mf

EMPLOYMENT TRIBUNALS

Claimant: **Mr J Sylvester**

Respondent: **Passion 8 Caterers**

Heard at: **East London Hearing Centre**

On: **5-7 September 2018**

Before: **Employment Judge A Ross**

Members: **Mr R Blanco**
Mr T Brown

Representation

Claimant: Mrs L Sylvester (Wife)

Respondent: Mr M Clarke (Managing Director)

JUDGMENT

The unanimous judgment of the Employment Tribunal is that:-

1. **The complaints of breach of contract, direct discrimination and holiday pay under the Working Time Regulations are dismissed on withdrawal by the Claimant.**

2. **The complaint of direct discrimination is not upheld.**

3. **The Claim is dismissed.**

REASONS

Complaints and Issues

1. Having complied with the Early Conciliation provisions, the Claimant presented a Claim on 24 March 2018.

2. At the commencement of this hearing, the complaints remaining for determination by this Tribunal were:

   2.1. Direct sex discrimination;

   2.2. Direct age discrimination;

   2.3. Breach of Contract;

   2.4. Holiday pay.

3. At the start of the hearing, the Tribunal produced a draft list of issues, which was provided to the parties on the first day. The parties were invited to amend or add to the list, but no such amendment was sought. Having pre-read the evidence, the Tribunal refined the list of issues, and a further draft was produced and provided to the parties. It was explained that it was a tool for the parties and the Tribunal, and no application to amend it was made.

4. In the event, because the Claimant withdrew complaints during the course of the hearing, it was only necessary for this Tribunal to determine the issues relevant to direct sex discrimination. The relevant issues were, therefore, those listed at paragraphs 7-10 of the list given to the parties, which is at Appendix A to this set of Reasons.

The parties

5. At this hearing, as at the Preliminary Hearing, the Claimant was represented by his wife.

6. The Claimant has dyslexia and it was clear from how he took the oath that this impairment had a substantial adverse effect on his ability to read. The Tribunal was mindful of this, and offered to make any adjustment that the Claimant might require when giving evidence, including by proposing that any documents or texts that he did not understand could be read to him. In the event, he sought no adjustment nor asked for documents to be read to him.

7. The Respondent was represented by Mr. Clarke, its managing director and owner of the business. He described himself as a chef who had started his own company. He did not claim to understand the administrative or payroll side of his company.

8. The documents suggested that there was a strained relationship, particularly between Mrs. Sylvester and Mr. Clarke. This did not affect the hearing, during which the parties were courteous, to their credit.

Case Management & events during the hearing

9. The parties had failed to co-operate in the preparation of this case. This wasted more than an entire day of the hearing. The fact that the parties were not represented by lawyers was no excuse; the Tribunal has many lay parties who comply with directions.

10. The parties had failed to agree a bundle of documents. There did not seem to be much excuse, save that they had fallen out. It transpired on the first morning that neither party had the bundle of the other party.

11. Therefore, the Tribunal had 3 bundles:

    C1: Claimant's bundle (which we encouraged the parties to refer to, for ease)
    R1 and R2: The Respondent's bundle, with its witness statements in R2.

12. Moreover, insufficient copies were produced. To save time, avoid delay, and further the overriding objective, copies were made by the Tribunal staff.

13. Further, on the first day, it transpired that the Respondent's main witness, Mr. Clarke, had failed to make or serve a witness statement. Therefore, the case was adjourned at about 13:30 on the first day to ensure fairness to the parties in giving them a chance to read documents and to enable a witness statement for Mr. Clarke to be produced, so that the Respondent's case could be put in evidence and the Claimant would know exactly what it was.

14. In addition, on the first morning, preliminary case management points were addressed.

15. First, the Claimant applied to amend the Claim to include a disability discrimination complaint and an "unlawful victimisation" claim. At the request of the Tribunal, during our pre-reading, the Claimant was requested to prepare a draft amendment in writing.

16. This application to amend was refused for reasons given at the time.

17. Secondly, the Tribunal raised the fact that some correspondence (pages 51, 54 of C1) between the parties about employment matters were marked "without prejudice", although they did not seem to attract that label from their content. Mr. Clarke agreed that these were admissible and should remain in evidence.

18. Thirdly, the Respondent pointed out that the Claimant's bundle contained correspondence to him from his solicitor. Mrs. Sylvester stated these were sent during disclosure to the Claimant; the Respondent asked to check this, so this matter went over to the second morning of the hearing.

19. On the second morning, the parties were still not ready to commence. The Respondent renewed the application to exclude pages 47 and 43 of C1 on the grounds of legal professional privilege. This was opposed. The Tribunal decided, for reasons given at the time, that the documents should be excluded. In short, given the poor level of preparation in general, we concluded that it was likely that these were disclosed by the Respondent in error.

20. Mrs. Sylvester produced further documents concerning the issue of whether there was a transfer of an undertaking within the Transfer of Undertakings (Protection of Employment) Regulations 2006, including communication from the Insolvency Service and details of the payments made to the Claimant.

21. Mr. Clarke produced his witness statement plus a further section of it, which had not been served or filed, plus further documents, which had not been served. The case was put back again so this material could be read.

22. All these documents were added to the bundles – either R2 or C1 – as appropriate.

23. It is important to record that neither party complained of any unfairness in the procedure adopted and both parties were given sufficient time to read any documentation. Neither party asked for more time. It is to be noted that we did not hear Mr. Clarke's evidence until the third morning.

24. During cross-examination of Mr. Clarke, Mrs. Sylvester stated that the Claimant was withdrawing the complaint of direct age discrimination and the claim for notice pay. On our enquiry, the Claimant expressly confirmed these were his instructions. The Tribunal adjourned the hearing to enable the Claimant to consider his position after this, because it appeared to the Tribunal that the breach of contract claim was being withdrawn – notice pay being the only issue identified at the Preliminary Hearing.

25. After the break (from 11:35 to 12:00), Mrs. Sylvester confirmed that the Claimant was withdrawing the direct age discrimination complaint and the breach of contract claim. The Claimant then also withdrew the holiday pay claim (which was not raised at the Preliminary Hearing and not mentioned in the Claimant's evidence). The Tribunal dismissed these complaints on withdrawal.

The Evidence

26. The Tribunal read witness statements and heard oral evidence from the following witnesses:

    26.1. The Claimant;

    26.2. Mark Clarke, managing director of the Respondent;

    26.3. Sonya McCarthy;

    26.4. Cynthia Hyde.

27. The Tribunal were requested by the Respondent to read the witness statements of Serena Bower (R2, p.136) and Jayne Latchford (R2 p.139). We attached little weight to these statements given that we heard no reason why these witnesses could not give oral evidence.

28. In terms of the oral evidence, where there was any conflict of fact, we preferred the evidence of Mr. Clarke to that of the Claimant. This was for the following reasons.

29. Although we were mindful of the Claimant's dyslexia, we found that he was not a reliable witness on all issues of fact. He presented as confused by some of the evidence and the questioning. He appeared to have difficulty comprehending

some concepts and questions. The Tribunal found that this was not the result of nervousness nor any dishonest intent. We found that it was probably due to a lack of recall and a lack of basic understanding. For example, the Claimant could not recall having received pay in lieu of notice from the Insolvency Service, even when the letter demonstrating this (at page 183 of C1) was put to him.

30. We found that Mr. Clarke was a reliable witness. Although he, too, was giving evidence for the first time, he was able to give fluent evidence including about the catering service at Snaresbrook Crown Court ("the Court") and about his business. The evidence of Mr. Clarke was well-particularised, in contrast to the Claimant's evidence. He was candid in admitting errors that he had made, such as his admission that he had not paid the Claimant because he did not think he had to until a contract was signed. Generally, his evidence was corroborated by other oral evidence.

The Facts

31. The Claimant was employed as a Customer Assistant at the canteen facility at the Court from March 2012. He was employed by a series of contractors, but his work and the organisation of the canteen service remained the same up to January 2018.

32. We did not see a copy of the Claimant's statement of terms and conditions as at 7 January 2018. We inferred from the document at page 22 of C1, his letter of appointment with his former employer, that, although the Claimant's main place of work was at the Court building, there must have been some form of mobility clause in his contract (or else the letter had no need to use the words "*main place of work*").

33. The Claimant gave no evidence as to what his contractual terms were at 7 January 2018, save that his place of work was at the Court. Mr. Clarke stated that the term in the Respondent's standard terms (at paragraph 1.2, page 73 of C1) was the same as that in the standard terms of The Servery Limited, the Claimant's former employer. Further, Ms. Hyde, also a Customer Assistant, explained that when employed by Servery Ltd she would be asked to cover roles at other courts, which sometimes she did.

34. We accepted the Respondent's evidence on this issue and found that the Claimant's terms and conditions with his former employer included a term the same as or to the same effect as paragraph 1.2 of the standard term of the Respondent's employment contracts, shown at page 73 of C1, in the fixed term contract of Jayne Latchford, who was also a Customer Assistant at the Court engaged in the canteen service.

35. Immediately prior to January 2018, the canteen service was provided by The Servery Limited. The service was provided to five separate canteen areas: for the judges, for Jury 1, for Jury 2, for advocates and for the Public.

36. On 7 January 2018, the Claimant and other colleagues employed by the Servery

Limited at the Court received a text from a director, informing them not to go into work because of liquidation (although, in fact, the Servery Limited did not go into liquidation until 24 January 2018, see C1, p.41)

37. No copy of this message was in the evidence. The Tribunal found that the message did not state that the employees were dismissed. The Claimant inferred from it that it meant that they should not come into work on any further days, and that it meant that there was "no more job for us" as he put it. This was probably because the Servery Limited had not paid him or his colleagues since the end of November 2017 and because, when he attended the Court on 9 January 2018, there was no sign of the Servery Limited operating the canteen and the cash tills had been removed.

38. We concluded that the text message from The Servery Limited coupled with the non-payment of wages, and the statement that there would be no further work, amounted to a repudiatory breach. This was accepted by the Claimant on or about 9 January 2018, which is the date specified on the P45 of both the Claimant and Ms. Latchford (see p.149 of R2 and p.85 of C1).

39. However, the Claimant and colleagues attended the Court on 9 January 2018.

40. They found customers waiting to be served; so they served them. The chef called Mr. Clarke, a former director of The Servery Ltd and known to the staff.

41. The Respondent's business was, at that point, an outside catering business. It provided catering for events like weddings. The food was prepared at its kitchen in Walthamstow, then taken to the event, rather than being prepared on site.

42. On 9 January, Mr. Clarke was requested by the Court manager at about 10:35am to provide the canteen service on an urgent basis for that day for the jurors (who could not leave site). This request was made because their caterer (The Servery Limited) had not turned up.

43. Mr. Clarke attended, providing hot food, prepared and cooked off site, for the jurors at Court, and supplied drinks. He met the staff including the Claimant, whom he knew by sight from his time as a former director of The Servery Ltd, albeit he had stopped that role more than two years earlier and had not line managed these employees. He wished to assist staff and take a business opportunity.

44. From 9 January 2018 until about 29 January 2018, the service provided was purely for the jurors. These were the essential customers, because they could not leave the building.

45. On 9 January, the Claimant and colleagues, including Jane Latchford, were present at a staff meeting held by Mr. Clarke. He said he would provide food and cash until he found out what was happening. We find that Mr. Clarke did not state that he would pay cash, and that the Claimant had misunderstood or mis-remembered this meeting. At that meeting, Mr. Clarke had advanced cash – a "sub" – to Ms. Latchford, because she was desperate to pay her rent; he

was shocked to find staff had not been paid in December 2017.

46. At some point after 9 January, there was a second meeting where the person responsible for the Respondent's payroll function attended and explained to the Claimant and his colleagues that they would be paid at the end of the month and how they would be paid.

47. On 12 January, there was a further staff meeting. By then, Mr. Clarke had a clearer idea of what the Court management wanted from the Respondent, namely an interim service until completion of a tendering process for a new contract for the canteen service. Mr. Clarke explained this to all staff, explaining that he could only offer a temporary contract with the Respondent because he did not know if the Respondent would be providing the interim service, because he did not know if a price could be agreed with the Court. He would not provide the service unless a fixed price was agreed (which subsequently was agreed).

48. After this meeting, Mr. Clarke did not call all staff members into the office individually.

49. The Claimant then asked to see Mr. Clarke in the office at the Court. Mr. Clarke offered him a standard Passion 8 contract, for outside catering.

50. In this one-to-one meeting, Mr. Clarke did not tell the Claimant that he would go to work in Walthamstow on Monday. We found Mr. Clarke was honest and reliable in his evidence about that meeting, and there was no evidence that he was unreasonable or unkind to any employee, whether on the issue of place of work, or at all. We find it most likely that the Claimant genuinely misunderstood or was confused about what was said to him at the meeting, and that after the meeting he believed he had been told that he would be transferring to work in Walthamstow. This confusion or misunderstanding may have been linked to his previous grievance against the Servery Limited, when it tried to exercise the mobility clause in his contract. We find it most likely that Mr. Clarke had told him that he could be asked to work somewhere other than the Court.

51. On 12 January, at the one-to-one meeting, Mr. Clarke asked the Claimant to attend his office on Sunday 14th January to sign the Respondent's standard contract. The Claimant did not attend.

52. We did not accept the Claimant's evidence that Mr. Clarke did not want him to work at the Court. There was no reason for Mr. Clarke to want this. Mr. Clarke's evidence is corroborated by the draft contract which was sent to him on 26 January 2018, which had Snaresbrook Crown Court as his place of work. As explained below, this was in the form of that at p.73 of C1.

53. The Claimant did not attend work from 15 to 29 January 2018. This was because he was very unhappy, not because he had not been paid for working from 9 to 12 January, but because he believed the Respondent required him to re-locate to Walthamstow.

54. The Claimant had child-care responsibilities. He took his child to school and

collected her after school. Prior to January 2018, he had never worked at another site whilst working as a Customer Assistant based at the Court. He believed that re-locating him to Walthamstow would interfere with those child-care responsibilities.

55. On 15 January, the Claimant wrote to Respondent. We find this letter was drafted by the Claimant's wife (page 39 of C1). This is because the letter refers to "bank worker" and the "TUPE Regs"; because from seeing the Claimant give evidence, we found it most unlikely that he would have known or used such terms. We infer that this letter was written on the Claimant's behalf, but it is unlikely that he had much input into it, or, if he did, that he recalled properly or understood properly what had been discussed on 12 January 2018.

56. The Claimant did not resign in this letter as alleged in his witness statement. The letter alleged Mr. Clarke dismissed him on 12 January 2018, but we heard and saw no evidence to support that allegation. We found that the Claimant was not dismissed and did not resign at the one-to-one meeting on 12 January 2018. We preferred Mr. Clarke's evidence that neither resignation nor dismissal by him took place on that date. We prefer the Respondent's account of that meeting and find that the events are accurately described in the correspondence from the Respondent at page 134.

57. On 26 January 2018, Mr Clarke sent the Claimant a letter dated 22 January 2018, offering to transfer his employment contract to the Respondent and that he would continue to be based at the Court. It stated the Claimant would be paid at end of month, with payment of his salary being brought in line with standard payroll procedures of the Respondent.

58. It is likely that the draft contract which accompanied the letter dated 22 January 2018 was the same as the three-month Fixed Term contract offered to and accepted by Ms. Latchford, which is at page 73 of C1. This was offered to all former Servery Limited staff based at the Court. It was offered for three months because, shortly after the emergency provision of canteen services by the Respondent, the Court management and the Respondent had agreed a contract for the provision of canteen services for three months, pending the re-tender of the canteen service contract, which was estimated to take about three months.

59. This Fixed Term contract contains at 1.2 the following clause:

> "*Your normal place of work will initially be Snaresbrook Crown Court, 75 Hollybush Hill, London E11 1QW. You will, if necessary, work at other locations as required by the Company within the United Kingdom or in very unusual circumstances outside of the United Kingdom.*"

60. All staff at the Court accepted this contract with this term, and, as we have found, there was the same or a similar clause in the Servery Ltd standard terms. The exception was Ms. Hyde who was off work sick with a bad back at this point; when she returned (around June 2018), the Respondent had won the contract for the canteen provision at the Court and she entered a permanent contract offered by the Respondent.

61. On 28 January 2018, by email, the Claimant replied that he was happy to return to work on 29 January. He stated his usual hours were 9am to 3pm due to the need to take his daughter to school, and to collect her from school.

62. The Claimant arrived at work on 29 January 2018.

63. On 30 January, Mr. Clarke sent a further letter to the Claimant (page 54 of C1). It offered him two options in terms of contracts. Option 1 was a permanent contract with the Respondent, based on agreed hours and continuous service. This contract reserved the right to place the employee in any of the Respondent's locations, for holiday, sickness and training cover. The letter stated this would be exercised immediately if the Respondent failed to secure the contract for the Court.

64. Option 2 was a Fixed Term contract for three months – which was the offer to the other former Servery Limited staff working at the Court. This was to continue working at the Court pending the tender process for the long-term catering contract. The letter explained that, if not successful in the tender process, the Respondent would not be in a position to renew this contract.

65. The Respondent's offers were made on the basis of the hours sought by the Claimant, highlighted in his e-mail dated 28 January 2018. There was no suggestion in the evidence that the Respondent had ever refused the Claimant's request for the same usual working hours of 9am to 3pm, nor that Mr. Clarke had ever proposed any alteration to those hours.

66. The Claimant's colleagues at the Court had not been offered two options, but only Option 2.

67. The evidence from all the Respondent's witnesses was that it was quite rare to be asked to work anywhere other than the Court either before or after the Respondent began providing services in January 2018. Staff took it in turns if cover was required.

68. From 29 January 2018, the Claimant worked four more days and then did not attend work again.

69. The Respondent did not pay the Claimant for the 29 January to 1 February because he believed that he did not have to, because the Claimant had failed to sign any contract of employment, none having been agreed.

70. We accepted the Respondent's evidence that the Claimant did not raise any complaint about his working hours and his child care duties with Mr. Clarke at the meeting on 12 January 2018 or thereafter.

The Law

Direct discrimination

71. Section 13 EA 2010 provides:

> "A person (A) treats another person (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

72. The required comparison must be by reference to circumstances. Section 23(1) provides:

> "On a comparison of cases for the purposes of section 13,14 or 19 there must be no material difference between the circumstances relating to each case."

73. In *Shamoon*, at 9-11, Lord Nicholls gave guidance as to how an employment tribunal may approach a complaint of direct discrimination and explained that it was sometimes unnecessary to identify a comparator:

> "…employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will usually be no difficulty in deciding whether the treatment, afforded to the Claimant on the proscribed ground, was less favourable than was or would have been afforded to others."

74. It is incumbent on a tribunal which seeks to infer (or indeed to decline to infer) discrimination from the surrounding facts to set out in some detail what these relevant factors are: see the observations of Sedley LJ in *Anya v University of Oxford* [2001] EWCA Civ. 405, [2001] IRLR 377 especially paragraph 10.

Burden of proof provisions

75. We reminded ourselves of the reversal of the burden of proof provisions within section 136(2) EA 2010, as explained in *Igen v Wong* [2005] EWCA Civ. 142 and *Madarassy v Nomura* [2007] ICR 867.

76. Section 136 provides:

> "(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."

77. The proper application of these provisions is set out in the Equality and Human Rights Commission Employment Code 2015 (EHRC Code). According to the Code, 'a claimant alleging that they have experienced an unlawful act must

prove facts from which an employment tribunal could decide or draw an inference that such an act has occurred' – para 15.32. It goes on to explain that where such facts are proved, 'to successfully defend a claim, the respondent will have to prove, on the balance of probabilities, that they did not act unlawfully' – para 15.34.

78. At the first stage, therefore, it is for the Claimant to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondents have committed an act of discrimination which is unlawful or which is to be treated as having been committed against the Claimant.

79. The burden of proof does not pass to the employer simply because the Claimant establishes a difference in status and a difference in treatment. When considering a complaint of direct discrimination, the bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination: *Madarassy v Nomura* [2007] ICR 867 at paragraph 56.

80. It is important not to make too much of the role of the burden of proof provisions at section 136. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they do not apply where the Tribunal is in a position to make positive findings on the evidence one way or the other: *Hewage v Grampian Health Board* [2013] UKSC 37.

81. In the event, although the Tribunal considered section 136 EA 2010, it did not find it necessary to apply it in this case, where positive findings of fact have been made which did not depend on whether the burden of proof had shifted or whether the Respondent had then managed to discharge it.

Conclusions

82. Applying the facts found set out above, and the law outlined in summary above, the Tribunal reached the following conclusions on the remaining issues arising from the complaint of direct sex discrimination.

Issue 7

83. The record of the treatment recorded in the Preliminary Hearing Summary probably involved a minor misunderstanding in this respect: there is no court in Walthamstow and neither party claimed that there was. The hearing proceeded on the basis that the Claimant's case was that he had been required to work at the Respondent's only site in Walthamstow, namely the Town Hall.

84. We concluded that the Claimant was not required to work in Walthamstow. This was never required of him, whether at a meeting on 12 January 2018 (as the Claimant alleged in evidence) nor subsequently. On 30 January, he was given the two options set out above. It is clear that one of those options expressly provided for him to be based at the Court.

85. The Claimant's complaint of direct sex discrimination fails because he has failed

to prove the treatment relied upon.

Issue 8: Less favourable treatment?

86. The Tribunal went on to consider issues 8 – 10, in any event, so that the parties would know its reasoning in full.

87. The Claimant was not treated less favourably than the comparator identified, Jane Latchford. There was no evidence that he was treated less favourably than Jane Latchford or any other employee recruited at the Court. The Claimant, as with Jayne Latchford and all the other employees who worked in the canteen service at the Court and who decided to stay on after the insolvency of The Servery Ltd, was offered a fixed term contract for three months based at the Court.

88. The Tribunal concluded from the evidence that the Claimant was treated more favourably than Ms. Latchford and the other Customer Assistants by:

88.1. The Respondent offering him two options in terms of employment contract, as explained above.

88.2. The Respondent allowing him to work shorter hours each day than those required of the other Customer Assistants recruited at .

Issues 9 - 10

89. Moreover, no inference could be made of a discriminatory reason for the treatment of the Claimant from the surrounding facts. On the contrary, the findings of fact point away from a discriminatory reason for the treatment. In particular:

89.1. The Claimant was favourably treated compared to other staff, as explained above.

89.2. There was no evidence that the Respondent even suggested interference in the Claimant's usual hours of work.

89.3. There was no evidence to suggest that Mr. Clarke acted as he did because of the Claimant's sex. The Tribunal found that Mr. Clarke was acting in an emergency situation at the beginning of January 2018, and the proposals for running the canteen service at the Court only gradually emerged. Mr. Clarke sought to assist staff whom he knew, albeit only in a general sense, and to provide the service as a business opportunity.

89.4. Mr. Clarke offered contracts of employment, in the Respondent's standard form, for three months to facilitate payment of staff and to provide them with a measure of certainty in the interim, pending the re-tender of the contract.

Summary

90. For all the above reasons, the complaint of direct sex discrimination is not upheld. The Claim is dismissed.

Employment Judge A Ross

21 September 2018