EMPLOYMENT TRIBUNALS

Employment judge Hargrove sitting with members Mr N Cross and Mr N Knight at Southampton on 28th and 29th of October 2019.

Claimants: 1. **Miss M Genova**
2. **Miss E Muzycka**
3. **Mrs ME Kamyk**
4. **Mrs WE Stanczyk**

Respondent: Kujawiak Bognor Ltd

Representation: Claimants in person. Interpreter Ms M Dzulic.
Respondent. Ms Y Montez, employment consultant,
Interpreter Ms B Kawka.

RESERVED JUDGMENT AND REASONS

The unanimous judgement of the tribunal is as follows: –

1. The claimant Genova's claim of discrimination on grounds of her national origin is not well founded.
2. The claims of Genova, Kamyk, and Stanczyk of an unlawful deduction from their wages are well founded. The respondent is ordered to pay to each of these claimants the sum of £347.58.
3. The claims of Muzycka of breach of contract are well founded and the respondent is ordered to pay to this claimant the sum of £201.23 as notice pay, and £283.32 as holiday pay due on termination of her employment.

REASONS

1. The claimants were each employed as shop assistants at the respondent's shop in Bognor Regis selling Polish produce. Their claims were presented to the tribunal on the 13th of February 2018 and were more particularly

identified in a case management hearing on the 21st of July 2018 at which issues were also identified and case management orders made. At that case management hearing a Polish interpreter assisted each of the claimants who, we are satisfied, did not have sufficient knowledge of English to represent themselves. At the present hearing there was a Polish interpreter for the claimants, Ms Djulic, and for the respondent's witnesses, Mr Jan Parys, Director, and Aneta Florczak, Manager, Ms Kawka, to both of whom we are grateful.

2. The claimants presented a variety of claims. The claimant Genova, who is Bulgarian by national origin but speaks fluent Polish, claims that she was directly discriminated against by the respondent because of her national origin contrary to Section 13 of Equality Act. In addition that claimant and the claimants Kamyk and Stanczyk claim that an unlawful deduction was made from their wages by the respondent contrary to section 13 of the Employment Rights Act 1996. The claimant Muzycka claims that she was wrongfully dismissed and that holiday pay due to her on termination of her contract was wrongfully withheld.
3. Despite the orders of the Tribunal, the claimants did not prepare or provide witness statements. Genova was permitted to disclose a witness statement on the second day of the hearing with a view to explaining her discrimination claim. Kamyk relied upon a grievance letter sent to the respondent after her dismissal. Both gave evidence, and Genova gave evidence in addition in support of her and the other 2 claimants' unlawful deductions claims. Both of the respondent's witnesses had provided witness statements, gave evidence and were cross examined. There was a bundle of documents from both sides.
4. **The background to the claims**.

   4.1. Ms Musyzka was employed from 21 January 2017 to 17 May 2017, when she was summarily dismissed by Mr Parys allegedly for gross misconduct. She had taken holiday for about 5 days in Poland at the beginning of May 2017 in particular to attend her granddaughter's first communion. The respondent's case was that she had expressly been refused permission to take holiday at this time only some 2 days before, and that she was guilty of gross misconduct justifying summary dismissal. The issue in her case was: Does the respondent prove on the balance of probabilities that she was guilty of gross misconduct? In this case the Tribunal decides the case on the basis of the evidence given to the Tribunal at the Hearing, not on the basis of the evidence or beliefs held by the dismisser at the time of the dismissal. The claim was brought to the Tribunal well outside the normal 3 month time limit for such a claim, but the earlier tribunal had extended time on the basis that it was not reasonably practical to bring it within the normal time limit.

   4.2 Ms Genova's discrimination claim. She was employed first from 4 of May 2016 to 4 of April 2017, and then returned to work for the respondent from the 20th of July 2017 until the 8th of March 2018, when she resigned following deductions from her wages about which she also complains. She claims that shortly prior to her return, Mr Parys had made enquires of another Polish employee when "the Bulgarian" was coming back. She claims that this was less favourable treatment because of her national origin. She recognised at the preliminary hearing that her claim was in that respect out of time but relies upon the remark as evidence to support her claims that later acts of the

respondent were acts of less favourable treatment because of her national origin. The later acts are closely connected to the claims by Genova, and the other two claimants that they were subjected to unlawful deductions from wages, the background to which we now summarise. On 23 December 2017 a substantial quantity of meat was delivered to the shop. Some, but not all of it was immediately stored in the freezer prior to the Manager, Aneta, going on holiday in Poland that afternoon, not returning until 6 January 2018. The claimants were allegedly responsible for completing the storage in her absence. Mr Parys asserts that he observed the 3 claimants (not Muzycka who had been sacked in May 2017), on CCTV throwing meat into bin liners in early January before Aneta's return. This was alleged to be the part of the December delivery, which had not been stored properly, and which was accordingly not in a fit state to be sold. It was asserted that the claimants were responsible for the non-storage, and particularly Ms Genova because she was acting Supervisor. Accordingly, a meeting was called for 7 January (which Ms Genova did not attend – she claims she was not invited to it) at which Mr Parys notified his intention to deduct £200 from each of the claimants' wages, which he effected from the wages due at the end of January. He also made a further deduction of £147.58 from their wages for February in respect of a second delivery in January of sausages which had had to be thrown away because they were past their sell by date. There are numerous disputes about this account, but so far as Ms Genova's discrimination claim is concerned, she claims that she was treated less favourably because of her national origins because she was alleged to have been principally blamed for the loss of meat; that she had never been appointed as supervisor responsible for the meat or its ordering; and that she was not invited to the meeting.

The issues for Ms Genova's direct discrimination claim arising under section 13 of the Equality Act were as follows: –

- Does The claimant prove facts from which a tribunal could reasonably conclude that she was treated less favourably than others because of her national origins?
- If so, does the respondent prove that the treatment had nothing whatsoever to do with her nationality?

These issues arise from the application of the burden of proof provisions in Section 136 of Equality Act.

The acts of less favourable treatment constituting detriments under section 39 of the Act were: – treating her as being most responsible for the loss of the meat; and failing to invite her to the meeting on 7 January.

4.3. The issues arising from the unlawful deductions from wages claims. Section 13 of the Employment Rights Act makes unlawful any deduction from a worker's wages unless the deduction was authorised by a relevant provision of the worker's contract of which the worker was given a copy before the deduction OR the existence and effect of the provision was notified to the worker in writing before the deduction.

There is an initial issue whether the respondent complied with this provision, although it does not appear to be in dispute that each claimant

was given a copy of a written contract in English; and it is not in dispute that there was a provision in the contracts that: "any damage to stock or property that is the result of your carelessness, negligence or deliberate vandalism will render you liable to pay the full or part of the cost of repair or replacement… Any loss to us that is the result of your failure to observe rules procedures or instruction or is as a result of your negligent behaviour or your unsatisfactory standards of work will render you liable to reimburse to us the full or part of the loss. In the event of failure to pay such costs will be deducted from your pay".

There are other issues as to whether this provision was translated into Polish; and as to whether there was a version in Polish of a handbook contained within the office which contained a similar provision. Finally, there is a substantial issue as to whether or not the respondent is able to prove that the these claimants or any of them were guilty of carelessness or negligence such as to entitle the respondent to make the deductions.

5. **Conclusions**.

5.1. **Unlawful deduction from wages.**

We are satisfied that the claimants were given their own copies of their contracts of employment in English, containing the deduction clause cited above. We are not satisfied that it was specifically translated; nor was its meaning and effect notified to the claimants in writing. We are also not satisfied that there was a Polish version of the handbook contained in the office. However, that finding is, in our view, not relevant because the handing over of a copy of the contract of employment in English complies with the requirements of section 13 (2) (A) of the Act, although we doubt whether it would comply with section 13 (2) (B) which requires the effect of the provision to be notified in writing. We are satisfied that the claimant had the opportunity to take the contents of the contracts away and have them translated themselves. The only outstanding issue is thus whether the respondent has proved that the claimants acted negligently so as to cause loss to the respondent in respect of the two meat deliveries. There is a distinct lack of evidence to prove the necessary links in the chain. The fact that Jan P saw the claimants on CCTV throwing meat into a bin is insufficient to prove that they were responsible for the initial failure to store it properly. Those circumstances were not clarified by the respondent's witnesses. Aneta was away in Poland at the material time. In her absence Robert was acting as a manager. There is no evidence from him. The claimants make two points. First, they say that Robert told them not to put the chicken in the freezer until the afternoon of the 24 December when they proposed to do it in the morning. Secondly, it is claimed that there was inadequate freezer space to store such a large order. In addition, there is no evidence as to when the second delivery of sausages took place or as to its expiry date. Thus we are not satisfied that any of the claimants were guilty of any causative negligence. Furthermore, it is unclear why all three of the claimants were responsible, rather than Ms Genova alone who, we accept ,was being trialled as a potential supervisor although not paid for that post. It follows that the deductions were all unlawful.

5.2. **Discrimination**. It is necessary for Ms Genova to prove facts from which we could reasonably conclude that she was treated less favourably in the form of a detriment than a person not of her racial or national origin

would have been treated in similar circumstances. A detriment consists of treatment by the employer which a reasonable person would consider put him or her at a disadvantage in their future employment. An unjustified sense of grievance does not constitute a detriment. The starting point for our consideration was the supposed enquiry by Jan P as to when "The Bulgarian" would be returning to work. We find on the balance of probabilities that Mr Parys did use that expression but not directly to the claimant and that it was reported to her by a third party. Mr Parys has no recollection of it but accepts that he may have made the enquiry since he says that he did not know the names of all of his approximately 100 employees, a very high percentage of whom were Polish. We fail to understand how such an enquiry in those terms constitutes a detriment since a description of a person by their nationality, where the word has no derogatory connotation is not inherently offensive (as opposed to expressions referable to national origins, which very clearly have racist connotations). The claimant did not raise any issue about it at the time; went back to work for the respondent, and no complaint was made until much later. We do not accept Ms Genova's late evidence at our Tribunal that Jan P called her the Bulgarian on any other later occasion. This was a recent invention. Next, there is the allegation that she was more heavily blamed than the two Polish claimants in circumstances where she does not accept that she had been appointed a supervisor. Even assuming that this is capable of constituting a detriment, we are satisfied by the respondent's non-discriminatory explanation: She was being trialled for promotion to supervisor and assisted Aneta in placing Orders. The fact that the respondent did that indicates that the respondent favoured her over her Polish colleagues. Furthermore, even though it was indicated that she was more to blame, wrongly as we have found, since none of them have been proved to be at fault, equal deductions were made from all 3 of the claimant's wages. There was no inequality of treatment in that respect. There is an issue why Ms Genova did not attend the meeting on 7 January – Aneta claims all were invited – but even if she was not, we are satisfied that any failure to invite her had nothing to do with her national origins.

5.3.**Breach of contract.** We are not satisfied that Miss Muzycka was guilty of gross misconduct. We have accepted her uncontroverted evidence that when she was interviewed and offered employment she indicated that she would need to take time off to attend the event in Poland. Again, it is uncontroverted evidence that she filled in the appropriate leave application form and handed it in at the end of March 2017, about a fortnight after Aneta returned from maternity leave. No indication was given at that time or until Saturday 29 April 2017, before the claimant's departure by ferry on Thursday 4 May (which she had booked in advance), that she could not take the time off. Bizarrely, during her evidence, Aneta said that she had given the claimant permission to go for a few days. She knew the purpose of the visit. However, the claimant said in evidence that she – Aneta, said on the Saturday that she could not go because she, Aneta and her husband, were due to go on holiday and that if she did she was under threat of dismissal. The claimant put the substance of her version in an email in 2017, shortly after her dismissal. There is no evidence of any enquiry being made at the time. In these circumstances, we reject the respondent's case the she was guilty of gross misconduct. She is entitled to one week's notice pay and

the holiday pay denied to her, but not the inflated amounts she claims in her schedule of loss.

____

Employment Judge Hargrove

Date 1 November 2019