



EMPLOYMENT TRIBUNALS

Claimant: Mr M F Mann

Respondent: Televue Marketing Limited

Heard at: Leicester **On:** Monday 6 August 2018

Before: Employment Judge Blackwell

Members: Mr K Rose
Mrs L Woodward

Appearances

For the Claimant: Ms U Obaseki, Solicitor

For the Respondent: Mr N Shah, Solicitor

RESERVED JUDGMENT

Mr M F Mann

1. The Complaint of direct race and/or religious discrimination in relation to comments made by Mr Rajendra Mistry pursuant to Section 13 of the Equality Act 2010 succeed.
2. The Complaint of direct race and/or religious discrimination by dismissal fails and is dismissed.
3. The Complaint of unfair dismissal pursuant to Section 94 of the Employment Rights Act 1996 (ERA) is upheld but that it would not be just and equitable for the Claimant to be awarded either a Basic or Compensatory sum.
4. The Complaint of wrongful dismissal also fails and is dismissed.
5. The Complaint of unauthorised deduction from wages in respect of the period 11 July to 27 July 2017 succeeds.
6. The Complaint of a failure to pay compensation for accrued but untaken annual leave fails and is dismissed.
7. The Complaint of a failure to comply with Section 8 of the ERA is dismissed on withdrawal by the Claimant.
8. The Claim of a breach of contract in respect of a failure to pay expenses succeeds in part and the Respondent is ordered to pay to the Claimant:-
 - a) The sum of £88.00.
 - b) The sum of €85.00.

REASONS

1. Ms Obaseki represented the Claimant whom she called to give evidence. Ms Lehane who is also a Claimant gave evidence which was in part on behalf of Mr Mann.

2. Mr Shah represented the Respondents and he called Mr Rajendra Mistry, a Director of the Respondents and Mr Bakul Mistry his brother, the General Manager of the Respondents. There was an agreed bundle of documents and references are to that bundle.

Introduction

3. The cases of Mr Mann and Ms Lehane were heard together and the relevant issues were identified in a case management summary of Employment Judge Camp sent to the parties on 16 July 2018. Mr Mann's complaints were identified in paragraph 6 of that document as follows:

“(i) So called ordinary unfair dismissal under the Employment Rights Act 1996 (ERA).

(ii) Wrongful dismissal, breach of contract by failing to give notice of dismissal.

(iii) Unauthorised deduction from wages – unpaid wages for June/July 2017, in respect of the period immediately before the date of termination of employment (which the Claimants allege was on 5 July 2017 and the Respondents alleges was on 27 July 2017).

(iv) Compensation for accrued but untaken annual leave on the termination of employment.

(v) Failure to provide any or any adequate itemised pay statements in accordance with ERA Section 8.

(vi) Breach of contract by failing to pay expenses.

(vii) Direct race and/or religious discrimination by dismissal and by Mr Rajendra Mistry (allegedly) making the comments set out in paragraph 11a of Mr Mann's further particulars provided under cover of a letter dated 26 March 2018.”

4. Employment Judge Camp also identified in his paragraph 8 the basis of the discrimination claims as follows:

“The basis of the race and religious discrimination claims is not that the Claimants were subjected to unpleasant comments and were dismissed because of a philosophical belief in mixed race partnerships (quotation from the Further Particulars) instead the alleged reason for the treatment is that the Respondent through Messrs Rajendra and Bakul Mistry was prejudiced against Muslims and disapproved of a man from a Muslim and South Asian background being in a relationship with a woman from a Christian and white European background.”

5. The relevant law in determining this complaint is:-

a) Section 13 Equality Act 2010 - Direct discrimination:-

(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.

(8) This section is subject to sections 17(6) and 18(7).

b) Section 136 Equality Act 2010 – Burden of proof:-

(1) This section applies to any proceedings relating to a contravention of this Act.

(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.

6. It seems to us that the logical way to reach decisions on Mr Mann's claims is to first deal with the allegations of discriminatory remarks set out in paragraph 11a of the further particulars. These are found at page 82 and read as follows:

"Rajendra Mistry had multiple conversations with Mr Mann about his relationship. Rajendra Mistry would often say things like:-

1. You shouldn't have got with a white girl.
2. You should never get with a white girl from a council estate.
3. You should have listened to me when I told you to settle down with a nice little Muslim girl and not white girl.
4. Rachael won't be able to cook Asian food and won't look after your mum, she is white and don't know the Asian way.
5. You are going to have force Rachel to convert to Islam."

Mr Rajendra Mistry in evidence denied that such statements were made at all.

7. We begin by saying that we did not find either Mr Mann or Mr Rajendra Mistry to be reliable witnesses. Mr Mann was often vague and on other occasions he gave answers in cross examination which are simply not credible eg he denied any knowledge of the Super Million products notwithstanding he had driven a works van advertising the product on a number of occasions (see 213). In relation to Mr Rajendra Mistry as we will come to later on in this decision we find that he and his brother fabricated a disciplinary process.

8. In cases where there is a direct conflict of evidence between two unreliable witnesses the Tribunal has to place what weight it can on documentary evidence. At page 374 is a birthday card showing Mr Mann's head superimposed upon the body of a suicide bomber. Mr Rajendra Mistry found the card to be appropriate. That evidence together with evidence from Ms Lehane persuades us to the conclusion that there was a culture within the work place, a small work place of some 20 employees, that was prone to religious and racial banter which has not been acceptable in the work place for many years. We believe that both Mistry's regarded that culture as being jocular in nature and neither of them perceive how harmful it can be. The birthday card should have led to disciplinary action against all of those involved but it did not.

9. On balance therefore we accept Mr Mann's evidence that the remarks were made but that they were concentrated at the time when Mr Mann's relationship with Ms Lehane became known within the work place but were repeated later in the employment.

10. In order to assist the parties to come to terms without the cost and delay of a remedy hearing, and we appreciate that we have not heard submissions on the point, but our provisional view is that the element of injury to feelings that Mr Mann would be entitled to recover would be in the region of the middle of the lowest band as set out in the Vento case.

The complaint of dismissal by reason of the protected characteristics of race and/religion

11. Again the relevant law is Section 13 and Section 136 of the Equality Act. We firstly take into account our findings above in relation to the comments of Mr Mistry. Mr Mann's case is that having regard to that prejudice his dismissal was because of direct race and/religious discrimination as is evidenced by those comments which we found to be proven. It seems to us the best approach to deciding whether allegedly discriminatory treatment was "because of" a protected characteristic is to focus on the reason why, in factual terms the employer acted as it did.

12. The employer's case is that it dismissed Mr Mann because it believed that Mr Mann had set up a company known as Hair and Go Limited which was directly competing with 2 of the 3 elements of the Respondent's business, namely Super Million Hair which sold hair building fibres and Pro Impressions which sells salon products. The employer also maintains that Mr Mann had stolen some of its Super Million stock and was relabelling it as Hair and Go Products.

13. We examine the evidence put forward by the Respondents in support of that contention.

14. On 18 June 2017 Mr Bakul Mistry was cleaning a van that was normally used by Mr Mann in preparation for a business journey he was about to make. In that van he found a number of business cards, an example of which we see at page 220 in the name of Hair and Go purporting to be that of "Rachael Mann, Customer Support Manager and giving telephone and e-mail particulars.

15. That caused Mr Rajendra Mistry to begin an investigation and he found, see pages 221 onwards at Companies House a certificate of incorporation of Hair and Go Limited. The sole Director is Mr Mohammed Mann and the sole shareholder is Mr Mohammed Mann. He is also said to be the person with significant control.

16. The investigation also found on ebay products that were similar to those of Super Million and Pro Impression. Mr Mistry decided therefore to do a purchase through a Mr Jordan Thorpe, see 249. At page 250 is a receipt sent to Mr Thorpe in the name of Andre Mann which it is common ground is the name that Mr Mann uses in a business context. Mr Thorpe requested via ebay a tracking number because the product had not arrived. He received a reply 255 which ended "kind regards Ann". Subsequently "Ann" sent the product with a tracking number.

17. The product arrived and we see what the Respondents say is the envelope containing the product at 263 and at 264 a return if undeliverable address showing Ms Lehane's home address.

18. Mr Thorpe was instructed to effect a return of the product which he did again via ebay and that is acknowledged again through ebay at 279. The return address is that of the Claimant Mr Mann.

19. The Respondents assert that the product contained within the Thorpe order is identifiable by a batch number as being a Super Million product. They also assert and it is not in dispute that they are sole distributors for Super Million products in the UK.

20. The Respondents assert that they did a stock check and found that some 300 cans of the Super Million product were missing and they accordingly reported the matter to the Police. Eventually the Police decided not to proceed with any prosecution though it is unclear to us whether they actually interviewed either Mr Mann or Ms Lehane.

21. Other documentary evidence consists of Paypal statements which confirm the Jordan Thorpe payments.

22. Mr Mann's evidence to us is that all of the evidence was fabricated by the Respondents save for that relating to the Companies House, ebay and Paypal documents. In relation to those documents his evidence is that he set up the Hair and Go company as a favour to a friend, a Rakesh Gosai whose ebay account had been suspended. Mr Mann's evidence is that he had nothing to do with the conduct of the Hair and Go business.

23. We accept that it was within the Respondents abilities to fabricate all of the evidence that is not relating to the Companies House records, the ebay records and the Paypal records. In relation to these records Mr Mann's case is that he set up Hair and Go as a favour to an old friend, a Mr Rakesh Gosai whose ebay account has been suspended for reasons which Mr Mann did not pursue. That the Hair and Go business albeit, that it was conducted in Mr Mann's name was carried out without his knowledge and entirely by Mr Gosai. That evidence is simply not credible and we do not accept it. We note that Mr Gosai did not give evidence.

24. Why then did the employer act as it did, notwithstanding Mr Mistry's proven comments? We are satisfied that the dismissal arose because of Mr Mann's conduct. We find that the Mistris were outraged by their perception of Mr Mann's conduct and saw it as a betrayal. Therefore the claim of direct discrimination in relation to the less favourable treatment of dismissal fails.

Unfair dismissal pursuant to Section 94 of the Employment Rights Act

Relevant law

25. The Respondent is required to prove a potentially fair reason falling within Section 98, subsections 1 and 2. The Respondent's case is that this is conduct as we have explained above. Conduct is a potentially fair reason.

26. If such potentially fair reason is proven then it is for us to apply to the dismissal, the statutory test of fairness set out in subsection 4 of Section 98:-

“(4) In any other case where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer):-

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.”

27. In terms of case law we need to apply the test from the well-known case of Burchell namely:-

1. That the employer had a genuine belief in the conduct complained of and;
2. That at the time of the dismissal the employer had reasonable grounds for holding that belief and;
3. That the employer had carried out such investigation as was reasonable in the circumstances of the case.

28. In relation to test 1 the burden of proof lies with the employer as to tests 2 and 3 the burden of proof is neutral and the band of reasonable responses test is to be applied not only to the dismissal itself but also to the conduct of the investigation.

29. For the reasons given above in relation to the alleged discriminatory dismissal we are satisfied that the Respondents had a genuine belief that Mr Mann had set up a company in competition and had stolen stock.

Was the dismissal then fair having regard to the statutory test of fairness?

30. We will deal firstly with the allegations of procedural unfairness. The Respondents' case is that they sent a series of letters to Mr Mann to which he did not respond and they therefore sent a dismissal letter (absent employee) which we see at 211 and 212. They claim that they sent letters on 6 July, 11 July and 17 July which we see respectively at pages 199, 203 and 207. It is common ground that none of these letters was sent by any means where proof of delivery could be obtained. Mr Mann says he did not receive any of these letters.

31. During this period Mr Mann sent an e-mail of 10 July wishing to raise a grievance in relation to his dismissal on 5 July see page 205. There is proof that this e-mail was sent but it was not replied to or otherwise acted upon by the Respondent.

32. We note also that the P45 at page 314 identifies the leaving date as 5 July 2017. This is explained by the Respondents' accountants as a typographical error. However accountants can only act upon the information that they have been given and we note that the P45 is dated 27 July.

33. Mr Mann's case is that he was summoned without notice to a meeting on 5 July, was presented with some evidence including the business card and the Hair and Go company registration and was dismissed on the spot. Ms Lehane gave similar evidence.

34. In our view the Respondents' case is not credible. An employer might well send out one letter to which there is no response without obtaining a proof of delivery but to send out three in similar fashion and indeed the same letters were sent to Ms Lehane at a different address and then not to obtain proof of posting and delivery or delivery by e-mail we cannot accept.

35. Thus we find that there was no proper procedure and the dismissal is unfair on that basis.

36. As to the substance of the dismissal was it fair? Did the employer have reasonable grounds to believe that Mr Mann was operating a competing company? In our view the evidence which we have set out above is in that regard compelling. As to whether Mr Mann was guilty of theft the evidence is less compelling but in our view the employer had reasonable grounds to believe it. Insofar as the investigation is concerned the only criticism which was made was in relation to a failure to review CCTV tape. However we are of the view given the Respondent's description of the open nature of the stock room and the position of the cameras, that it is unlikely that that would have assisted.

37. Ms Obaseki also argued that the dismissal was unfair because there were 3 other employees who were engaged in competition and the Respondent had taken no action against them. Those employees were a Mr Brian Carol, V Vivek and Zoe Smith. In relation to Brian Carol the Respondent's evidence which we accept is that the business he was conducting was the sale of sweets and therefore not in competition. As to V Vivek the business he conducted out with his employment with the Respondents related to his graphic skills and again was not in competition with the Respondents.

Again we accept that evidence. As to Zoe Smith, Mr Bakul Mistry said that when it was drawn to his attention that Ms Smith was selling products that appeared to compete with Pro Impression products he asked her to desist and he believed that she had done so. The evidence in the bundle produced by the Claimants is largely illegible and is not consistent with Mr Mistry's evidence which we accept. Therefore none of the 3 named employees are anywhere near on all fours with Mr Mann.

38. Finally did the decision to dismiss fall within the band of reasonable responses? We have no doubt that it did.

39. The finding of procedural unfairness brings into play both the **Polkey** principle and contributory fault.

40. We prefer to deal with the matter by consideration of contributory fault. The relevant statutory provisions are Section 122, subsection 2 of the Employment Rights Act in relation to the basic award and Section 123, subsection 6 of the same act. In order for there to be a finding of contributory conduct, conduct must be blameworthy and it must have led to the dismissal. There is no doubt in our mind that Mr Mann's conduct was blameworthy and plainly it did lead to his dismissal.

41. We are on the balance of probabilities satisfied that he did set up a competing business and that he did steal stock. In those circumstances it would not be just and equitable either in relation to the basic award or to the compensatory award for Mr Mann to recover any sum. He is however entitled to be paid for the period during which a fair ##### process should have taken place ie 3 weeks beginning on 5 July 2017.

Wrongful dismissal

42. The relevant law is that the employer must prove a repudiatory breach of the contract of employment which he has accepted. In our view there is a clear breach of the term of the contract of employment of paragraph 28, see page 130 and also the covenant at page 135 both of which are terms of the contract of employment. There is thus clearly a breach of an express term going to the root of the contract and which is repudiatory. We find therefore that the employer was entitled to dismiss without payment of notice and Mr Mann's claim for notice pay fails.

Unpaid wages

43. We asked twice for a calculation of the sums claimed and none was provided. However we understand it to be in relation to the period between 11 July 2017 to 27 July 2017. It is common ground that the wages were not paid for that period; the Respondents' case being that Mr Mann failed to respond to requests to come into the office, therefore did not work, and therefore was not entitled to be paid. It follows from our decision above that the effective date of termination for Mr Mann was 5 July 2017 but that he is not entitled to claim compensation for that period arising out of our finding of unfair dismissal, nor is he entitled to notice pay. He is as is said above however entitled to 3 weeks' pay commencing from 5 July 2017 during which a fair process ought to have been carried out.

Unpaid holiday pay

44. Again we asked for a calculation and again none was provided. Mr Mann's evidence was vague and unconvincing. The Respondents' calculation of his entitlement to holiday pay is set out at page 414. Other than to say he didn't think he had taken that amount of holiday he provided no evidence.

45. On that basis we accept the Respondents' calculation which we understand to be based upon records kept. Mr Mann's claim in this regard therefore fails.

Expenses

46. Again we asked for a calculation and again none was provided. Mr Mann's evidence was that he believed that he was owed approximately £400.00. The records of which are all with the Respondent and he has had no access to them since his dismissal. The Respondents say there are no such records.

47. In addition Mr Mann relies on his own records in respect of specific sums.

48. He draws our attention to pages 476 and 477 which appear to be his bank account. An item on page 476 seems to relate to the document at page 518 is a booking at the White House Guest House; the sum is £48.00.

49. The next page is 477 which is a mystery since it does not appear to relate to anything. It clearly relates to expenditure in the Republic of Ireland but Mr Mann gave no evidence about it.

50. The next page he put forward was 511 and appears to show the booking of a hotel room in the sum of £40.00.

51. At 514 is a similar booking, this time in the sum of €45.00 and 516 a further hotel booking, this time in the sum of €40.00.

52. In relation to these claims the Respondents say that legitimate expenses will be paid. They do not say whether these expenses are legitimate or not, they merely point out to the fact that they are a long time ago.

53. In those circumstances we believe Mr Mann is entitled to the sterling sum of £88.00 and to the sum in euros of €85.00.

Employment Judge Blackwell

Date: 16 August 2018

JUDGMENT SENT TO THE PARTIES ON

18 August 2018

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FOR THE TRIBUNAL OFFICE