THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE BALOGUN**

MEMBERS: **Ms S Campbell**
Mr J Gautrey

BETWEEN:

MR VICTOR ATANASIU (1)
&
MRS MARIA ATANASIU (2)

CLAIMANTS

AND

MR GAD SALAMA

RESPONDENT

ON: **27-28 July 2017, 28-29 September 2017**
30 October 2017 (In Chambers)

Appearances:

For the Claimants: In Person
Interpreter: Mr Bogdon Onofras
For the Respondent: Mr Tim Wake, Counsel

RESERVED JUDGMENT

1. The unanimous judgment of the Tribunal is that:

    a. The automatic unfair dismissal claim fails.
    b. The unlawful deduction of wages claim in respect of non payment of the national minimum wage succeeds in respect of C1 and C2.
    c. The unlawful deduction of wages claim in respect of C1's final weeks' wages and deposit succeeds.
    d. The notice pay claim succeeds in respect of C2 but fails in respect of C1.
    e. The holiday pay claims of C1 and C2 succeed.

2. The matter will be listed for a remedy hearing on a date to be advised.

REASONS

3. By a claim form presented on 17 December 2016, the first Claimant, Mr Atanasiu, (C1) complains of automatic unfair dismissal, unlawful deduction of wages (holiday pay, arrears of pay and deposit), breach of the National Minimum Wage regulations and breach of contract (notice pay). The second Claimant, Mrs Atanasiu (C2) brings the same claims, save in respect of her deposit, which the Respondent refunded to her prior to these proceedings. A claim of discrimination on grounds of sex and marriage was withdrawn. All claims were resisted by the Respondent.

4. The Claimants gave evidence on their own behalf through a Romanian interpreter. We also heard from the Respondent. There was a core bundle of documents, which was added to over the course of the hearing. References in square brackets in the judgment are to pages within the bundle. In addition to the documents, the Claimants and the Respondents produced discs of video recordings, which were viewed, with the parties present, on the first day of the hearing and reviewed again in chambers.

Preliminary Issue

5. At the start of the hearing, we considered the Respondent's application for a strike out of the claims on grounds of illegality. The respondent submitted that the Claimants had breached section 3 of the Fraud Act 2016 by dishonestly failing to disclose C1's earnings to the relevant authorities in order to claim Tax Credits and Housing Benefit to which they were not entitled.

6. It is for the Respondent to prove illegality. They relied on a letter from HMRC dated 19.8.16 relating to the Claimants' entitlement to tax credits. In the letter C1's income is declared as nil when, on the respondent's case, C1 commenced employment on 17 August 2016. Whilst the letter postdates the commencement of employment, we accept the Claimants' explanation that the information was provided long before and there is no evidence before us to suggest that at the time it was declared, it was not correct.

7. The Respondent submitted that the Claimants were under an obligation to update the information thereafter. At [103a] is a letter dated 23 May 2017 headed: Final Tax Credit decision for 6/4/16-5/4/17. Within the letter C1's earnings for this period are shown as £3,500. There is no evidence before us that this figure does not include income from the Respondent, in which case, any necessary updating appears to have taken place.

8. The Respondent also relied on a letter to the Claimants from Brighton and Hove City Council (the "Council") dated 25.1.17 suspending their claim for Housing Benefit because of their employment with the Respondent. [106] We were being invited to draw an adverse inference from this but there is no basis to do so. The letter does not suggest at all that the Council is investigating a case of fraud. It simply states that no further payments will be made until they resolve the query regarding the household income and child care costs. The most that can be inferred from that is that there may have been an overpayment of benefits. That is supported by further correspondence in the bundle. [106Z17 & 106Z18]. An overpayment of benefits is a far cry from fraud.

9. There is nothing within these documents from which could safely conclude that there has been non disclosure or, if there has been, that it was done with the intent to defraud. We are not entirely clear from the Respondent's submissions why, if there was fraud, it would oust the Tribunal's jurisdiction to deal with the presented claims. However, it has

not been necessary for us to resolve that issue as there is nothing in the evidence before us from which we could safely conclude either a breach of a statutory duty to disclose or intent to defraud.

10. The application for strike out was refused.

The Issues

11. The issues in this matter are set out paragraphs 12,13,15,16 and 17 of the case management summary of Employment Judge Tsamados, dated 27 March 2017, following a preliminary hearing on 13 February 2017 [65-72]. These shall be referred to more specifically in our conclusions.

The Law

Automatic unfair dismissal

12. Section 104 ERA provides that an employee shall be regarded as unfairly dismissed if the reason, or if more than one, the principal reason for the dismissal is that the employee…..alleged that the employer had infringed a right of his which is a relevant statutory right.

National Minimum Wage

13. Section 1(1) of the National Minimum Wage Act 1998 (NMW) provides that a person who qualifies for the national minimum wage shall be remunerated by his employer in respect of his work in any pay reference period at a rate which is not less than the national minimum wage.

14. Section 10 NMW gives a worker the right to require the employer to produce any relevant records relevant to establishing whether or not the worker has received the minimum wage. Those records must be produced before the end of 14 days of receipt of the request.

Credibility

15. We should say from the outset that as well as the issues referred to above being in dispute, there was little, if any, agreement on the chronology of events. The normal documentation associated with employment i.e. contracts, payslips, policies etc was glaringly absent and apart from a number of audio and CCTV recordings, there was little by way of contemporaneous documentation to assist us. Our findings have therefore been based, in large part, on the relative credibility of the parties.

16. We had significant issues with the credibility of the Respondent who we did not regard, overall, as a witness of truth. His evidence contained glaring inconsistencies, for which the explanation could only be that he was lying. An example of this can be found in the grounds of resistance. The Respondent's reply to the claim was that C2 had never worked for him and he had never met her. In respect of C1, the Respondent contended that he had not worked for him either but had undertaken a one week trial in the last week of September 2016, but was not taken on thereafter because he stole from the till [31-32].

17. Included within the bundle are signed statements from the Respondent and 6 other "witnesses", all asserting that the Claimants had never worked in either of the Respondent's two establishments: Pizza King or Traditional Fish & Chips. (the "Restaurants") [83-92]

18. By the time of this hearing, the Respondent had changed his position and accepted that both Claimants had worked for him, albeit there was still a dispute about the period of employment. When asked to explain why his position had changed in relation to C2, he claimed that he did not recognise her surname because she had called herself Marianna. That explanation was completely dishonest as we were shown some covert video recordings, taken on C2's phone, of meetings between her and the Respondent which showed beyond a doubt that the Respondent knew who C2 was and that she had worked for him, and that he was seized of this knowledge when he responded to the claim. Further, it was C2's evidence that she had previously worked for the Respondent and that it was she who had approached the Respondent and asked him for a job for C1. That accords with video footage we have seen, referred to at paragraph 21 below.

19. In our view, the more likely explanation for the Respondent's change of position is that he became aware of the covert recordings and realised that they told a completely different story. The Respondent was asked about the 6 supporting witness statements, which given his change of position, were completely discredited. Incredibly, he claimed that the 6 individuals had heard about the case and decided to write the statements off their own bat. There were a number of reasons to reject that as an explanation, one being that 2 of the witnesses were related to the Respondent (his wife and his son) and another being that the synergy between the contents of the statements, all of which, apart from one, were signed on the same date, suggested collusion. We do not believe him. Based on the above and other matters, it is our view that the Respondent was prepared to mislead the Tribunal with false evidence in order to win his case. We have therefore treated his testimony with extreme caution.

20. Turning to the Claimants, whilst we had issues over the reliability and credibility of some of their evidence, in particular, C1's, overall, we considered them to be more credible than the Respondent and there was strong circumstantial evidence in support of much of their claims.

Submissions

21. Both parties made oral submissions which we have taken into account.

Findings and Conclusions

Automatic unfair dismissal pursuant to section 104A ERA

22. The Claimants were employed by the Respondent as cashiers/waiting staff at the Respondents' Restaurants. The date of commencement of employment is in dispute. The Claimants say that they both started working for the Respondent on 30 July 2016. The Respondent, on the other hand, contends that C1 started on 17 August 2016 and C2 on 17 September 2016. At page 141 is a print out of a text message sent by C2 on 29 July 2016 to Sam (a manager of the Respondent). In the message she reminds him that she and C1 have not yet received their uniforms. C2 told us that the text was sent the day before they started. We accept that evidence.

23. The Claimants said that they were both dismissed on 8 October 2016 by phone by Dobrian Cornita, one of the Respondent's managers. The Respondent's case was that only C1 was dismissed and that this occurred a few days after 30 September, though he was unable to provide a specific date. He claimed that C2 resigned her position in protest at C1's dismissal.

24. We find that both claimants were dismissed. On one of the video recordings provided by the claimants, C2 asks the Respondent whether she was dismissed because of C1's alleged theft. The Respondent does not deny dismissing C2 but says: "*I trusted you, I took your word and employed him. He has given you a bad name".* That suggests to us that she was also dismissed.

25. We also find that the dismissals both took place on 8 October 2016. Although the ET1 refers to Saturday, 7 October, the Saturday was in fact the 8 October and the 8 October is the date given in C2's witness statement. We did not hear from Dobrian Cornita, the manager said to have carried out the dismissals by phone. There is a statement in the bundle purportedly from him in which he claims never to have met either of the claimants but this is one of the discredited statements referred to at paragraph 17 above so we place no reliance upon it.

26. Turning to the reason for dismissal. The claimants contend that they were dismissed because they asserted a statutory right to be paid the national minimum wage. C2 told us that at the start of her employment, she was paid £5.50 per hour and asked the Respondent for the national minimum wage – at the time £7.20 per hour. She said that after 2 weeks, her hourly rate was increased to £6 and she believed this to be a net figure because she was told by the Respondent that £1.20 had been deducted for tax and that the tax was because it was her second job. C1's evidence was that when he started, he was initially paid £5 per hour, but he asked for a 50p per hour increase because C2 was earning more than him. He said that his pay increased to £5.50 two weeks later (around the same time that C2 rate increased to £6)

27. The Respondent's position was that he paid both Claimant's the national minimum wage. I address this dispute below.

28. C2 told us that she was not confident that the deductions were being properly accounted for with the tax authorities and so asked the Respondent for contracts and payslips, so that she could check for herself.

29. In her statement, C2 claims that on 6 October 2016, she made 2 calls to the Respondent's mobile during which she requested to be paid the minimum wage and that because of that request, she and C1 were dismissed. We have seen C2's phone record of 2 calls on 6 October to the Respondent's mobile. The first was made at 17.56 and lasted for 1 minute and 30 seconds, and the second was made at 17.59 lasting for a minute and 12 seconds. The Respondent contends that he did not speak to C2 on that day but that she left a voicemail message. Given the length of the calls and the absence of any evidence from C2 as to the Respondent's reply, we accept that they did not speak on that occasion and that C2 left a voicemail message.

30. In terms of the contents of the voicemail, we reject the Respondent's claim that the message was that C1 and C2 were not coming back to work at the shop anymore. The Respondent was at the same time saying that C1's dismissal had already taken place,

which we have found not to be the case, and was inferring that C2 resigned in protest. However, we have found that she too was dismissed.

31. Equally, we do not accept C2's claim that she requested the national minimum wage in the message as this is inconsistent with her evidence that her understanding was that she was receiving it net of tax. Also, when asked by the panel whether she had repeated her request for the national minimum wage between the initial request and C1's dismissal, she replied "No."

32. It appears from other evidence given by C2 that the trigger for the voicemail message was the fact that when C1 received his wages on 5 October, £2.50 had been deducted because he had given away chips to a homeless person. C2 said that she called the Respondent on the 6 October to remonstrate about the deduction and at the same time complained that they had been waiting for their contracts for 2 months. We consider this more likely content of the voicemail message rather than any assertion for the national minimum wage.

33. It is the Respondent's case that C1 was dismissed for stealing takings from the till. That was what the Claimants say they were told by Dobrian Cornita during the dismissal phone call on the 8 October, referred to above. It is also what the Respondent told C2 on the two occasions she visited him at the shop post-dismissal. We know this because we have watched C2's covert recordings of those meetings.

34. The Respondent has CCTV in both shops, covering the counter and till area. This is operated by a third party contractor though the Respondent is able to view the footage via the internet. Part of C1's role was to cash up the day's takings at the end of the shift and place them in an envelope (He was not required to count them). The Respondent says that in early October 16', he was alerted by the CCTV contractor that C1 had taken money from the till on the 30 September 16'. A review of footage on other dates was undertaken, which the Respondent contends also showed the Claimant stealing.

35. During the course of the hearing, we viewed CCTV footage of C1 cashing up the day's takings on 18 separate occasions between 17 August and 30 September 2016. It is alleged that on each of those occasions the Claimant stole money from the till though at the time of dismissal, the 26, and 30 of September seemed to be the dates relied upon at the time.

36. We have viewed the footage carefully and whilst not conclusive on many of the dates, C1's body language and slight of hand suggests that he is putting some till money aside rather than placing it in the envelope. This is most obvious from the footage of the Fish and Chip shop of 26 and 30 September. When C2 was shown the 26 and 30 September footage on 14 October 2016, her response was that C1 must be taking his tips. Implicit from that reply is that C1 did put money aside but was entitled to. C1 admitted in evidence that he took money from the till on 26 and 30 September and also claimed that they were his tips. However, the Respondent contended that till money belonged to the business and that employees were not allowed to keep tips without permission.

37. During his evidence, the Claimant told us that when he started at the Pizza restaurant, he was told that he was not allowed to keep tips and that the money should be put in the till as it belonged to the business. He said that he only started taking tips when he worked at the Fish and Chip shop because a colleague of his, Stephan was doing so as well (not necessarily with authorisation). However, the Claimant was not given

permission to do so from the Respondent and he was unable to explain why the situation at the Fish and Chip shop should be any different from the Pizza restaurant. We therefore accept the Respondent's evidence that employees were not entitled to keep tips. It follows that the money taken from the till by C1 on 26 and 30 September was without authorisation.

38. We therefore find that the Respondent held a genuine belief that C1 was stealing money from the till and we are satisfied that this was the reason for his dismissal. Also, based on our findings at paragraph 21 above, we are satisfied that C2 was dismissed because of her association with C1.

39. The automatic unfair dismissal claim pursuant to section104A of the Employment Rights Act 1996 is therefore dismissed.

Unauthorised deduction from wages

40. We accept the Claimants' evidence relating to their hourly rate, referred to at paragraph 23 above. We do not accept the Respondent's case that this represented the net rate. The Claimants were paid cash in hand and there is no documentary evidence by way of payslips or other that deductions were made at source for tax, even though this is what the Claimants were told.

41. There is a dispute between the parties as to the total hours worked. Both sides produced schedules of hours. The Respondent's schedules cannot be accurate as the dates for C2 commence on 17 September 16' [112a] and those for C1 commence on 17 August 16' [112b] We have found as a fact that they both commenced employment on 30 July 16. We therefore prefer the Claimants' schedule of hours.

42. The Claimants' schedules show that between 30/7/16 -7/8/16, C1 worked a total of 59 hours at £5 per hour and between 1/8/16 and 7/10/16 he worked a total of 342 hours at 5.50 per hour. [112c-f]. C2 worked 49 hours at £5.50 per hour between 30/7/16-7/8/16 and 172 hours at £6 per hour between 12/8/16-25/9/16. [112g-h]

43. As the relevant minimum wage rate at the time was £7.20 per hour, we find that the Claimants were paid less than the minimum wage throughout their employment. Their unlawful deduction of wages claim in this respect is therefore made out.

C1's final week's wages and deposit

44. C1 contends that he did not receive his final week's wages, for the period 3/10/16-7/10/16. During that week he worked 25 hours. [112]. The Respondent refused to pay the wages due on the basis that C1 had stolen from him.

45. At the commencement of employment, the Respondent retained £70 and £100 from the wages of C1 and C2 respectively by way of a deposit. This was to cover any losses such as cash shortages and, in the absence of such losses, was refundable on termination. C2 requested the return of her deposit when she visited the Respondent on 13 October and it was returned the following day. The Respondent refused to return C1s deposit.

46. The Respondent contended that he was entitled to withhold the payments because of the cash shortages arising from the thefts from the Claimant.

47. Sections 17-22 ERA deal with cash shortages and stock deficiency in retail employment. Retail in this context covers the supply of goods and services and so would cover the Claimants' employment. Under these provisions, an employer can make deductions from an employee's wages on account of a cash or stock deficiency arising because of any dishonest or other conduct on the part of the employee. (s.17 ERA).

48. Any such deduction is only permissible if it conforms to the requirements of s.13 ERA. In other words, it must be authorised by statute or by a relevant provision of the worker's contract or the employee must have previously signified in writing his agreement or consent to the deduction. We know in this case that C1 was not provided with any contractual documentation and did not give his prior written agreement to the deduction.

49. Further, section 20 ERA requires an employer to notify the worker in writing of the total liability in respect of cash shortages and to make a formal demand for the payment in writing. There is no evidence before us that the Respondent did either of these. Further, there is no evidence before us as to the amount of the shortages as the Respondent admitted that he did not know how much money was in the till at the start of day.

50. For these reasons, the Respondent is not entitled to deduct the cash shortages, such as they are, from the final weeks wages or the deposit (which in reality is wages in hand). The claim for the final weeks' wages and the deposit is therefore made out.

Notice Pay

51. Both claimants were dismissed without notice. In the case of C1, based on the evidence, we are satisfied that on at least 2 occasions, he took cash from the Respondent's takings, knowing that he was not entitled to do so. That is sufficiently serious to amount to a repudiatory breach of contract and in those circumstances, the Respondent was entitled to dismiss him without notice. C1's claim for notice pay therefore fails.

52. In the case of C2, she was dismissed on account of C1's conduct and not her own. As she was not guilty of any culpable or blameworthy conduct, she was entitled to receive the statutory one week's notice of dismissal. The Respondent therefore breached her contract by failing to give such notice.

Holiday Pay

53. The Respondent admitted that he did not pay the claimants holiday pay throughout their employment. Their leave year would have commenced on 30 July 2016. By the date of termination they had worked for 10 weeks. They would therefore have been entitled to payment for holiday that had accrued during that time, on termination. Because their hours were variable, the entitlement is best calculated by reference to hours.

54. In the case of C1, he worked a total of 401 hours over 10 weeks so his average weekly hours were 40 per week. His holiday entitlement would therefore be: 5.6 x 40 hours x 10/52 = 43 hours holiday.

55. In the case of C2 she worked a total of 221 hours over 10 weeks, making her average weekly hours 22. Her holiday entitlement is 5.6 weeks x 22 hrs x 10/52 = 24 hrs holiday.

Judgment

56. The unanimous judgment of the Tribunal is that:

    a. The automatic unfair dismissal claim fails.
    b. The unlawful deduction of wages claim in respect of non payment of the national minimum wage succeeds in respect of C1 and C2.
    c. The unlawful deduction of wages claim in respect of C1's final weeks' wages and deposit succeeds
    d. The notice pay claim succeeds in respect of C2 but fails in respect of C1
    e. The holiday pay claims of C1 and C2 succeed.

57. The matter will be listed for a remedy hearing on a date to be advised.

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Employment Judge Balogun
Date: 8 January 2018