EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Mr OE Zolna	**v**	AJ Worldwide Services Limited

Heard at: Reading **On:** 17 September 2018

Before: Employment Judge Milner-Moore
Members: Mr D Sutton and Mr R Clifton

Appearances
For the Claimant: Miss A Trembuay (friend)
For the Respondent: No attendance or representation

JUDGMENT

1. The claims of unlawful deduction from wages and breach of contract succeed.

2. The claims of direct race discrimination and harassment on grounds of race succeed.

3. The claim in respect of unpaid holiday pay was withdrawn and is dismissed upon withdrawal.

4. The Respondent failed to provide the Claimant with a written statement of particulars of employment.

5. The Claimant is awarded and the Respondent is ordered to pay the sum of £17,481 in total:
   5.1. £1,120.00 in relation to unlawful deduction from wages;
   5.2. £400.00 in relation to breach of contract;
   5.3. £1,200.00 in relation to the failure to provide a statement of terms and conditions;
   5.4. £5,161.00 compensation for financial loss flowing from discrimination and £256.00 interest in relation to such sum;
   5.5. £8,500 compensation for injury to feelings and £844.00 interest in relation to such sum.

REASONS

1. This case was listed for a full merits hearing to consider claims and issues as detailed in the case management summary prepared by Employment Judge George on 25 January 2018, save that the claim for holiday pay was withdrawn.

Procedural issues

2. The Respondent's ET3 and grounds of response denied that the claimant was an employee, asserted that he had been dismissed for misconduct (being under the influence of alcohol at work) and not for any discriminatory reason and that dismissal had occurred on 30 May 2017. However, that response was automatically struck out following non-compliance with an Unless Order and the Tribunal therefore proceeded on the basis that the case was to be treated as one in which no response had been entered (Rule 38(3) of the Employment Tribunals Rules of Procedure). The Respondent did not attempt to overturn the order for strike out or request to be heard in relation to matters of remedy.

Evidence

3. We heard evidence from the Claimant who attested to the truth of the statement that he produced in support of his claim. We also heard from the claimant's brother and received a witness statement from a third person who did not attend to give evidence. We received a small bundle of documentary evidence from the Claimant. This bundle included his bank statements, showing payments to him from the Respondent, and copies of exchanges of emails between the Claimant and the Respondent post-dismissal. We also received a document which showed that the Claimant had worked for the Respondent during June, contrary to the Respondent's assertion that the Claimant had been dismissed on 30 May 2017.

Findings of fact

4. The Claimant began work for the Respondent on 17 November 2016 as a delivery driver. He had been told of the vacancy by a friend and was interviewed by Mr Singh and then offered work straight away. He understood himself to be an employee of the Respondent. He was never issued with a written statement of terms and conditions of employment. The Respondent initially promised to issue him with a statement of terms, along with pay slips, but when he pressed to receive these documents, he was told that he was lucky to have a job. He did not subsequently receive any written contract or statement of terms and conditions from the Respondent or indeed any pay slips.

5. Thereafter the Claimant worked only for the Respondent. He usually worked five days a week with occasional overtime. His working day began at 9.30 and continued until he had finished his deliveries. He wore the Respondent's safety clothes, shoes and a high viz jacket and was issued by the Respondent with a pass so that he could collect freight from a secure area at Heathrow Airport. He used the Respondent's van and was

permitted to take it home and make limited private use of it. He had a fuel card so that he could refuel the van at the Respondent's expense. If he wanted to take annual leave, he needed to ask permission so that the Respondent could ensure that there was adequate cover. He received a daily rate of £80 nett and we have seen bank statements for from the beginning of 2017 onwards which bear out that the Claimant generally earned at least £1,500 or £1,600 net a month with occasional additional sums representing payment for overtime worked. That is broadly consistent with his working five days a week each month.

6. On 22 June 2017, the Claimant worked as usual for the entire day but at the end of the day was told that he was going to be dismissed for diesel theft. There had been no investigation and no disciplinary hearing was conducted and the Claimant was offered no opportunity to explain his position. He was told by the Respondent that the theft had been reported to the police but they declined to supply a crime reference number when asked by the Claimant to do so. The Claimant has never been contacted by the police in relation to the alleged theft. When dismissing the Claimant, Mr Singh used offensive language to him saying words to the effect that "Polish people were all alcoholics and thieves and that he should fuck off". The Claimant texted his brother then to say that he had been sacked and when his brother rang him later, the Claimant repeated to him the allegation that he had been dismissed for theft and that he had been subjected to racist language.

7. In subsequent email correspondence with the Claimant, the Respondent repeated the allegation of theft of diesel. However, when filing its response to these proceedings, the Respondent maintained that the Claimant had been dismissed for drunkenness, having been given a warning on 7 February 2017 after allegedly arriving at work under the influence of drink, then a further written warning for the same offence on 18 April before being eventually dismissed for a third occasion of drunkenness on 30 May 2017. Although the Respondent maintained that a written warning was given, no supporting evidence has ever been produced by the Respondent to verify these allegations and they are denied by the Claimant. In subsequent correspondence with the Claimant's representative, the respondent appeared to accept that had an unlawful deduction from wages had been made and that wages were due to the Claimant.

8. The Claimant was not paid for 14 of the days worked between 1 and 22 June, five days of which he took as annual leave and for which he considers he ought to have been paid.

The law

Employment status

9. In assessing whether an individual is an employee (working under a contract of employment) or a worker (providing services under a contract for services), it will be relevant to begin by examining any written contract

between the parties. Looking beyond the terms of the written document, it is established law that certain factors represent the "irreducible minimum" which is invariably required for a contract of employment to exist **(Ready Mixed Concrete v the Minister of Pensions and National Insurance** [1968 2 QB 497). Those factors are: a requirement to provide personal service on the part of the employee, the exercise of control by the employer over the work performed, and mutuality of obligation (an obligation or the employer to offer work and for the employee personally to perform such work). Other relevant factors which may assist in determining whether the relationship is one of employment include: the label accorded to the relationship by the parties, whether the individual bears any financial risk (e.g. because he receives a rate for the job rather than a wage), whether he provides his own equipment, the extent of the individual's integration into the employer's business, whether the individual is free to provide and/or does provide services to others and whether the individual is free to set their own hours and working arrangements and whether the individual has an unrestricted right to send a substitute to perform the services on his behalf if he wishes to do so.

10. Section 230(3) of the Employment Rights Act 1996, defines a worker as someone who

> " has entered in to or works under (or where employment has ceased, worked under)
>
> (a) A contract of employment, or
> (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for any party to the contract his status is not by virtue of the contract that of a client or customer of any professional business undertaking carried on by the individual."

11. In **Byrne Brothers v Baird** the court viewed workers as an intermediate class of persons who, whilst not employees, had a degree of dependence on the employing organization which was similar to that of employee, and who could be distinguished from those who were wholly independent contractors running their own businesses.

> *"Thus the essence of the intended distinction must be between, on the one hand, workers whose degree of dependence is essentially the same as that of employees and, on the other, contractors who have a sufficiently arm's-length and independent position to be treated as being able to look after themselves in the relevant respects.*
>
> *Drawing that distinction in any particular case will involve all or most of the same considerations as arise in drawing the distinction between a contract of service and a contract for services—but with the boundary pushed further in the putative worker's favour. It may, for example, be relevant to assess the degree of control exercised by the putative employer, the exclusivity of the engagement and its*

typical duration, the method of payment, what equipment the putative worker supplies, the level of risk undertaken, etc. The basic effect of limb (b) is, so to speak, to lower the passmark, so that cases which failed to reach the mark necessary to qualify for protection as employees might nevertheless do so as workers.".

Deduction from wages and breach of contract

12. Section 13 of the Employment Rights Act provides the employer shall not make a deduction from wages of a worker unless one of the exceptions listed at section 13 (1) (a) or (b) or Section 14 applies. A deduction is defined as occurring whenever the total amount of wages paid to a worker is less than the amount properly payable.

13. Under section 86 of the Employment Rights Act, employees with less than two years' service are entitled to a minimum of one weeks' notice save where the conduct of the employee would warrant summary dismissal.

Race discrimination

14. Section 39(2) of the Equality Act 2010 states that an employer must not discriminate against an employee by dismissing him or subjecting him to a detriment. Employment for the purposes of the relevant part of the Equality Act covers both employees engaged under a contract of employment and workers who have a "contract personally to do work" (Section 83(2) Equality Act 2010.)

15. Section 13 of the Equality Act provides that direct discrimination occurs where, because of a protected characteristic such as race or nationality, A treats B less favourably than A treats or would treat others.

16. Section 26 of the Equality Act defines harassment as unwanted conduct which is related to a protected characteristic and which has the purpose or effect of violating dignity or creating an intimidating, hostile, degrading, etc workplace. In deciding whether or not conduct has such an effect a Tribunal must take into account the perception of the Claimant, the circumstances of the case and must assess whether it is reasonable for the conduct to have such effect.

17. Section 136 of the Equality Act deals with the question of burden of proof. If there are facts from which the Tribunal could conclude (absent any proper explanation) that discrimination has occurred, then the burden shifts to the Respondent to show a non-discriminatory explanation. It is not sufficient for a Claimant merely to point to less favourable treatment to shift the burden. There must be something more.

Conclusions

Employment status

18. We have considered whether the Claimant was employed as an employee under a contract of service or whether he was a worker employed under a contract for services within the meaning of section 230 (3) of the Employment Rights Act 1996 or whether he was a genuinely self-employed independent contractor engaged in business on his own account.

19. Having had regard to the case of **Ready Mixed Concrete** and the factors described there as representing the "irreducible minimum" for a contract of employment to exist, we have concluded that the Claimant was an employee. Whilst there was no written contract of employment, it was a clear pattern that the Claimant worked for at least five days a week for the Respondent as a delivery driver and we find that there was mutuality of obligation for the Respondent to supply and the Claimant to perform work. If he wanted to take holiday, he needed the employer's permission and he was not required or empowered to provide a substitute – the employer arranged cover. He was subject to control by the Respondent in that he performed work at its direction and in accordance with its rules. He was required to begin at 9.30 and finish only once the deliveries had been complete. He was expected to wear his employer's PPE. Other factors were consistent with employment such as the use of the employer's van and the provision of a Heathrow pass by the Respondent. The Claimant did no work for others and received a fixed daily rate so he was at no financial risk. Throughout he understood himself to be employed.

20. For these reasons, we have concluded that the Claimant was an employee but even if we are incorrect about that, we consider that the Claimant plainly had worker status. He was engaged under a contract personally to do work. He was not engaged in business on his own account, he did no work for anyone else and did not own a van in order to provide services as a delivery driver.

Breach of contract

21. It is common ground between the parties that the Claimant was dismissed without notice. The response having been struck out and no evidence having been received from the Respondent, the Respondent has not proved that there were grounds for summary dismissal and accordingly the Claimant is entitled to reasonable notice which we consider to be the statutory minimum of one week.

Unlawful deduction from wages and holiday pay

22. The Claimant's evidence, which we accepted, is that he was underpaid and received no salary for 14 days' work that he did during June, a total sum of £1,120 net. The Respondent appears in subsequent correspondence to have largely conceded that an underpayment was made and we find that a deduction from wages in this amount was indeed made.

23. The claim for holiday pay was withdrawn by the Claimant save insofar as he was seeking repayment of the five days' holiday which he took during June before being dismissed, but that period is already covered by his claim for unlawful deduction from wages.

Harassment

24. We accept the Claimant's evidence that the Respondent used a racial slur when dismissing him. The Claimant was a credible witness and his brother confirms that he reported the matter to him at the time. Such conduct was plainly unwanted and related to a protected characteristic namely the Claimant's nationality. Such comments violated the Claimant's dignity and were humiliating and offensive. It was plainly reasonable for the Claimant to be offended by the comments. We therefore find that the Claimant was subjected to harassment on grounds of his nationality by the Respondent.

Dismissal – direct discrimination

25. It is not disputed that the Claimant was dismissed. This, combined with the use of a racial slur at the point of dismissal, represents sufficient facts from which a tribunal could find discrimination, absent explanation by the Respondent. The burden of proof therefore passes to the Respondent to show a non-discriminatory reason for dismissal. The Respondent has failed to do so in the light of the strike out of its response. It is in any event notable that the accounts provided by the Respondent were contradictory and unreliable. The Claimant was summarily dismissed without investigation or receiving an opportunity to put his case. The Respondent has changed its story regarding the reason for a dismissal from theft to alcohol misuse. There is no evidence that the Respondent ever reported theft to the Police and we found the story of alcohol misuse implausible. It seemed to the Tribunal highly unlikely that a Respondent which was engaged in employing delivery drivers would have taken such a lenient attitude towards the abuse of alcohol by a delivery driver arriving for work in the Respondent's van. In addition, the Respondent's account of the timing of the dismissal is contradicted by the evidence produced by the Claimant which shows that he did indeed undertake work for the Respondent during June. In short, the Respondent having failed to show a non-discriminatory reason for dismissal we conclude that the Claimant was dismissed because of his nationality. The claim therefore succeeds.

Failure to provide a written statement of terms and conditions

26. In addition, we have found that the Claimant was not issued with a statement of terms and conditions of employment despite having made requests for such a document. Therefore, pursuant to section 38 of the Employment Act 2002, we consider it just and equitable for the Claimant to receive an additional three weeks' pay in compensation. Whilst the Respondent may have considered that the Claimant was not an employee, the fact is that the Claimant was seeking a written statement of terms and conditions and it was open to the Respondent to clarify the matter and to

issue him with a document confirming his status. It positively refused to do to do so and we therefore think an award of three weeks' pay is just and equitable in all the circumstances.

Remedy

Findings

27. The Claimant sought compensation for financial loss suffered as a result of dismissal in the period June – December 2017. He gave evidence on oath and produced a breakdown showing his wages between June and December 2017 in comparison with his monthly wages of £1,600 per month from the Respondent. We made the following findings in the light of that evidence:

    - During June 2017, he earned £200,
    - during July 2017, he earned £1,210,
    - during August 2017, he earned £870,
    - during September 2017, he earned £870,
    - during October 2017, he earned £573,
    - during November 2017, he earned £95.63, and
    - during December 2017, he earned £1,100.

28. The Claimant had made efforts to get new employment after being dismissed by the Respondent. He had looked on Gumtree and had tried to get jobs through recommendations with friends as well as registering with an agency. Initially, he had managed to get some casual employment with United Businesses and then subsequently with GTS. However, the work for GTS did not pay enough given the hours and resulted in a rate below National Minimum Wage. He also did some temporary work for a sandwich company. However, on a number of occasions, calls had been made to prospective employers by somebody who he believed to be Harvinder Singh suggesting that he had an alcohol problem and should not be employed. This had impacted on his ability to get work and caused him further upset.

29. In December 2017, the Claimant started work with UK Mail and since January 2017, had been working successfully with UK Mail earning £95 a day and around £1,900 a month. His loss of earnings therefore ceased at the end of December 2017. The Claimant had not received any benefits during his periods of unemployment but had been assisted by family and friends. He had not incurred any credit card debts or overdraft fees as a result of having been in lower paid employment.

30. I asked the Claimant to describe the impact that his dismissal had had on him. He said that it had mostly affected his feelings. He had felt very hurt because he had been doing a good job and he felt that he had been "treated like shit" after working hard for the Respondent and that it had

been very unfair. Although the Claimant did not go into a great deal of detail about the impact of the dismissal on his feelings, it was evident that he felt very hurt and indignant at his treatment.

31. I explained the Vento bands which provide the starting point for the Tribunal in considering issues of injury to feelings to the Claimant's representative and asked the Claimant's representative whether she wanted to address us in detail about the appropriate band. She did not have any particular submissions to make but observed that she had found the lack of cooperation from the Respondent in dealing with the proceedings difficult.

Law

32. Under section 124 of the Equality Act 2010, a Tribunal may order a Respondent to pay compensation on the basis on which compensation could be awarded by a County Court, which may include compensation for financial loss and compensation for injury to feelings. The award of compensation is intended to put the Claimant in the position that he would have been in but for the unlawful discrimination. The case of Vento provides guidance to tribunals as to how to approach the assessment of compensation for injury to feelings. Compensation can be awarded by reference to one of three bands and, at the relevant time, the bands were:

- Low: £840 - £8,408 for less serious or isolated instances;
- Medium: £8,408 - £25,225 for more serious instances of discrimination where compensation in the higher band is not appropriate;
- High: £25,225 - £42,043 for those acts of discrimination which are particularly severe or sustained.

33. Compensation for injury to feelings is intended to compensate the Claimant for the injury suffered and not punish the Respondent. In considering the appropriate level, it is relevant to consider the extent of the hurt feelings that have been suffered by the individual in light of the nature of the mistreatment to which they have been subjected. Awards should be set at a level which is appropriate to reflect the public policy aims behind our discrimination legislation and be broadly similar to the awards made in personal injury cases.

Conclusions on remedy

34. In relation to injury to feelings, we have awarded the Claimant the sum of £8,500 having concluded that this represents appropriate compensation for the impact on the Claimant of the mistreatment to which he was subjected (in being summarily dismissed, racially abused and subjected to unsubstantiated allegations of theft and/or drunkenness). Although the Claimant did not address these matters at length in his evidence, it was apparent from the evidence that he gave and the manner in which he gave it that he was very hurt by the way that the Respondent had treated him and upset and aggrieved by the impact on his reputation and on his ability

to get new employment. We concluded that an award of £8,500, at the lower end of the middle band, was appropriate in all the circumstances.

35. We have awarded compensation as follows in relation to the claims advanced and

Unlawful deduction from wages	(in relation to wages owed but not paid during June)	**£1,120.00**
Breach of contract	(one week's notice)	**£400.00**
Failure to provide a statement of terms and conditions	(three weeks' pay)	**£1,200.00**
Financial loss resulting from discriminatory dismissal Calculated as follows: The Claimant suffered a loss of: £280 during June (£1,600 - £1,120 awarded in compensation for unlawful deduction from wages and £200 earned through other employment); £390 during July (£1,600 - £1,120); £730 during August (£1,600- £870); £730 during September (£1,600- £573); £1,027 during October (£1,600-); £1,504 during November (£1,600- £95.63); £500 during December (£1,600- £1,100);		**£5,161.00**
Injury to feelings		**£8,500**
Interest in relation to financial loss – from the mid-point to date of judgment (226 days) at 8% **226/365 x8% x5161.00 = £256.00**		**£256.00**
Interest in relation to Injury to feelings – from date of discrimination to date of judgment (453 days) **453/365 x 8% x £8500 = £844.00**		**£844.00**
Total		**£17,481.00**

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Employment Judge Milner-Moore

Date: …15.11.18……..

Judgment and Reasons

Sent to the parties on: 15.11.18…....

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For the Tribunal Office

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