finish I would have hoped that maybe things will have settled down and (mumbled) give me time to get it finished. I wouldn't necessarily travel home cos there's no how *[probably "way"]* I can get there."

37. James Edwards emailed Isaac Seopane at 14:33 on 10 May 2020:

"Subject: Re: Off this Week

Isaac

We should not discuss other individuals by direct email, but in short and in goodwill, I will share Rob was the first request for consideration.

There have been other employees/sub contractors who requested 'furlough' - but again we cannot discuss individuals.

For Rob's first request, there was no GP letter, but there was written record of his ill health from previous absences and previous reduced working hours. We did everything to accommodate Rob's work in the office, until it ran out.

The decision was verified and validated through a third party, as I feared other less robust requests would follow and they did (excluding yourself).

Then, as now, the greatest misunderstanding seems to be employees/sub contractors understanding that Furlough is a request that can be made by the employee/sub contractor, not as the government intend it to be used 'to protect redundancy' and the business. Furloughing Is to protect employees from immediate redundancy when there is not sufficient work.

I can underline how hard it has been to keep everybody employed during the last 3 months, both employees and sub contractors - and I suspect we are going to be under pressure throughout 2020.

Any questions you have on payments can be raised in the morning - if there is an error I will speak to payroll in the morning. For clarity, you are the only member of the business who has requested such overtime and as previously stated, we paid you half the overtime that was requested. As the level of this overtime request was unexpected, unknown and unverifiable, the other half will be paid on completion of the contract and payment received from the client. Please refer to my earlier emails in the relation to the quality of the work and the fact that two of the sub-contractors were not fit for work and two were to return to my agreed rates of payment, their wages were deducted rather than being promised at a later date. Having

had to take over your project at the hospital, it was clear that the overtime you worked through split shifts was unnecessary at times.

Any further queries will be dealt with at our meeting at 7 .45 tomorrow morning.

James Edwards"

38. Isaac Seopane emailed James Edwards on 10 May 2020 at 14:56:

"James,

I have a record of my asthma which I can make available and the medication I am on. If I have to come for a meeting I don't see why we cannot hold a meeting on a zoom video conference.

• We did not sign a contract that says any overtime will be paid at the end of a project subject to client paying In full, as such you cannot impose that on my wages without any consultation, the email you sent advising of withholding my pay was done without any consultation. I have sent you a full breakdown of the overtime a week. In advance of my pay, you did not discuss any reservations you had with it until pay day when you decided to cut it in half.

• If I am coming back to the office to work in front of a computer I do not see a reason why I cannot do the same from home. If Rob was put on furlough for a health reasons without any letter from the GP I do not see a reason why I cannot be afforded the same."

39. On 10 May 2020 at 15:22 – 26 minutes later - James Edwards sent Isaac Seopane an email in reply (87):

"With regret - we are at an end.

I am not prepared to have you manipulate furlough for your benefit.

We will follow statutory redundancy procedures and work within the law.

Please bring all possessions back to the office in a timely manner."

40. Subsequent to the dismissal of Isaac Seopane, James Edwards has carried out the work that Isaac Seopane used to do. He says, and there is no reason to doubt, that although schools have reopened, the budgets for work for maintenance are not yet freed up.

41. The furlough scheme is winding down, and closes today. However, there were nearly 2m people still furloughed at the end of July 2021[13].

42. The Claimant is not able to work by reason of the eczema on his palms.

[13] https://www.gov.uk/government/statistics/coronavirus-job-retention-scheme-statistics-29-july-2021/coronavirus-job-retention-scheme-statistics-29-july-2021

Conclusions

43. The employment of the Claimant started in 2017. He worked full time. His role changed not at all when he became an employee. That he might have declined to work at any time is entirely hypothetical. The contract signed by the Claimant with a school was at the Respondent's instigation. He was at that school only 1 day a week for 3 months. Had HMRC investigated they would surely have found the Claimant to be an employee. There was no written contract to be a subcontractor. He was always an employee, in reality. The only consequence of this is that his basic award/redundancy payment is based on 3 years' service and not 2.

44. There is a contradiction in the Respondent's position. James Edwards said that he felt it was inappropriate to put Isaac Seopane on furlough to do his masters degree or go home to Botswana, and not right to do so for medical reasons without medical evidence.

45. However, he did not see that there was any issue in putting others on furlough for medical reasons (without evidence).

46. Further, he said that he was very worried for the future of his business, needed to cut overheads and saw no reason to delay the redundancy of Isaac Seopane. What this does not address is the fact that the furlough scheme was intended precisely to avoid redundancies by removing almost all of the cost of employing someone. James Edwards had access to the advice of his accountant about the furlough scheme. While the rules changed often and without notice, employers with advice were able to cope, and this is a business with a turnover approaching £5m a year. Nor was Isaac Seopane entitled to more than a couple of weeks' notice: if the scheme ended he could be made redundant before the furlough scheme came to its end.

47. The explanation given by James Edwards, that he did not feel the need to delay Isaac Seopane's redundancy is contradicted by his furloughing of others. If it be that long term they were needed but long term the Claimant was not, that evidence is, in the Tribunal's judgment fatally undermined by the words in the email of 10 May 2020 at 14:33. He is clear that furlough is to protect from redundancy and that he has used it for that intended purpose.

48. It follows that the reason James Edwards did not furlough Isaac Seopane was not that he was considered to be redundant. It was a variety of reasons:

    48.1. He thought Isaac Seopane was taking advantage of the UK taxpayer for his own ends (online work on a masters degree and going to Botswana).

    48.2. He did not believe health considerations prevented Isaac Seopane working at the hospital.

    48.3. He was very unhappy at the level of overtime claimed.

49. That it was (as Isaac Seopane had put in his email on 10 May) highly unlikely that he could go to Botswana does not affect the fact (as the Tribunal finds it to be) that this was what James Edwards thought was Isaac Seopane's motivation for seeking to be furloughed.

50. The recording in fact supports Isaac Seopane's account. If furloughed he would spend the time on his masters, but that was not the reason for asking. There was no way in April 2020 that he was going to be able to leave the UK. However, it is clear that James Edwards took great exception to what he saw as the misuse of taxpayer's money – to be paid to be at home studying, not working – by necessary implication when there was work to be done.

51. James Edwards did not want to put Isaac Seopane on furlough. That was – inevitably – because he was very busy at the hospital. He was not redundant in terms of the work he had to do. The decision to dismiss the Claimant was because he wanted to stop working on work that needed doing at the hospital, not because there was no work for him to do.

52. The argument that there was a need to reduce overheads is not credible, as James Edwards fully understood, because there are very limited overheads when someone is furloughed. This was an employee who had brought in £2m of business over the last couple of years. It follows that the reason for dismissal was not redundancy. That James Edwards stated that "We will follow statutory redundancy procedures and work within the law" is not cogent evidence of the real reason. It is to dress up a dismissal for other reasons as a redundancy.

53. It is not credible that James Edwards moved from a refusal to permit furlough (because there was work to be done) to deciding to dismiss him as redundant, in the space of a week.

54. James Edwards stated that there had been complaints about the Claimant's work at the hospital. This further undermines the Respondent's position because there is no evidence of any such complaint (so that it is not established as a fact) and because to dismiss for such a reason (genuine or not) is a capability or conduct reason, not related to redundancy.

55. This was all despite James Edwards stating in an email to Isaac Seopane of 04 May 2020:

    "I do appreciate this is a two way street, and the PAH account is challenging, and your own family have concerns for your well being."

56. In a text to a friend on 27 July 2020, Isaac Seopane wrote:

    "Just called to let you know that I am no longer with JT Edwards. I explained to James that I wasn't willing to expose myself due to my asthma and he opted to lay me off instead of furlough."

This, the Tribunal finds, is highly unlikely to have been constructed disingenuously for the purposes of this claim (lodged on 12 May 2020). It is what the Tribunal finds occurred.

57. Accordingly, the dismissal was not for a reason within S98(2) (redundancy). Or, if it was for capability or misconduct, it was unfair.

58. If the Tribunal is wrong about that, and it really was a redundancy, dismissal was still unfair. Plainly not everyone who is dismissed as redundant and who could have been furloughed is unfairly dismissed. But in this case it would have been unfair, precisely because the reasons he was dismissed, not furloughed, were matters about which James Edwards was critical of Isaac Seopane. It was, in effect, a sanction, not an objective economic decision. While there is no reason to keep on an unsatisfactory employee who could be furloughed, there was no proper procedure which could have led to a fair redundancy on objective grounds.

59. Isaac Seopane claims the dismissal was race discrimination. He points to two earlier matters. First the chair. There is nothing in the provision of chairs for others and not for him (in April 2019). He never asked for a new chair, nor said that the one he had was inadequate for his back. The Tribunal assessed carefully his claim that James Edwards had said that he was going to say that the reason he had not got a new chair was race. The Tribunal assessed carefully his claim that when ill there had been a reference to a "green monkey" disease.

60. The Claimant was an impressive and dignified witness. On the balance of probabilities, the Tribunal finds these comments were made. That about illness was highly unlikely to be a racist comment such as is, alas, sometimes heard at football grounds. It is far more likely to be an ill-advised reference to the Claimant's African nationality, and to illnesses emanating from primates in the African countryside. The working relationship between them was close at the time, and these do not appear to have been made as intentionally offensive comments. In themselves they might have founded a race discrimination claim if made at the time. They are out of time and, for the reasons that follow, are not part of a series. It would not be just and equitable to extend time for them to be considered now.

61. Isaac Seopane referred in his witness statement to a "toxic environment". In a text to a friend on 11 May 2020 – the day after being dismissed he wrote:

    "It's all good Dan, is for the best. I wasn't happy there anymore."

This undoubtedly related to the events that led to his dismissal, and the word "anymore" does not indicate any hurt at past racially related slurs.

62. This indicates that the unhappiness of the Claimant has arisen with hindsight, rather than being felt deeply at the time.

63. Secondly, he refers to a theft of goods and tools from the hospital for which he was blamed. He says that a white person was not similarly blamed when a larger theft occurred in similar circumstances at a school. The Respondent says that the school insurance covered that loss[14], but because the things

[14] After the hearing and when in retirement the Respondent sent in evidence about this insurance payment. The Tribunal did not consider it, because it did not find it relevant, given its findings about the primary submission made by Counsel for the Respondent – that there was no

stolen were not in vehicles or a locked container neither theirs nor the hospitals insurance covered the loss.

64. The Tribunal accepted the submission made by Counsel for the Respondent: while James Edwards was critical of Isaac Seopane (even though the theft occurred when he was off for the week) there was no detriment. There was no sanction. There is no reason to doubt that this cost the Respondent of the order of £2,000, and so every reason for James Edwards to tell Isaac Seopane how to store goods and materials in future. Even if he did so in an unfair way there is every reason to think this had nothing to do with race, but was irritation at the loss.

65. The Tribunal was shown no evidence of any instruction to keep tools and materials in vehicles or container. However on 29 April 2020 James Edwards emailed the hospital and Joe Dixon:

    "There have been tool and materials taken from the secure area/garage.
    I would recommend a security door on the building subject to your review agreement."

This is not supportive of the Respondent's case and the Tribunal finds that there was no such instruction given to Isaac Seopane. That does not make it a matter of race discrimination.

66. The Respondent submitted that Isaac Seopane had a very expensive company car and this was a strong contra indicator to race discrimination. The vehicle is indeed a good car, a VW Amarok. However, it was 4 years old, and previously used by James Edwards. No other employee needed a car: Clinton Abbot, Joe Dixon and Rob Gypps all needed vans. James Edwards owned the company, and he would chose whatever vehicle he wanted for himself and his wife. The assertion of the Claimant that it had been difficult to sell, hence given to him was not challenged. This was no more than that the Claimant needed a car and James Edwards passed his vehicle on to Isaac Seopane when he got a new one.

67. The Claimant says that he received no bonus, and that he should have done. Plainly Isaac Seopane hoped for a bonus. He had been successful and he may well have had good reason to hope for one. He raised it with James Edwards, who did not give him a yes/no answer, but said that he was willing to discuss it. He was, put shortly, fobbed off on the topic, but that is nothing to do with race, just to avoid the discomfort of saying no, outright. The Tribunal accepted the submission made by and on behalf of James Edwards that in a sense the overtime was a substitute for a bonus: it was money on top of his salary. There was no bonus scheme, and nothing in writing to or from Isaac Seopane to support a claim to an entitlement to a bonus. It would, in any event, be discretionary, and it would be a reason not to award bonus that substantial overtime had been paid. The claim to a bonus is not based on any particular scheme, or parallel with any other person. It was a hope and no more. Not being paid a bonus is not causally connected with the race of the Claimant.

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detriment. The Claimant then sent in other documents about his work schedule, to support his claim that he was directed by the Respondent. The Tribunal had decided that point in his favour before they were received and so the Tribunal did not look at that documentation either.

68. The Tribunal considered whether requesting medical evidence of asthma was tainted by race considerations. Rob Gypps had been off sick and his obesity was plain. There was no reason to ask him for proof of being at risk. At the time – this was only 6 weeks into the pandemic – there was confusion about whether someone off sick could be furloughed, and in what circumstances someone could decline to attend for work by reason of risk from Covid 19, and if they did whether they should get SSP or furlough. There was plenty of work for Isaac Seopane to do at the hospital, so that he was not a natural choice to be furloughed, and it was not unreasonable to ask for something to justify the conclusion that he should he furloughed (even though it was not possible to provide much). This was not race discrimination.

69. The Tribunal considered whether the unfairness of the dismissal was tainted by race discrimination. The Tribunal concluded that facts had not been established to show that there was such a causal link. The burden of proof did not shift to the Respondent. (If it had, it was discharged.)

70. This is for the following reasons:

    70.1. James Edwards knew Isaac Seopane before he started to work for the Respondent, and plainly that was a positive relationship because of subsequent (pre Covid) events. Since it is James Edwards who made the decision to dismiss that is not indicative of any negativity on the basis of race towards him.

    70.2. It was James Edwards who took Isaac Seopane on as a subcontractor.

    70.3. James Edwards acceded without demur to the request made by Isaac Seopane to become an employee.

    70.4. James Edwards had the Respondent pay an extra £4,400 to Isaac Seopane. It was for his personal needs, in particular to help fund a trip to see his wife and children in Botswana. This was on any evaluation a generous thing to do. If it was a gift it was very generous. If it was a loan it was generous not to make any request for repayment.

    70.5. Clinton Abbot was requested, but was denied, furlough. He is white. Mr Edwards says that he could not be made redundant as he was needed, but as there was much less work to certify that would not mean that he could not be placed on furlough.

    70.6. None of the background matters set out above are supportive of a link between race and dismissal.

Remedy

71. The claim under S13 succeeds given the Tribunal's findings of fact. The amount claimed is 87 hours at £27 an hour, which is **£2349.00**.

72. It is accepted that there was no S1 statement of employment particulars and so that claim succeeds. The remedy is 2 or 4 weeks' pay. No request was made for such a statement, so that it is an omission, not a refusal, and the Tribunal will award 2 weeks' pay. The Claimant's salary was £37,620 annually. That is £723.46 weekly. A week's pay for compensation purposes is capped. The claim was lodged on 12 May 2020. The cap for that financial year was £538. Two weeks' pay is therefore **£1,076.00**.

"

73. The basic award is, on the Tribunal's findings, based on 3 years' service. The Claimant is between 21 and 41, and so the award is 3 week's pay, again capped at £538, and so the basic award is **£1,614.00**.

74. The Claimant is signed off from work, by reason of eczema on the palms of his hands, which he attributes to stress arising from his dismissal. In his submissions he made reference to Sheriff v Klyne Tugs (Lowestoft) Ltd [1999] IRLR 481: but such a claim can only be successful if a discrimination claim succeeds.

75. There is no award for the manner of dismissal[15].

76. There is no claim for notice pay (intentionally to avoid a counterclaim for the £4,400 said to be due to repay a loan).

77. The Claimant's schedule of loss includes an element of pay for accrued but untaken holiday. The claim form does not have that box (8.1) ticked and nor does such a claim feature in the particulars of claim, or in his witness statement. That is not a claim before the Tribunal.

78. The Tribunal will have to assess loss and consider carefully the *Polkey* principle. On the basis of the facts found, and subject to reassessment after submissions, the Tribunal considers that there would have been an extended period of furlough, at the end of which there would have been a fair dismissal either on the basis of redundancy (because James Edwards was doing the Claimant's work) or capability (Isaac Seopane indicating that it might be 6 months from now until he is able to work again).

79. The Tribunal's preliminary assessment is that the period would be until the end of July 2021, when the Government contribution reduced to 60%, but the employer was obliged to pay another 20%[16].

80. There would have been no reason to bring matters to a head before that, particularly for an employee who had brought in about £2m of work in a relatively short time. The increasing problem of schools being undermaintained has been headline news[17], and there would be good reason to keep Isaac Seopane furloughed so that when such work resumed he could again play a profitable role in seeking it.

81. That would be a period of 1 year and 6 weeks, at 80% of pay.

[15] Johnson v. Unisys Limited [2001] UKHL 13
[16] https://www.gov.uk/guidance/claim-for-wage-costs-through-the-coronavirus-job-retention-scheme
[17] This is just a matter of judicial knowledge.

82. The Acas code will apply, as the dismissal was not by reason of redundancy. Given that no process at all was followed, the uplift must be the maximum of 25%.

83. There is in addition the standard sum of £500 for loss of statutory industrial rights. There was no pension contribution.

84. There is a cap on a compensatory award of one year's salary.

85. Isaac Seopane claimed universal credit, and so the Recoupment Regulations will apply. The calculation of the maximum repayable is in Schedule 2.

86. In considering the compensatory award the Tribunal paid particular attention to S123 of the Employment Rights Act 1996:

"Compensatory award.

(1) Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

(2) The loss referred to in subsection (1) shall be taken to include—

(a) any expenses reasonably incurred by the complainant in consequence of the dismissal, and
(b) subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.

(3) The loss referred to in subsection (1) shall be taken to include in respect of any loss of—

(a) any entitlement or potential entitlement to a payment on account of dismissal by reason of redundancy (whether in pursuance of Part XI or otherwise), or
(b) any expectation of such a payment,
only the loss referable to the amount (if any) by which the amount of that payment would have exceeded the amount of a basic award (apart from any reduction under section 122) in respect of the same dismissal.

(4) In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland."

87. The circumstances of this case are highly unusual. While ensuring that the whole of the statutory guidance was borne in mind the Tribunal paid particular attention to the words "just and equitable in all the circumstances".

88. Isaac Seopane was dismissed at the worst possible time, a few weeks into Covid-19 lockdown 1.

89. The chronology of the lockdowns was:

    lockdown 1: 23 March - 01 June 2020
    lockdown 2: 31 October - 02 December lockdown 2
    lockdown 3: 06 January 2021 - 29 March stay at home - 12 April eased end 17 May 2021

90. Construction continued during lockdowns, but it is well known that recruitment came to an almost total stop with the start of lockdown 1.

91. The Tribunal fully appreciated that what would have happened had there been a fair procedure is to decide whether there should be a reduction in compensation, not as a means to assess recoverable loss. It is nevertheless relevant to the consideration of what is just and equitable.

92. There was no evidence of mitigation of loss. Neither was there evidence from the Respondent as to the availability of jobs in the sector, or more widely. The Tribunal therefore has to assess the extent of compensation in a hypothetical environment, based on its assessment, as an industrial jury, of when it was likely the Claimant could gain suitable alternative employment.

93. Isaac Seopane said that the eczema to his palms had prevented him working. Counsel for the Respondent pointed out that he had been able to use his computer for this hearing and doubted that he was unable to work. The Claimant said that he had obtained universal credit by reason of fit notes by so stating. It was not submitted that loss should be limited to the maximum of 6 months' SSP because of inability to work, although the Tribunal raised the point.

94. The submission was that loss should be limited to perhaps 3 months, submitted as a reasonable period of time during which to find alternative work.

95. Isaac Seopane had returned to Botswana from November 2020 – January 2021, and the submission was that November 2020 was a long stop date for the cessation of compensation for loss of the job.

96. The Tribunal accepted the Claimant's submissions that:

    96.1. He was seeking a visa for his wife and children to join him in the UK (he has indefinite leave to remain), and the loss of his job meant that he could no longer seek such a visa as he could not demonstrate income at the required level.

    96.2. His masters was modular based, and he could not finish it without the work he was doing for the Respondent.

    96.3. He needed (for the same reason) to get a similar job.

96.4. He also could not accept low paid work (and it would not be reasonable to expect him to do so) because he had to demonstrate a substantial income to bring his family to the UK[18].

96.5. Because his family could not come to him, he went to Botswana to see them.

97. The Tribunal did not accept the submission that it should select a period in the usual way and compensate for that period. While it is for a claimant to mitigate his loss, there is a responsibility on the Respondent to show that he has not.

98. While every claimant should seek to mitigate loss, it is plain that the odds of the Claimant getting a suitable job in a short term were non-existent. There was a window of opportunity in summer 2020, but while lots of people went on holiday that summer, there is no evidence of much hiring going on, and unemployment rose substantially in that period[19] despite the furlough scheme.

99. The Tribunal's considered view is that the Claimant was highly unlikely to get a job before November 2020.

100. The Tribunal considers that whether the Claimant was in Botswana or the UK he was also very unlikely to get a job during the period November 2020-January 2021.

101. There must come a point when loss ceases, and the Tribunal finds that the prevalence of vaccination and the easing of lockdown 3, widely expected to be permanent, means that by a year after dismissal it would no longer be reasonable to attribute loss of income to the Respondent.

102. That also accords with the *Polkey* consideration that redundancy would have been likely at about that time (but the one conclusion was not the reason for the other conclusion).

103. The calculations are set out in the Schedules below (prepared with employmentlawclaimstoolkit of Bath Publishing).

Employment Judge Housego

30 September 2021

[18] I have judicial knowledge that the figure is £18,600 for a spouse, and a further £3,800 for the 1st child and £2,400 for each other child: the Claimant referred to children, and so the minimum is £24,800 p.a.

[19] I, along with most employment judges and members, have paid particular attention since March 2020 to the trends in unemployment.

Schedule 1 Awards

IN THE EMPLOYMENT TRIBUNALS CASE NO: 32001317 2020 BETWEEN Isaac Seopane AND J T Edwards Ltd CLAIMANT'S SCHEDULE OF LOSS	
1. Details	
Date of birth of claimant	10/04/1985
Date started employment	02/04/2017
Effective Date of Termination	10/05/2020
Period of continuous service (years)	3
Age at Effective Date of Termination	35
Date new equivalent job started or expected to start	10/05/2021
Remedy hearing date	30/09/2021
Date by which employer should no longer be liable	10/05/2021
Statutory notice period (weeks)	3
Net weekly pay at EDT	533.77
Gross weekly pay at EDT	721.15
Gross annual pay at EDT	37,500.00
2. Basic award	
Basic award Number of qualifying weeks (3) x Gross weekly pay (538.00)	1,614.00
Less contributory fault (basic award) @ 0%	0.00
Less redundancy pay already awarded	0.00
Total basic award	**1,614.00**
3. Compensatory award (immediate loss)	

Loss of net earnings Number of weeks (52.1) x Net weekly pay (533.77)	27,809.42
Plus loss of statutory rights	500.00
Plus loss of commission and/or bonus	0.00
Less payment in lieu	0.00
Less ex-gratia payment	0.00
Less non-recoupable benefits	0.00
Less early payment of compensation	0.00
Plus Company Car	2,000.00
Plus loss of pension	0.00
Pension loss	0.00
Loss of occupational pension	0.00
Class 1 NIC contributions (0 weeks)	0.00
Loss of state second pension in old job Gross annual earnings (37499.8) x Estimated years of loss (0) x One year's accrual of S2P (2.9%)	0.00
Total compensation (immediate loss)	**30,309.42**
4. Compensatory award (other statutory rights)	
Unlawful deductions	2,349.00
Total compensation (other statutory rights)	**2,349.00**
5. Adjustments to total compensatory award	
Less Polkey deduction @ 0%	0.00
Plus failure by employer to follow statutory procedures @ 25%	8,164.60
Less failure by employee to follow statutory procedures @ 0%	0.00

Less deduction for making a protected disclosure in bad faith @ 0%	0.00
Less contributory fault (compensation award) @ 0%	0.00
Accelerated payment @ 0%	0.00
Compensatory award before adjustments	**32,658.42**
Total adjustments to the compensatory award	**8,164.60**
Compensatory award after adjustments	**40,823.02**
6. Failure to provide written particulars	
Number of weeks (2) x Gross weekly pay (538.00)	1,076.00
Less contributory fault (compensation award) @ 0%	0.00
Total	**1,076.00**
7. Summary totals	
Basic award	1,614.00
Compensation award including statutory rights	41,899.02
Total	**43,513.02**
8. Grossing up	
Tax free allowance (£30,000 - any redundancy pay)	30,000.00
Basic + additional awards	1,614.00
Balance of tax free allowance	28,386.00
Compensatory award + wrongful dismissal	41,899.02
Figure to be grossed up	13,513.02
GROSSED UP TOTAL	**52,521.70**
AFTER COMPENSATION CAP OF £37,500.00 (GROSS ANNUAL PAY)	**39,114.00**

Schedule 2 - recoupment

IN THE EMPLOYMENT TRIBUNALS CASE NO: 32001317 2020
BETWEEN
ISAAC
AND
J T EDWARDS LTD
RECOUPMENT

Recoupment

Prescribed period	11/05/2020 to 30/09/2021

Compensation cap applied

Total award	£39,114.00
Prescribed element	£20,710.25
Balance	£18,403.75

Compensation cap not applied

Total award	£52,521.70
Prescribed element	£27,809.42
Balance	£24,712.28