THE EMPLOYMENT TRIBUNALS

Claimant: **Mr D E Lynch**

Respondent: **Harkers Transport Limited**

Heard at: **North Shields** **On:** **23-25 May 2018**

Before: **Employment Judge AE Pitt**

Members: **Mrs S Mee**
Mr R Dobson

Representation:

Claimant: **In person, assisted by Ms Alderson (daughter)**
Respondent: **Mr A Crammond of Counsel**

JUDGMENT

1. The claimant did not suffer from direct age discrimination.
2. The claimant did not suffer from indirect age discrimination
3. The claimant was not subject of victimisation.
4. The claimant was not wrongfully dismissed
5. The Tribunal does not have jurisdiction to hear a complaint of unfair dismissal
6. The claimant is not entitled to compensation for annual leave.
7. The claimant is entitled to wages from 31st August to a date to be determined

REASONS

1. The claimant, David Edwin Lynch, was born on 9 September 1947 and at the time of these events was 68 years of age. He was employed by the respondent's Harkers Transport Limited from 24 May 2016 until 31 August 2017. He was employed by them as an HGV driver. There is a dispute as to when the contract terminated and as to whether it was a zero hours contract. These issues are dealt with later in the judgment.

2. The Tribunal heard from Mr Lynch on his own behalf, Mr Kevin Harker, Managing Director of the respondent; Mr Barry Bruce, Senior Planner, General Fleet at the respondent: Mr Sam Wilson, Transport Manager. The parties had produced for the Tribunal a hearing bundle which consisted of the pleadings, various documents relating to the respondent's road traffic insurance policies, a contract of employment and correspondence between the parties during the employment.
3. The claimants claims are for age discrimination, both direct and indirect in relation to events occurring through May 2017 until August 2017; claim for victimisation having made a protected act in May 2017;fuinally a claim for compensation for untaken annual leave.

The Issues

4. I am grateful to Mr Crammond who with the claimant spent time discussing and distilling the issues. At the commencement of the hearing the issues were identified as these:

Section 13 Direct Discrimination

1. The protected characteristic is age
2. The less favourable treatment is
3. Not being offered work from 31st August and in effect being dismissed
4. Being told he was finished and couldn't drive on 31st May
5. Failure to check the holding letter from DVLA

Section 19 Indirect Discrimination

1.The PCP was being under 70 years

2. Not being offered work from 31st August

3. Being dismissed on 31st August

4. Being told he was finished and couldn't drive from 31st May

5. Failure to check the holding letter from DVLA September

Section 27 Victimisation

1.Not being offered CPC in September

2.Not speaking to him in the office when he returned to work

Breach of contract

1. Holiday pay
2. Unpaid wages since his dismissal
3. Notice pay
4. Wrongful dismissal – what were the terms of the contract?
5. Was it terminated and if so was it in breach of the contract for notice period

6. if so what damages are due and holiday pay.

8. The claimant's contract entitled him to 28 days holiday, he had taken 10. Was he entitled because he was still employed to take an addition 18?

The Facts

5.1 At the time of these events the claimant was a qualified HGV driver. Prior to being employed by the respondent the claimant was working for an agency; during this employment he had meet Mr Kevin Harker and spoken to him, with regards to regular employment with the respondent. The claimant says, and we accept he was offered work by Mr Harker which the claimant understood was to be regular work with holiday pay, neither of which he received with the agency. Louise Marr who was an administrator at the respondent but from whom we did not hear told the claimant that it would be a regular 55 hours per week. The Tribunal is satisfied that for most of the time the claimant worked for the respondent he worked a 55-hour week. The Tribunal accepts the claimant's evidence on this point because it is unlikely that he would give up his lucrative position with the agency unless it was to be for regular paid work which was stable, and which entitled him to holiday pay.

5.1The Tribunal is also satisfied that the claimant was usually allocated work on a weekly basis at the end of a week's shift. The Tribunal note that on the evidence the claimant was never told that he was on a zero hours contract. The contract of employment which we have seen was handed over for signature a short time after the claimant was employed. The Tribunal was satisfied the claimant would not have accepted a zero hours contract as he required stable work with holiday pay which he would not have on a zero hours contract, and indeed he took a pay cut to accept Mr Harkers offer of employment. The written contract is ambiguous. It is silent as to the actual hours to be worked by the claimant, it does not make it clear that it is a zero hours contract there is no clause in it which says that the respondent does not have to offer work and the claimant does not have to accept it. In addition, there are clauses which the Tribunal considers to be inconsistent with a zero hours contract. In particular; Clause 9, is a lay off clause for when there isn't regular work. Such a clause would be unnecessary in a zero hours contract. Clause 16 makes a specific reference to not working for another employee without the permission of the respondents. That is inconsistent with a contract for zero hours because it would prevent the claimant earning a living; finally, Clause 20 makes provision for garden leave; again, this clause would not be required in a zero hours contract. The Tribunal is satisfied that the claimant probably did sign the contract probably without realising it but in any event the mains terms of agreement had been reached prior to that signature being taken.

HGV drivers over the age of 65, as the claimant was, must apply to the DVLA every year for renewal of their license. In April of 2017 the claimant was to go through that process. He told the Tribunal that he duly applied; he not had received a reminder from the respondent as to this. There was some considerable delay in the claimant's renewal; it seems likely this was because of issues with his health as ultimately the HGV licence was not renewed for this reason. It was the claimants understanding that he was able to keep driving until he was informed he was not to.

Mr Harker told us in his witness statement and in his evidence that he believed the claimant to be over 70 years of age; certainly, his actions in May 2017 were because of this. The claimant denies he had the conversations the respondent refers to; the Tribunal do not consider anything turns upon this, Mr Harker acted in the way he did because of his belief.

5.1 In or around the end of May the claimant was informed by Mr Bruce that he was no longer able to drive for the respondent. It was believed by the Tribunal and the claimant that the respondent agreed that this occurred on 31st May 2017. However, during these proceedings the respondent produced documents which cast doubt on this. Their case being that the claimant required the date to be 31st May to be able to persuade the Tribunal that the claim was within the requisite time limits. Having considered the document which is from the respondent's insurance brokers and refers to a meeting on 30th May, the Tribunal accepts that is when the meeting occurred. On the evidence we heard it was at this meeting that Mr Harker was told that his insurance policy didn't cover persons over 70 years of age. As a result of this information Mr Harker told Mr Bruce to inform the claimant he could no longer drive. The Tribunal is surprised that the case got all the way to this hearing before this information came to light it did leave the claimant somewhat of a disadvantage as he had not come to Tribunal prepared to deal with that issue. However ultimately the Tribunal concluded that it was just to allow the document to be considered.As to the conversation itself. There is a dispute as to whether it occurred in the office or via the telephone. The Tribunal did not consider that anything hung upon this dispute. What is agreed is that Mr Bruce told the claimant he could no longer drive because of his age and the claimant indicated he would be seeking legal advice. It is clear from this that the claimant was aware that the respondent could not discriminate against him based on his age.

5.1.1. At this time no-one had checked the claimants personnel file and it wasn't until Mr Watson did carry out a check some days later that the claimants true age of 67 was revealed. The Tribunal note that the respondents did assert in relation to the issue of DVLA checks that they regularly checked their driver's paperwork to ensure they were up to date and no points had been added. Clearly the Tribunal are sceptical of such a claim as Mr Bruce and Mr Wilson were unaware of his true age.

5.2. Mr Wilson having discovered the error informed the claimant, on 2nd June he could return to work, which he duly did on 5thJune. At this time the claimant asserts that he was ignored by the office staff for a period. The Tribunal concluded there was an atmosphere but there is no evidence before us from which it could conclude this was as blatant as ignoring the claimant, indeed we will go further that there was no evidence this was because of any protected act and it may simply have been through embarrassment because of the respondent's error.

6. In relation to the July incident, again the respondent now seeks to challenge the date having previously accepted these events occurred on 21 July. Nothing hangs on this date, the claimant was involved in a minor collision and in accordance with procedures he called the respondent, spoke to Mr Bruce who talked him through the procedure and told him to take his driving license into the office. This telephone call was not put to the claimant. The evidence we had was that the insurers required certain information as to the claimants driving license, that's contradicted in oral evidence by the respondent saying that the insurance company required the driving license. The Tribunal cannot find any requirement within the policy documents with which we were presented for the actual driving licence to be produced. According to Mr Bruce the respondent did not have a copy of the claimants driving license. Clearly this is not correct as Mr Wilson was able to access it back in April. The Tribunal failed to understand why it was so relevant and pressing if as the

respondents assert it carries out quarterly review driving license status. Nevertheless, we do accept that the respondent had requested the driving license and the claimant told them that it was away for renewal at DVLA. It seems it is at this point the respondent first became aware that the licence was due for renewal and it was with DVLA; it is not clear why this was not discovered in May. At this time, it appears not to have concerned the respondents that the driving license had not been renewed although it had been with DVLA since April.

7. On 31 August the claimant was asked about his driving licence by Ms Marr. It was agreed he would contact DVLA for an update. The claimant did this and asked DVLA to send a copy to the respondent. For several reasons DVLA could not send a copy direct to the respondent, a copy was however was sent to the claimant. At this time Mr Bruce had a conversation with Mr Wilson, the outcome of which was that Mr Wilson said the claimant could not drive until he could prove he could drive. Mr Bruce spoke to the claimant, again there is a dispute as to the content of the conversation. Mr Bruce asserts in his witness statement that he repeated the words of Mr Watson, whilst the claimant asserts that he believed he was finished; whatever the content of the conversation it is clear to the Tribunal that the claimant understood he had been dismissed and again this can be the only reason he acted in the manner he did.

8. Following the events on 31 August the respondent did not offer work to the claimant nor did he ask for work. He did however contact the DVLA and the Tribunal accept he sent a letter to the respondent on 4 September which included a holding letter from the DVLA; the respondent's evidence is they never received this letter. The Tribunal has, however, seen a signed for receipt from the Post Office dated 5th September; this indicates that the letter was delivered to Harkers as the word Harkers is printed is the relevant box. The respondents evidence as to the non-receipt was unconvincing, none of the witnesses from whom we heard dealt with the post, this was obviously an administrative job. If there had been a going problem with the Post Office as the respondent asserts there was no evidence presented to the Tribunal of representations made to the Post Office of this or any attempt to resolve them themselves such as creating their own letter box or a bell to attract the attention of their administrator. We do not find it credible that so much correspondence in this claim goes missing. We note that the only correspondence that was delivered was that which was not sent by some form of special delivery. The respondents assert that as they have never received the letter the claimant could not be offered work. Mr Wilson is of the belief that the claimant is still employed at the date of this hearing.

9. The claimant having heard nothing from his employer sent another letter on 2nd October querying why he was not been offered work despite the proof he had provided. He also asked for his P45. He received a response on 18th October

10. It was only at the point of the second letter in October that the claimant was informed he had not been dismissed. The letter of 9th October is capable of being misunderstood as it does not directly refer to the holding letter or request that it be sent again. The letter refers to a letter from DVLA being requested and goes on;' At current you are still classed as an employee and we have been awaiting a response from you' It goes on ;' we had no choice but to remove you from driving a company vehicle until such time as you could provide proof that you could legally drive an HGV It is also clear that Mr Wilson made no attempt to discuss the matter or resolve

it or any anxiety about the claimants medical ability to drive. Indeed, Mr Wilsons evidence is that the claimant is still employed today.

11. On 27th November that claimant again wrote to the respondent, having taken legal advice in this letter he comments: 'In the last letter I received on 18th October,Sam [Mr Wilson] mentioned that he was waiting for me to get in touch however I have been in touch once on 4th September and again on 2nd October surely once these letters were received then somebody should have called me to offer me, my duties of the next working say as is normal practice.'

12. The ET1 was present on 1st December.

The law

13. Age is a protected characteristic for the purpose of the Equality Act 2010. The Tribunal had regard to the following sections of the Equality Act 2010: Section 13 relates to direct discrimination and prohibits an employer from treating an employee less favourably because of a protected characteristic; in this case age. An employer can justify its treatment if it can show that it was a proportionate means of achieving a legitimate aim. For direct discrimination, the claimant must establish that his treatment is less favourable than another employee who does not share the same characteristic.

Section 19 Equality Act 2010 relates to indirect discrimination. It is unlawful for an employer to apply a provision criterion or practice which is discriminatory in relation to a protected characteristic if the employer cannot show that it is a proportionate means of achieving a legitimate aim. Again, the claimant must establish that the provision, criterion or practice puts him at a disadvantage compared to others who are not his age.

Section 27 relates to victimisation. If an employee has done a protected act it is unlawful for an employer to subject them to a detriment because of it. For the purposes of this case the protected act was informing the respondent that it couldn't prevent him from working because of his age.

The Tribunal also had regard to the Code of Practice on Employment in relation to who is an appropriate comparator. The guidance in is that it is often better for the Tribunal to consider the reason why rather the less favourable treatment occurred than trying to construct comparators.

In relation to time limits the Tribunal had regard to the guidance in **Hendricks v The Commissioner of Police for the Metropolis [2002] EWCA-Civ 168**. The Tribunal are required to focus on whether there was an act extending over a period as distinct from a succession of unconnected of isolated specific acts for which time would begin to run from the date of each specific date of each specific act was committee

Submissions

14. I am grateful to Ms Alderson who has ably presented the case on behalf of her father Tribunal closing submissions. As to the breach of contract she asserts there was mutuality of obligation between the claimant and the respondent and the claimant received work from the respondent regularly. He never refused work and he worked 55 hours every week. In relation to the age discrimination, the respondent perceived the respondent to be in his 70s. No attempts were made to check his true age before he was told he could drive. This was not a legitimate aim as the claimant had told the respondent prior to May that at this point he was no longer insured. Victimisation – the claimant made a complaint of age discrimination in May. He said he was ignored by the

respondent on return work. He was denied the chance to attend a training course in September 2017.

The respondent's submissions are that the events of 31 or 30 May are not correct, that this was a conversation over the telephone, the claimant was clearly told that he could not drive because he was over 70, that there was no suggestion that he was ignored, that the events of 31 August cannot be connected back to 31 May because three months has passed. And in any event, he was not dismissed on that date.

Conclusions

Assessment of witnesses

15.1 The claimant – the Tribunal, although not accepting everything Mr Lynch said, considered that he was honest and straightforward. Where there are any differences in dates we believe that that is simply an error and not an outright lie. In particular the May dates, he was unaware that the respondent was to challenge the date he asserted until this hearing. As to the employment contract, it may well be that he did sign it and just does not recollect it. The Tribunal do not accept that the claimant changed dates or fabricated evidence in relation to events in July to present a stronger case to this Tribunal .

15.2 Kevin Harker, the Managing Director – the Tribunal were not impressed with his evidence. He was a man who seemed to think that as the Managing Director he could delegate work to others and simply take no responsibility for what was going on in his office and the Tribunal viewed his evidence cautiously because of this.Bruce – the Tribunal again take caution when looking at his evidence. As a starting point the Tribunal queries why, Mr Bruce felt it was necessary to tell us that he had come across the claimant previously in the way he did, i.e. to say that he had a bad driving record and had several infringements. Clearly, we have seen the driving license and there are absolutely no endorsements upon it.

15.3 Mr Wilson – he was the best of the three of the respondent's witnesses. However, that is not to say much. His credibility was undermined as all three were by the issues on the dates.

15.4 In relation to all three of the respondent's witnesses the Tribunal cannot understand why at the time this claim was made the investigations as to date were not properly undertaken at that time. All three of the witnesses indicated that they took the date of 31 May simply because that is what the claimant has said. They then came to Tribunal late with documentation to try and change the dates. This is unacceptable. They should have made enquiries properly at the time. The fact that they did not do this casts doubt upon all their evidence.

Discrimination

16. It is accepted that the claimant was told he could not work at the end of May 2017 and this was the position for 5 days. Clearly this is less favourable treatment. The Tribunal accepts that the claimant would have considered the words used by Mr Bruce were such to think that he was not employed, and this is supported by the fact that he went to seek legal advice the following day.

17. As noted above the Tribunal in looking at who was the comparator through all these events looked at another driver who was not 68 who was told he could not drive

because of his insurance position. Considering what was the reason for the respondent's behaviour, although indirectly the reason was the claimant's age, it was not the prime mover. The prime mover was that the respondent's insurers would not cover the claimant to drive because of his age although That is enough to raise the issue of age discrimination. The question the Tribunal must then consider whether the respondent can show that this was a proportionate means of achieving a legitimate aim. The legitimate aim is to comply with the requirements of the Road Traffic Act for drivers to be insured; the respondent belief was that the claimant was not. Was it proportionate to prevent the claimant from driving and therefore from working. The evidence the Tribunal heard was that there were no other jobs for the claimant to do therefore the Tribunal is forced to concluded that the action was proportionate. However, the Tribunal would comment that the way the respondent carried this out is not best practice. The respondent may have been best advised to check its facts before informing the claimant that he was unable to work. Indeed, best practice would be to have a formal meeting with the claimant concerning the issue.

18. The events in August, although concerning the claimant's ability to drive the same issues arise here. The Tribunal concluded that the claimant was told that he could no longer drive until he produced the documentation. This must be so as he went on to produce the relevant documentation from the respondent. The respondent had a legitimate aim in complying with the criminal law and again the Tribunal concluded that this was a proportionate means of achieving that aim.

19. The claimant asserts that he was dismissed in August. The Tribunal are not entirely satisfied with this argument; if the claimant believed he had been dismissed why did he then go on to produce the relevant paperwork from the DVLA He would only have sent that if he believed he needed to produce it to the respondent in order to work the Tribunal do not accept that the claimant believed he was dismissed on 31st nor do we accept that he was in fact dismissed on that date. This head of claim fails for that reason and therefore we query whether he was in fact dismissed on 31 August 2017. That being the case there can be no breach of contract on that date.

Indirect Discrimination

20. The provision, criterion or practice is that the claimant must be under 70 years of age, in relation to the events in May, for those in August that he held the requisite driving documents from DVLA.

21. Turning to the events in May; did the PCP discriminate against the claimant; on the face of it, it does the claimant was prevented from driving because of the respondent's belief of the claimant's age. However, under section 19 the Tribunal must go on to look at the legitimate aim and proportionality. For the reasons stated above, in relation to direct discrimination the Tribunal is satisfied that the respondent did act in such a manner.

22. Turning to the events in august; the provision criterion or practice here is that the employees are required to have the relevant driving documentation from DVLA to drive. For a driver over 65 this includes going through an annual renewal with DVLA. As the claimant was required to go through this process because of his age the pcp again appears discriminatory. Turning to the legitimate aim; again this is to comply with statutory provisions in relation to HGV drivers and their driving licence; turning to how at the respondent acted, the Tribunal considered that it was proportionate, the claimant was employed as a driver and until such time as he was able to satisfy

his employer he was entitled to drive they were unable to allow him to drive. This is of importance when it involves the driving of HGVs. For that reason, the indirect discrimination claim fails.

Victimisation

23. The claimant and the respondent both agree that the claimant referred to seeking legal advice in relation to the conversation in May. The Tribunal is satisfied that this may amount to a protected act under section 27 (2) Equality Act 2010. However, the Tribunal is not satisfied that there was enough evidence before it of a detriment. In terms of being ignored in the office, it simply may have been people were busy. However, even if it were true, the Tribunal, on the evidence it heard, was not satisfied that any such behaviour was because of the protected act.

24. Turning to 31 August – the less favourable treatment is that the claimant was dismissed. Again, the issue was the prime motivation because of the claimant's age and whilst it may be connected to his age it was in fact because he was not insured to drive because of his age.

Breach of Contract

25. The claimant appears to have understood that on 31 August he was dismissed. The Tribunal are not entirely satisfied with this argument because he then went on to produce the holding letter from DVLA; if he believed he was dismissed that would not be required. The Tribunal therefore concluded that the claimant was not dismissed on 31st August or at all. That being so the claimant is either still employed and available to work for the respondent at such a time he can establish that he has the requisite driving licence; or he resigned sometime later because of his letter dated; or the contract was frustrated by non-performance.

26. As the claimant was not on a zero hours contract and was not dismissed on 31st August, he is entitled to recover his ongoing wages. The Tribunal has not heard any argument advanced as to what date this should be; the Tribunal will leave the issue for the parties to resolve initially but if there is a failure to agree further argument will be required.

Unfair dismissal

27. Turning to the Unfair dismissal claim the claimant does not have the requisite qualifying period of 2 years to bring such a claim therefore the Tribunal has no jurisdiction to hear such a claim.

Holiday Pay

28. The burden is on the claimant to establish that he is entitled to compensation for his annual leave. The claimant has taken 10 of his 28 days. He accepts his leave would be reduced for the number of months worked. He is therefore not entitled to any further compensation.

29. All the claimant's claims fail save for the failure to payhis ongoing wages from 31st August to a date to be determined.

EMPLOYMENT JUDGE PITT

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON
19th September 2018

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