



EMPLOYMENT TRIBUNALS

Claimant

Mr Antonio Martinez Lopez

v

Respondent

SIG Trading Limited

Heard at: Watford

On: 5 – 6 February 2018

Before: Employment Judge C Palmer

Members: Mrs J Smith and Ms A Crighton

Appearances

For the Claimant: In person

For the Respondent: Ms T Burton, Counsel.

JUDGMENT

1. The claimant's claim for race discrimination fails and is dismissed.
2. The claimant's claim for breach of contract fails and is dismissed.
3. The claimant's claim for wrongful dismissal and notice pay fails and is dismissed.

REASONS

Claims

1. **By claim forms lodged with the tribunal on 26 December 2016 and 1 February 2017, the claimant brought the following claims:-**
 - 1.1 Breach of contract in failing to pay contractual sick pay.
 - 1.2 Direct race discrimination by not paying contractual sick pay.
 - 1.3 Wrongful dismissal.

2. The respondent defended the claims.

The issues

3. The issues between the parties which were agreed at the case management discussion on 23 June 2017, are as follows:-

3.1 Breach of contract

3.1.1 Whether the respondent failed to pay the claimant company sick pay, in breach of his contract, while he was on sick leave.

3.1.2 The respondent will contend that sick pay is discretionary, and it was properly and fairly paid in the claimant's case.

3.1.3 The claimant contends that another employee on sick leave was treated more favourably in that he had the benefit of 8 months company sick pay, whereas he the claimant had only 3 months.

3.2 Direct race discrimination

3.2.1 The issue is whether the claimant was treated less favourably than an actual or hypothetical comparator, because of his Spanish nationality in that the respondent only gave him sick pay from 20 June 2016 to 1 September 2016 and not during the whole of the time he was on sick leave.

3.2.2 The next issue is whether the claimant's comparator, who is described as English, while on sick leave, received 8 months company sick pay whereas the claimant only benefitted by 3 months.

3.2.3 Can the claimant show less favourable treatment because of race? If so, what is the respondent's explanation?

3.2.4 It is the respondent's case that the comparator is not appropriate and that it exercised its discretion fairly.

3.3 Wrongful dismissal

3.3.1 The issues are whether the respondent had fundamentally breached the contract of employment in terminating the claimant's employment.

3.3.2 If so, was it entitled to dismiss the claimant without notice or with pay in lieu of notice?

3.3.3 Was the claimant paid in lieu of notice of dismissal?

Preliminary issue

4. The claimant said he had submitted a third claim (p77ff). This did not have a tribunal stamp, there was no date of receipt and no ACAS early conciliation certificate number. The claim stated that the claimant was amending the two cases that has been joined and wanted to include all the information sent by email to the defendant and tribunal in the previous cases. The respondent argued that the claimant was trying to go behind Employment Judge Bedeau's order dismissing the claimant's application to amend his claim and so should not be admitted.
5. The claimant's application to amend was refused as it was effectively the same application as had been rejected previously by Employment Judge Bedeau (p72-74).

Evidence

6. We heard evidence from the claimant and from Ms Avdic for the respondent.
7. During the tribunal hearing the claimant was, on several occasions, aggressive, loud and rude, making allegations that the respondent had lied throughout and falsified documents, sometimes calling them "the enemy". The claimant gave contradictory evidence, particularly in relation to what happened at the meeting on 31 October when he was dismissed. Where there was a conflict of evidence, we preferred the evidence of Ms Avdic, whose evidence was consistent and credible.
8. There was a bundle of documents prepared by the respondent and amended to include further documents provided by the claimant. The claimant said that there were a lot of documents that had not been included, that many of the documents had been falsified by the respondent and that he had not received the bundle in time to prepare for the hearing.
9. Having heard evidence from both parties, we do not accept that any of the documents had been falsified or prepared after the event. The respondent had provided the claimant with a hard and soft copy of the bundle in early January 2018. The claimant brought with him the original bundle but appeared to have the additional documents, marked 'a' and 'aa' though had not inserted them in the bundle. Many of the documents he said were missing were in fact in the bundle or alternatively they were not relevant, such as those relating to his benefit claims and his flat hunting.
10. At the beginning of the hearing the claimant was given time to consider what further relevant documents he said were relevant and missing and discuss these with the respondent's counsel and the tribunal. He refused to speak to the respondent's counsel.
11. The claimant asked that documents on his laptop be considered by the tribunal even though there were no hard copies. This application was refused

as it was necessary to have hard copies for the tribunal members, the respondent and the witnesses.

12. On the basis of the evidence and the balance of probabilities we find the following facts.

The facts

Contract of employment

13. The claimant commenced working for the respondent, as an HGV Driver, on 14 March 2016. His salary was £24,000 gross and he worked at the respondent's Ruislip office. The claimant is Spanish by nationality.

14. The claimant was provided with a contract of employment on 9 March 2016, which he signed on 14 March (p133-144). The contract provided the following:-

“Incapacity for work and sickness

Statutory Sick Pay (SSP)

- i SSP will not be paid until staff have provided self certification forms covering all absences due to sickness or injury. SSP is not normally paid for the first three days of absence.
- ii To obtain SSP benefits in excess of one week (7 continuous days including Saturday and Sunday) you must provide medical certification from your doctor or an equivalent authority.

Company Sick Pay Scheme

- iii The Company Sick Pay Scheme is operated on a discretionary basis and payment will only be applied on the direct recommendation of the Director/General Manager as appropriate. Company sick pay is normal 'basic' salary inclusive of statutory sick pay.

To qualify for consideration for payment of company sick pay you are required to comply with clauses i to iii above.

Benefits under the Company Sick Pay Scheme are in accordance with the following scale:

Service of 0-3 months – nil
Service of 3-6 months – 5 days

The above scale of payments represents the maximum payable during any period of twelve consecutive months.”

15. Paragraph 26 (p142) of the claimant's contract (termination of employment) states the following:-

“The period of notice for permanent staff is a minimum of one week by either party during the first year of employment, after one month's service.

On the completion of one year's service the period of notice is extended to four weeks by either party."

16. The claimant's contract of employment did not set out a probationary period but we accept the respondent's evidence that all employees have a probation period of 3 months which can be extended.
17. On 11 July 2016 the claimant's probationary period was extended for a further 3 months until 13 September because of the claimant's attitude/behaviour and job performance (p152). The letter to the claimant stated that failure to achieve the required standards during the review period may result in his contract being terminated.

Accident and Period of sick leave

18. On 20 June 2016 the claimant had an accident when getting out of one of the respondent's lorries, which caused him to suffer ligament damage (p148).
19. The claimant was signed off as unfit to work and he never returned to work except to attend two meetings, one on 25 August 2016 and the second on 31 October 2016 when he was dismissed.
20. The claimant received full company sick pay from 20 June until 1 September after which he received SSP.

Meetings between the claimant and HR

21. Ms Aida Avdic, HR Business Partner, was contacted by branch management to advise about how to manage the claimant as he was sending emails to different people and making a number of accusations.
22. When Ms Avdic reviewed the claimant's file she noticed that the claimant was in receipt of full company sick pay even though, given his length of service, the company's sick pay benefit ought to have expired after 5 days. This meant that the claimant had received salary which was well in excess of his entitlement due to a clerical error.
23. Before Ms Avdic met the claimant, she had no idea of his nationality and she had nothing to do with the extension of the claimant's probationary period.
24. On 16 August 2016 Ms Avdic wrote to the claimant saying that his terms and conditions would normally only provide him with SSP during any period of sickness absence and he had been paid his normal salary from 16 June. The letter said that as from 1 September he would receive SSP only, this being £88.45 per week. Ms Avdic asked for the claimant's consent to approach his GP for a medical report and asked for a meeting to discuss the claimant's condition.
25. On 25 August Ms Avdic met with the claimant and told him that his pay would soon revert to SSP. The claimant was annoyed by this and said he should be

paid in full, asking to see a copy of his contract of employment. Ms Avdic was in Ruislip and said she would email him a copy of the contract on her return to the office, which she did (p160). The claimant alleged that she stole his contract and replaced the page setting out his entitlement to company sick pay so that the contract in the tribunal was not the accurate contract.

26. Throughout the hearing the claimant alleged that the respondent falsified documents, including his contract. We do not accept this, there being no evidence at all of any falsification. We accept the respondent's evidence that there was one standard contract of employment which was held in the head office and the only changes made to the contract related to the employee's name, start date, job and salary.
27. During the meeting the claimant made various allegations against Ms Avdic, some of which were repeated during the tribunal hearing. He accused Ms Avdic and Mr Gary Herrington of being racist towards him because he was foreign, despite the fact that Ms Avdic herself was born in Bosnia. He alleged the police were "like Nazis".
28. Ms Avdic asked again for the claimant's consent to liaise with his GP but this was not provided.
29. On 28 October 2016 Ms Avdic wrote to the claimant confirming that she would like to meet with him on 31 October to discuss his current situation and its impact on his employment with the company. The letter said he was entitled to be accompanied by either work colleague or a trade union representative.
30. On 31 October the claimant met with Ms Avdic and Mr Herrington. We accept Ms Avdic's evidence that the main purpose of the meeting was to discuss the claimant's absence and she did not plan to terminate his employment during the course of the meeting.
31. Ms Avdic also wanted to discuss with the claimant an anonymous report via SIG's confidential whistle blowing line that the claimant had a criminal record following a conviction for violent crime.
32. The meeting was short as soon after it commenced the claimant became extremely angry. At one stage he stood up and shouted at Ms Avdic, calling her "the enemy" and "the Mafia". These allegations were repeated during the tribunal hearing when he referred to the respondents as "the enemies" who used "Mafia" tactics and he repeatedly said that Ms Avdic had lied and falsified documents.
33. Even in submissions the claimant said that lawyers and HR people like Ms Avdic had a mission to save their company as much as possible and used any trickery they could and a lot of people know they use "low level mafia methods". He said that he wished "God give her the same as she is giving to everyone else".
34. The claimant wrote to Ms Avdic on 25 December saying:

“REMEMBER YOU ARE NOT THE ONLY ONE WHO CAN ACT AS MAFIA, MAYBE SOMEDAY SOMEBODY WILL SHOW YOU WHAT PLAY DIRTY IS... I am not threatening you, I am just advising you don't play dirty games, somebody can bite in the eyes of a liar and slanderer and be blind forever.”

35. We accept that the claimant remained very angry at the meeting on 31 October and shouted in an aggressive way causing Ms Avdic to shake and feel intimidated. There were times during the tribunal hearing when the claimant behaved in an aggressive way.
36. Avdic said she was not prepared to tolerate the claimant's behaviour and as a result she was terminating his employment with immediate effect, although he would receive a payment in lieu of notice.
37. The claimant gave conflicting evidence about whether he knew his contract had been terminated at the meeting. At first, he said that he was told he was being terminated because he had a criminal record or was walking around with crutches, and then he said he did not know he had been terminated until December 2016.
38. We accept Ms Avdic's evidence about what happened at the meeting in that she told the claimant that his employment was terminated with immediate effect. She did raise with the claimant the issue of his criminal record but we accept that this had nothing to do with her decision to dismiss which was based on the claimant's inappropriate and aggressive behavior.
39. On 10 November the respondent wrote to the claimant to confirm that he was dismissed because of his angry, aggressive behaviour at the meeting (p176-177). She stated:

“I advised you that I was ending the meeting as I felt intimidated by you and that your employment was being terminated due to your conduct and behaviour.”
40. The letter also referred to an incident on 1 November when Ms Avdic said that she had been told that the claimant had jumped out in front of one of the respondent's vehicles in the middle of the road and started screaming at the driver and accusing him of stealing his phone, and then said that once he was better the claimant would kill him.
41. The letter said that the claimant could appeal, but he did not do so.
42. The claimant said he did not receive this letter as he was homeless. The respondent sent the letter to two addresses. One was the address held on the respondent's file and the other a temporary address the claimant had provided. On 17 October the claimant emailed Ms Avdic to say that he was living in Kensal Green, and on 24 October he gave his address as 639 Harrow Road, Kensal Green, London, NW10 5NU (p174c) which is where the letter was sent as well as the Hayes address.

43. Whether or not the claimant received the letter, he was aware at the meeting on 31 October that he had been dismissed with immediate effect.
44. The claimant was paid one week's notice in accordance with his contract. This is confirmed by his payslip (p262). The claimant did not dispute this payment.

Allegations of race discrimination

45. The claimant alleged that his contractual sick pay was stopped because of his race, being Spanish. He said that he had talked to an English driver who received sick pay for eight months. The claimant could not identify the driver and knew nothing about his circumstances, such as his length of service or the reason he was off sick. When Ms Avdic was told this she investigated whether any individual could be identified and prepared a table setting out the sickness absence records of Ruislip employees (p182a). There was no employee on the list who had taken 8 months sick leave and received payment in full.
46. The claimant also said he could not identify any English drivers who had been treated more favourably in relation to the contractual sick pay as he was the most recent person to be employed.
47. The claimant did not allege at the time that his sick pay was stopped because of his nationality. He did say that he was surprised not to be paid as in Spain they pay you fully during all the time you are sick (p168). In an email dated 31 August 2016 he referred to the fact that his solicitor said it could be discrimination (p171aa).
48. When questioned about why he thought he was not being paid full sick pay, the claimant said it was because of his injury and that the respondent needed to save money. He did not say that it was because of his nationality, being Spanish.

The law

49. S.9 of the Equality Act 2010 defines race as including colour, nationality, ethnic or national origins.
50. Direct discrimination under s13 of the Equality Act 2010 is where:

“(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.”

51. Under s.39 of the Equality Act 2010:

“(2) an employer (A) must not discriminate against an employee of A's (B)–

....

- (c) by dismissing B;
- (d) or by subjecting B to any other detriment.”

52. S.23 of the Employment Act states that:

“(1) On a comparison of cases there must be no material difference between the circumstances relating to each case.”

53. Like must be compared with like. The circumstances do not need to be identical but the circumstances which are relevant to the claimant’s treatment must be the same or nearly the same for the claimant and the comparator.

54. Other than the protected characteristic all characteristics of the complainant which are relevant to the way his case was dealt with must be found also in the comparator (see MacDonald v Ministry of Defence [2003] ICR 937.

55. It is a question of fact for the tribunal as to whether an employee has been treated less favourably than a comparator because of a protected characteristic. The fact that the employee believes that he has been treated less favourably does not in itself establish less favourable treatment.

56. Direct discrimination occurs where there is less favourable treatment “because of” an employee’s protected characteristic. The protected characteristic does not need to be the sole reason for the treatment (*O’Neill v Governors of St Thomas More Roman Catholic Voluntarily Aided Upper school* [1997] ICR 33. Racial grounds must be a cause, an activating cause, a substantial and effective cause, a substantial reason, an important factor.

57. Where the reason for the less favourable treatment is not immediately apparent, the tribunal must consider the mental processes, conscious or subconscious, of the alleged discriminator to discover what facts operated on his mind at the time.

58. S.136 of the Equality Act 2010 governs the burden of proof provisions in discrimination cases. The employee must show a prima facie case from which the tribunal could conclude, in the absence of any other explanation that an employer has committed an act of discrimination, unless the employer can show that it did not discriminate.

Breach of contract and wrongful dismissal

59. These claims are based on the claimant’s contract of employment which set out the provisions for paid sick pay and notice of termination.

Conclusions

Breach of contract in relation to sick pay

60. The claim for breach of contract is dismissed.

61. The contract of employment provides that the company sick pay scheme is discretionary. The maximum sick pay for those employed between 3 and 6 months is 5 days which is the maximum that should have been paid to the claimant if discretion has been exercised in his favour. The claimant was fortunate to benefit from a clerical error whereby he was paid for a much longer period. This was rectified when Ms Avdic discovered the mistake.

Claim of race discrimination

62. The claim for race discrimination is dismissed. The claimant has not shown a prima facie case of discrimination, nor indeed provided any credible evidence that he had been treated less favourably on grounds of his nationality. This is for the following reasons.

63. First, the respondent paid the claimant his entitlement to sick pay under his contract of employment and in addition, in error, paid more than this. He received full sick pay from the date of his accident (20 June) to 1 September 2016.

64. We do not accept that the contract in the bundle had been falsified, as alleged. The respondent had implemented their sick pay policy.

65. We note that there was no attempt to recover this overpayment which the respondent could have attempted to do.

66. Second, the claimant has not been able to identify any employee, of any nationality, who was paid more contractual sick pay than prescribed by the standard contract of employment. Payment of sick pay is also discretionary so depends on the individual circumstances.

67. The claimant said he had spoken to an employee who had received 8 months sick pay but could not identify him. Even if this were true, there was no evidence that the employee was a proper comparator in that his circumstances (including length of service) were the same or similar to that of the claimant.

68. Third, the claimant did not allege he had suffered race discrimination at the time his contractual sick pay was stopped. The first time he mentioned race discrimination was his email of 31 August 2016 after taking advice from his solicitor.

69. Fourth, we accept Ms Avdic's evidence that she did not know the claimant's nationality until she met him. The decision to stop the claimant's sick pay was made by 16 August (p156) soon after Ms Avdic found out the mistake and before meeting the claimant. We accept her evidence that the only reason she stopped the sick pay was because the claimant had no entitlement to it under his contract.

70. In conclusion, there was no evidence of race discrimination so the burden does not shift to the respondent. The evidence supported the respondent's position that the action they took was based on the claimant's contract of employment. They had in fact been more generous to the claimant in relation to his sick pay, even though this was an error.

Notice pay

71. The claimant's claim for notice pay is dismissed.

72. The claimant was paid one week's notice which was in accordance with his contract of employment.

73. In conclusion, the claimant's claims are dismissed.

Employment Judge C Palmer

Date: ...5/3/18.....

Sent to the parties on:

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For the Tribunal Office