Case Number: 1805453/2019 (V)

EMPLOYMENT TRIBUNALS

Claimants		First Respondent
Mr M Orlebar	v	**Harlow Pizza Limited**
		Second Respondent
		Ali Hazra

Heard: By Skype **On: 29 April 2020**

Before: Employment Judge JM Wade

Appearances:

For the Claimant: **Ms D Cambell**

For the Respondent: **Neither present or represented**

This has been a remote final hearing to which the parties did not object. The form of remote hearing was Skype for Business. A face to face hearing was not held because Presidential Guidance had directed conversion of all in person hearings. This hearing was due to take place in Sheffield today. The claimant and his representative said this about the process: they considered the Skype hearing to have been good and less stressful than attending court, once the technology was working at the start.

JUDGMENT

1. The claims against the second respondent are dismissed.
2. The claimant's complaint that the respondent failed contrary to Regulation 12 of the Working Time Regulations to provide rest breaks succeeds and the respondent shall pay to him the sum of £615.75 (two weeks' pay) in compensation for that breach.
3. The claimant's complaint of unauthorised deductions from wages succeeds and the respondent shall pay to him the gross sum of £1276.46.
4. The claimant's complaint of harassment related to race succeeds and the respondent shall pay to him the sum of £2000 in compensation for the injury to his feelings.
5. The financial awards above are increased by an award of four weeks' pay (£1231.50) because the claimant was not provided with a Section 1 written statement of employment particulars.
6. The total sum payable is: £5123.71. The recoupment regulations do not apply to the awards above.

7. The claimant's complaint of direct race discrimination is dismissed.
8. The claimant's complaint of a failure to provide a statement of standing deductions (pay slips) succeeds.
9. Remedy for the pay slip complaint is adjourned to be given when further information is provided (see separate case management orders) or to be dismissed if the information is insufficient (it being disproportionate for a further hearing to take place in that respect).

REASONS

Introduction

1. This hearing is a final hearing. It arises in circumstances where claims from three claimants were presented on their behalf on 16 October 2019. There were no responses to the claims, and that remains the case despite the information having been sent again to the first respondent's registered office. That was done after a hearing in Sheffield on 16 December and subsequent rule 21 judgments for two of the claimants.
2. The relevant information recorded by the Employment Judge at the December hearing is as follows:

> *It was clarified today that in so far as the claim form gives details these are details of Mr Orlebar's claim. I have explained to him, and the other two claimants, that an Employment Tribunal does not have the power to deal with every dispute or problem which might arise in an employment situation. Instead the Employment Tribunal only has the power to deal with such matters as Parliament has granted it. In the list of matters set out on page 6 of the claim form, many are things which the Tribunal cannot deal with. For instance the alleged failure to provide P60s and P45s is a matter for HMRC. Nor does the Tribunal have jurisdiction to deal with alleged breaches of data protection, nor issues about motor insurance for driving undertaken during the course of employment. Of the matters Mr Orlebar complains about the ones which the Tribunal does have jurisdiction to deal with are as follows:-*
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> - *The alleged failure of the employer to provide itemised pay statements (wage slips).*
> - *The alleged failure of the respondent to provide a contract of employment (a matter which can be relevant to remedy).*
> - *The alleged failure to provide breaks contrary to the provisions of the Working Time Regulations 1998, Regulation 12. (However the Tribunal does not have jurisdiction to deal with cases where it is alleged that the maximum weekly working time has been exceeded. If there were such a complaint the appropriate enforcement agency is HMRC – but in any event on enquiry Mr Orlebar had confirmed that he had not been required to work in excess of 48 hours per week).*
> - *Unauthorised deduction from wages – here Mr Orlebar complains that he is owed £1276.46.*
> - *Race discrimination – in the claim form (page 8) Mr Orlebar refers to racial bullying and racial comments. No further detail is given. When I asked*

Mr Orlebar about this today he explained that at work he heard someone say to somebody else, words to the effect "you look like a monkey". He accepts that those words were not directed at him. However he alleges that Mr B, a manager, replied "at least I don't like monkeys". The claimant says that that was said to his partner Beth Cambell and Mr Orlebar believes that that was a reference to him and Ms Cambell being in a relationship. Mr Orlebar thought that this conversation took place at some time in May 2019. If made out, this is a complaint of ***harassment related to race*** *contrary to the Equality Act 2010, section 26.*

The other aspect of the race discrimination complaint ***(direct race discrimination****) is that the claimant says that on an unknown date he and three other employees all had upset stomachs. Mr Orlebar said that the other three were allowed time off work but he was not. Although Mr Orlebar suggested that this might have been because he was a delivery driver, I have explained to him that if this is being pursued as a complaint of race discrimination it would have to be on the basis that the reason for the less favourable treatment was Mr Orlebar's race.*

3. The Employment Judge further recorded this on the last occasion (regarding the correct identification of the respondent): "*Two respondents have been named, Harlow Pizza Limited (the company) and Mr Ali Hazra (the individual). Neither of those respondents has presented a response to these claims. I have explained to the claimants the importance of identifying the correct respondent. In respect of most, if not all the complaints, the correct respondent would have been the claimant's former employer. As they were apparently not issued with contracts of employment it is not immediately obvious who the employer was. It was unclear why the claimants had named Ali Hazra as a respondent. It could have been that he was a franchisee from the first respondent of the Papa John Pizza outlet at which the claimant worked. However, on the information before me it appears that Harlow Pizzas Limited were the employer. Mr Hunter has shown me a copy of the pay slip he recently received from Harlow Pizza Limited and all three claimants have confirmed that it is that name which was shown as crediting payments direct to their bank accounts in respect of wages. Mrs Cambell suggested that Ali Hazra may be one and the same as an individual named as a director of the company, Tofur Ali. Whether or not that is the case it seemed to me nevertheless that the company would have been the employer rather than the individual. If of course either respondent had presented a response the position might have been a little clearer.*"

4. There was insufficient information available to me before today to be able to give a Rule 21 judgment. I therefore held a final hearing and heard oral evidence from the claimant, and representations from his representative Ms Cambell. There was, again, no attendance by or on behalf of the respondents. I was able to access information from Companies House to confirm that the first respondent remains registered as an active company. That information also confirmed that a Mr Ali ceased to be a director and shareholder of the respondent company in March of this year, placed by Sunita Miah. Ms Cambell tells me today that she is Mr Ali's daughter. Whatever the position, nothing I heard today was the basis for Mr Ali to remain a personal respondent to these claims – the company is the correctly identified respondent and claims against the individual (however identified) are therefore dismissed.

Summary findings

5. The claimant was initially employed the respondent by an oral agreement with Mr Ali to work part time, 20 hours a week, on Thursdays, Fridays and Saturdays, driving his own vehicle delivering the respondent's pizzas. The claimant was also a part time student. He commenced employment at the end of April 2019 and was paid on four occasions in May, June, July and August direct into his bank account. The employment ended in August. The pay rate was £8.21. On each occasion of payment the sum was less than was due in respect of the hours he worked to the value of the sum sought: £1276.46. Albeit the employment had been agreed to be part time, he was required to work around 37.5 hours in all but two weeks.

6. On no occasion was the claimant provided with pay slips: he knows from the HMRC records that inaccurate information has been provided in respect of his employment.

7. He was not provided with written particulars of employment. He was not permitted to take breaks on shifts which were all in excess of six hours. When between deliveries he was expected to assist with other kitchen tasks.

8. On an occasion in May or June, Mr B (who is white, and was a colleague or assistant manager), came into the background of a video call between the claimant's partner and her cousin, with the claimant present. When the claimant's partner asked Mr Barnes to get out of the call, or words to that effect, saying he looked like a monkey, a flippant remark, he responded with – "well at least I don't like monkeys" in the claimant's earshot.

9. The claimant was very upset about that remark and raised it at the time. He became withdrawn over time, and the issue was not resolved between him and Mr Barnes – he did not feel able to shake hands over it. He did, however, just get on with his job.

10. In July the claimant was permitted by the manager (not Mr Barnes) to take leave for a holiday, but on two occasions that manager did not permit him to take leave: when ill with a stomach condition and when he wished to take leave for an event related to his grandma. White colleagues (kitchen staff) had been permitted to take leave by the manager. The claimant considered he was not permitted to take leave because he was the driver.

11. The law, considerations and conclusions

12. Regulation 12 of the Working Time Regulations 1998 provide for the right to rest breaks in any shift of six hours duration. Regulation 30 provides for compensation where this right has been infringed. There has clearly been an infringement in this case. Over the duration of a 13 week or so employment, the claimant has missed out on 26 or so hours of breaks or thereabouts – that is, spending the time as he wishes. The loss of that time by a compensatory number of hours' pay, does not, in my view fully compensate for the loss to the claimant because he became withdrawn and overly fatigued – this may also have been influenced by the comment made to him and I deal with this separately. None the less it seems to me that compensate him in the sum of two weeks' pay, to take account of the cumulative effect of fatigue from working without breaks.

13. The claimant has not been provided with a written statement of employment particulars and because he was also not provided with pay slips I exercise my discretion to increase the award to four weeks' pay, calculating that, as with the award above, on the basis of a working week of 37. 5 hours (which is approximately the hours worked on average – sometimes more, sometimes a little less).

14. As to the Equality Act allegations, as to the "monkey" remark, I have made findings of fact from which I could conclude a contravention of the Act for which the respondent is liable as the employer: an unwanted remark, related to race in context, likely and reasonably to be perceived as violating the claimant's dignity. In fact, an abhorrent remark. That complaint succeeds as a contravention of the Equality Act – as to limitation – if the remark was made in May, rather than June, I consider in all the circumstances of this case that it is in the interests of justice to extend time to determine it, albeit that Mr B has not been able to dispute the fact of the remark. The respondent could have investigated matters at the time, and did not – in all the circumstances the lack of a response to the claims should not prejudice the claimant in seeking and receiving a remedy for an abhorrent remark to him by a boss or colleague at work.

15. As to remedy for that remark, it was a one off remark and properly to come within the Vento lowest band as adjusted for inflation and 10% uplift. The claimant's feelings were hurt, his confidence knocked and he felt unable to do anything until he had the support of his partner's mother, for whose support he must be very grateful. I asses that injury to his feelings as properly to be compensated by a payment of £2000, which also takes into account my decision not to award interest, not least because the finding as to when the remark occurred is not precise. It is a composite sum, in effect.

16. As to the Section 13 allegation of less favourable treatment because of race, the facts I have found above are not such that I can conclude a contravention: the fact that the claimant was given leave on one occasion, and that the decision making manager was not the manager who made the remark above, are such that the reason why is plainly as the claimant believed it to be: he was the driver – time off could not be granted easily.

17. The unlawful deductions from wages complaint succeeds because I am satisfied that the sums paid to the claimant on each occasion were less than the sums properly payable. That was aggravated, or perhaps facilitated by, a lack of pay slips.

18. As to the remedy for the payslips complaint, the claimant can obtain a print of the information provided by the respondent to HMRC, and together with the breakdown of the underpayments, it may be possible to declare the sums which should have appeared on those pay slips. I cannot, without that information today, address that remedy

Employment Judge JM Wade

29 April 2020