



THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH

BEFORE: EMPLOYMENT JUDGE BALOGUN

MEMBERS:

Mrs JS Muir
Ms Y Batchelor

BETWEEN:

MR S RIZVI

Claimant

AND

PASS-A-PIZZA LTD

Respondent

ON: 19 – 22 June 2017

Appearances:

For the Claimant: Mrs M Ceasar, Representative
For the Respondent: Mr Gareth Graham, Counsel

RESERVED JUDGMENT

All claims fail and are dismissed.

REASONS

1. By a claim form presented on 21.3.17, the Claimant complains of unlawful deduction of wages in relation to non payment of shared parental leave pay, paternity leave pay, statutory sick pay and holiday pay. The Claimant also claims detriment pursuant to section 47C of the Employment Rights Act 1996 (ERA); direct sex discrimination and victimisation. All claims are resisted by the Respondent.
2. We heard evidence from the Claimant and from Michelle Ceaser, his wife. The Respondent gave evidence through Karthik Subramanian. The parties presented a joint bundle and references in square brackets in the judgment are to pages from the bundle.

Issues

3. The issues are set out in the case management order of Employment Judge Freer dated 17 February 2017 and are referred to more specifically in our judgment.

The Law

Paternity Leave

4. Regulation 4 of the Paternity & Adoption Leave Regulations 2002 (PAL) provides the right of an employee to be absent from work on paid paternity leave, subject to the relevant notice requirement having been complied with.
5. Regulation 6 PAL provides that an employee must give notice of his intention to take paternity leave in or before the 15th week before the expected week of birth. The notice must be in writing, if the employer so requests.

Shared Parental Leave

6. Regulation 5 of the Shared Parental Leave Regulations 2014 (SPL) entitles a father or partner to be absent from work to take shared parental leave to care for a child, subject to certain conditions, including compliance with the statutory notice requirements.
7. Regulation 9 SPL provides that written notice of intention to take SPL must be given not less than 8 weeks before the start of the first period of SPL to be taken. The notice must contain the prescribed information at Regulation 9(2) and be accompanied by the declarations specified at Regulation 9(3).

Detriment

8. Section 47C ERA provide that an employee has the right not to be subjected to any detriment for a reason related to time off for, amongst other things, paternity leave or shared parental leave.

Direct Discrimination

9. Section 13 of the EqA provides that 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. The protected characteristic relied on in this case is Sex.

Victimisation

10. Section 27 of the Equality Act 2010 (EqA) provides that a person (A) victimises another person (B) if A subjects B to a detriment because i) B does a protected act or ii) A believes that B has done, or may do, a protected act.
11. The protected acts in question are listed at section 27(2) EQA.

Submissions

12. We heard oral submissions from the parties which we have taken into account.

Findings and Conclusions

13. The Claimant was employed on 22.3.15 as a delivery driver for Dominos Pizza at its East Dulwich Store. There were about 30-32 based at that store, who were managed by Kartik Subramanian, Area Manager. The Respondent contends that, in common with other employees below the position of store manager, the Claimant was on a zero hours' contract. The Claimant denied this, contending that he signed a 40 hour per week contract. We did not see his actual contract but we know from his induction checklist that he ticked a box indicating that he signed a contract of employment. [70] The Respondent has provided a template zero hours contract which they say applied to the Claimant and which provides that there are no set hours of work [42]. They contend that this is what the Claimant would have signed.
14. The Claimant's evidence on this was inconsistent. In cross examination he said his set hours were 35-40. He also said that he did not work the same hours each day and when asked how he knew what hours to work, he said that he was given a rota 1-2 weeks in advance. When asked whether he worked the same hours each week, he answered "Yes and No, sometimes".
15. Neither side has been able to produce the signed contract. However what we do have is a breakdown of the Claimant's hours for each week he actually worked and these figures are supported by his payslips. Of the 34 complete weeks worked, his hours are broken down as follows:
- a. 40 hours – 6 weeks
 - b. less than 20 hours - 8 weeks
 - c. 20-30 hours – 6 weeks
 - d. 30-40 hours – 14 weeks [67]

16. It is clear from this breakdown that the Claimant's hours were variable and that is more consistent with a zero hours' contract than it is a fixed hours' one. We therefore prefer the Respondent's evidence and find that the Claimant was on a zero hours one.
17. The Claimant contends that he was denied paid paternity leave (PL) and shared parental leave (SPL). The Respondent's case is that the Claimant was not entitled to either as he did not provide the required statutory notice. The Claimant denies this and says that he gave the proper notice.
18. It was common ground that the Claimant's baby was due on 18 February 2016. The Claimant wanted to take his PL from 28 March 2016 and his SPL from 2 May - 7 November 2016. Therefore the statutory notice of intention to take PL and SPL had to be given by 1 November 2015 and 7 March 2016 respectively.
19. The Claimant's evidence as to when he gave notice was inconsistent. He said that he was given a form to hand in by his wife, Michelle Caesar, in November 2015 but was unclear which form as he was given it in a brown envelope. At 92-94 of the bundle is a photo of a PL form, signed by the Claimant on 7 March 2016, requesting PL to commence on 28 March 2016. The form shows that the baby had been born, on 15.2.16, and it is signed on 7 March 2016. This was emailed to the Claimant on 7 March 2016 by his wife and the email contained a second attachment, which we are told, was the SPL form. [90]. What happened to the forms thereafter is a matter of dispute.
20. When asked when he submitted the PL form, the Claimant said that he handed it to Khaleel Rhamen, store manager of TK Maxx. The Claimant had a second job in TK Maxx and Khaleel Rhamen also worked for the Respondent. The Claimant worked with him at both employers. The Claimant further confused matters by saying that the form that he handed in was the SPL form at 100-109 of the bundle, which also has the baby's actual date of birth on it. [107]
21. There is no reference at all to these documents being submitted in November 2015, either in the Claimant's original claim or in the witness statements. Ms Caesar told us that she gave the Claimant the PL form in October/November 2015 but there is no reference to that in her statement either. She said that she emailed the form to the Claimant in March because they wanted to change the date for PL - it had originally been the baby's birth date now they wanted it later.
22. It is also noted that in the list of issues set out in the case management order, it refers to the request for PL and SPL first having been made in early Feb 2016.
23. Mr Subramanian told us that in early February 2016, during a conversation about other matter, the Claimant asked how he could claim PL and was told that he would have to fill out relevant forms. He said that the Claimant did not on that occasion state the date on which he wanted to take PL. The Claimant does not mention this exchange at all in his evidence and Mr Subramanian was not challenged on it by Ms Caesar, save that she put to him that the Claimant raised both PL and SPL. Nor was it suggested by Ms Caesar that on that occasion, the Claimant made any mention to Mr Subramanian that he had raised the matter with him before. Mr Subramanian also told us that he had spoken to Khaleel Rhaman and he denied being passed any forms by the Claimant. We accept Mr Subramanian's evidence that this was the first time the Claimant had raised the matter with him.

24. On 27 March, Ms Caesar emailed Mr Subramanian attaching the PL documentation for leave to commence the following day. [91] She told him that the documentation had previously been provided to Khaleel Rhaman. (In February according to the Claimant) even though the form was signed on 7 March 2016. [94]
25. On 28 April 2016, the Claimant emailed Mr Subramanian enclosing both forms and contended that it was the third time he had provided the PL form and the second time he had provided the SPL form [95]. Mr Subramanian was unable to open the attachment so it was emailed to him again on 29 April 2016. [95]. He says that this is the first time that he was provided with the form. The Claimant told us that the 2 occasions he submitted the SPL form were: November 2015 and 28 April 2016. He said the 3 occasions that he submitted the PL form were February, 27 March and 28 April. In November 2015 and February 2016 respectively the forms were said to have been handed to Khaleel Rhaman.
26. On 18 April 2016, the Claimant emailed Mr Rhaman asserting that he had given him his PL form in November. [98]. Prior to this, the Claimant had recorded a conversation between himself and Mr Rhaman which had taken place on 20 March. We were told that the reason for the surreptitious recording was that the Respondent was denying having received his forms. It is unclear whether that was a reference to the PL and SPL forms or something else as the transcript of the conversation makes reference to a sick note form. [38]. If the reference did in fact relate to the PL and SPL, then it is surprising that the Claimant did not say to Mr Rhaman on the recording that he had given the forms to him in November and February respectively. Perhaps that is because he knew that such confirmation would not have been forthcoming.
27. The inconsistencies in the Claimant's evidence and the lack of documentary evidence supporting his account leads us to prefer the Respondent's evidence that the first time it received the PL form was 27 March 2016 and the SPL on 29 April 2016. Both of these dates are outside the statutory notification time limits. In those circumstances, there was no entitlement to take PL or SPL.

The sick pay

28. The Claimant contends that he is owed statutory sick pay for the period 19 December to 7 February 2016. The Respondent on its part says he has received any sick pay due to him. The Respondent says that the only sick note it received during that period was a duplicate one dated 23 December 2015, covering absence between 23 December 2015 and 6 January 2016 [84-85]. The Claimant received £97.30 sick pay in his payslip of 8 January 2016, which can only relate to the absence between 19-31 December. There was some debate about whether the right payment had been made as we had no firm information as to how many days the Claimant would have worked during that period. However, based on the then weekly SSP rate of £88.45 and daily rate of £12.64, we calculated that 8 days absence during that period was £101.09. He was paid £97.30, which does not equate to an exact number of days or week's SSP so it could either be an under-payment or an over-payment. The Claimant has not satisfied us as to which. In any event, this claim is out of time.

Annual Leave

29. The Claimant contends that he was refused annual leave in 2015. This was not pleaded in the particulars of claim and was raised for the first time at the case management hearing on 20 January 2017. No evidence was presented on this apart from an oblique reference in the Claimant's statement at paragraph 5 to staff being required to work without any breaks or holiday. We do not accept that to be the case as we have seen within the bundle one of his 2015 payslip with and entry for holiday wages. [52] Apart from that, no evidence was led on when holiday was requested, who refused it and why. The complaint is not made out.

Detriment 47C

30. In mid-December 2015, the Claimant was attacked by a customer and sustained a head injury while out on a delivery. He was absent from work while he recovered. The Claimant alleges that the Respondent refused to allow him to return to work in February 2016 and that the reason for this was because he had made a request for PL and SPL. We heard from Mr Subramanian that because the Claimant informed him in January 2016 that he was still suffering from blackouts after the assault, he asked him to provide evidence that he was fit to drive. There was much cross examination about whether this was a request from the insurers or whether he was doing it of his own bat but in our view, it is irrelevant. The Claimant was employed to ride a motorcycle, he had suffered a head injury and was telling his employer that he was still suffering blackouts. In those circumstances, it was reasonable for his manager request evidence of his fitness as a duty of care towards him and the general public. Although the Claimant has produced a fit note dated 9 February 2016, declaring him fit to drive and claims to have provided it to Mr Rhaman at the time, Mr Subramanian said that the Claimant did not provide it to the Respondent until May 2016, by which point, he had decided to absent himself from work on SPL (even though he was not entitled to it). In any event, this is all academic as we have found that the requests for PL and SPL were not made until 27 March and 29 April 2016 respectively so they could not have been the reason for not allowing the Claimant back to work in February.

31. The Claimant also claims that he was not allowed to resume work in November 2016 after his SPL and the reason was related to his request for PL and SPL.

32. We have seen a chain of emails between the Claimant and Mr Subramanian covering November and December 2016 relating to the Claimant's return to work. These show that the Claimant was offered a number of hours work during this time. He did not at any point expressly accept the hours offered or indeed turn up to work the shifts. Instead, he repeatedly asserted that he was employed on a 40 hour a week contract and should be guaranteed those hours. [141-149] We are therefore satisfied that the Respondent did not refuse to allow the Claimant back to work in November 2016.

Sex Discrimination

33. On 5 December 2016, the Claimant emailed Mr Subramanian and within the body of the email states that he has requested an amendment to his tribunal claim (which by then had been presented) to add a claim of discrimination. [143]. That claim was of direct sex discrimination based on the Claimant not being allowed to take PL and SPL. As is clear

from our findings, the reason that PL and SPL were refused was because the Claimant did not comply with the statutory notice requirements. It had nothing to do with the fact that he was male. The sex discrimination complaint is not made out.

Victimisation

34. The protected act relied upon is the sex discrimination claim. Mr Subramanian told us that he first became aware of the Claimant's intention to pursue such a complaint in the email of 5 December, referred to above. On that basis, the Claimant can only rely on detriments occurring on or after that date.
35. On 16 December 2016, Jesse Read, Shift Manager, had reported to Mr Subramanian that the Claimant had threatened him on the phone saying that if he did not get the information he wanted (he was after payroll contact details) he was: "*going to beat the shit out of someone.*" [150]. The following day, 17 December 2016, Mr Subramanian emailed the Claimant informing him that he was suspended from work pending an investigation into the phone call he made to the store the day before. [140-141] Mr Subramanian told us that he took this step on advice from the Respondent's Solicitor, Toyah Marshall, who drafted the suspension letter, dated 20 December 2016. [153] We accept his evidence. The Claimant contends that this action was taken because of his stated intention to bring sex discrimination proceedings against the Respondent. However, we are satisfied from the evidence that it was because of his alleged behaviour. Given that a complaint had been made, it was reasonable for the Respondent to investigate it and suspending him in such circumstances is not an unusual step to take, particularly when dealing with what, on the face of it, was an allegation of gross misconduct. We do not accept that his actions were, consciously or unconsciously anything to do with the sex discrimination complaint. The victimisation allegation is therefore rejected.

Judgment

36. The unanimous decision of the tribunal is that all claims fail and are dismissed.

Employment Judge Balogun
Date: 18 August 2017