



EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT

V

RESPONDENT

Mr G Christ

**Atlas Facilities Management
Limited**

Heard at: London South
Employment Tribunal

On:

21 February 2020

Before: Employment Judge Hyams-Parish (sitting alone)

Representation:

For the Claimant:

Ms Goptareva (FRU Volunteer)

For the Respondent:

Ms L Broom (HR Adviser)

JUDGMENT

The claim of unfair dismissal pursuant to s.104 Employment Rights Act 1996 is well founded and succeeds.

The Respondent is ordered to pay the Claimant the sum of £1,551.24.

REASONS

Claims

1. By a claim form presented to the Tribunal on 15 August 2019, the Claimant claims that he was automatically unfairly dismissed pursuant to s.104 Employment Rights Act 1996 ("ERA"), namely because he alleged that the Respondent had infringed a right of his which is a relevant statutory right.

The relevant statutory right relied on is the right not to suffer unlawful deductions from his wages pursuant to s.13 ERA 1996.

2. Having given reasons for my decision at the hearing, these written reasons are provided at the request of both parties.

Legal issues

3. The legal issues in this case are straightforward and are as follows:
 - (a) Did the Claimant allege that the Respondent had infringed a right of his?
 - (b) Was that right a relevant statutory right?
 - (c) Was the reason, or principal reason, for the dismissal because the employee made the allegation at (a) above?

Practical and preliminary matters

4. The Tribunal heard evidence from the Claimant and Ms Broom, who appeared as the representative of the Respondent and is employed as their HR Adviser.
5. Both the Claimant and Ms Broom had provided witness statements for the hearing.
6. The Tribunal was referred throughout the hearing to a short bundle of documents extending to 60 pages.

Findings of fact

7. The Claimant was employed by the Respondent as a cleaner from 3 September 2018 to 7 June 2019. Throughout his employment the Claimant was assigned to provide cleaning services at David Lloyd Health Club ("David Lloyd").
8. The Claimant was paid an hourly rate, £7.83 rising to £8.21 in April 2019.
9. The Claimant worked from 5pm until 9.30pm on Monday to Thursday (inclusive) and from 5pm to 8.00pm on Friday.
10. The Claimant's line manager was a person called Grigor Stoyanov, who the Claimant described as a friend and fellow Bulgarian.
11. In or about October 2019, the Claimant was given additional hours by Mr Stoyanov, which from that point meant that he also worked on Saturdays and Sundays from 6.30am to 2.30pm.
12. Two to three weeks later, the Claimant was asked by the area manager,

Vitor Pinar, to assist at another location, in addition to his work at David Lloyd, which the Claimant reluctantly agreed to. The Claimant was concerned because he was already doing a substantial number of hours cleaning at David Lloyd. On the occasion when the Claimant went to clean at the other premises, at Mr Pinar's request, the Claimant was confronted by a drunk employee who was very intimidating. The Claimant said he was "scared for his life" and told Mr Pinar he would not work there again.

13. At the beginning of December 2019, the Claimant attempted on a number of occasions to ask Mr Pinar if he could take the remainder of his accrued but untaken holiday. He had accrued nine days' holiday and was concerned that if he did not take the remainder of his holiday by the end of the year, he would lose it. The Claimant did not receive any contact from Mr Pinar or replies to his calls, so the Claimant consulted supervisor, Mineva Andova. She told him that the correct procedure was to ask her and that she would then ask Mr Pinar. Ms Andova did ask Mr Pinar about the holiday and the Claimant's request for holiday was refused.
14. Later in mid-December 2018, the Claimant spoke to Mr Pinar when he visited David Lloyd. Mr Pinar explained why the Claimant could not take holiday in December but that he would be paid in lieu of the untaken holiday. The Claimant accepted the position and asked for the payment in lieu of unpaid holiday in January 2019.
15. When the Claimant was eventually paid, it was less than he was entitled to. At around the same time, the Claimant also noticed that he was underpaid in December 2018.
16. At the beginning of May 2019, the Claimant again requested to take annual leave which was refused by Mr Pinar. He asked for 6 May off and he also asked for a weekend off. The Claimant requested holiday on three occasions at least, each of which was refused.
17. At the end of May or beginning of June 2019, Ms Andova informed the Claimant that he had been underpaid in April 2019. She referred to the Respondent having underpaid her as well. The Claimant wrote to Mr Pinar by text asking why he had been underpaid.
18. On 7 June 2019, Mr Pinar visited the Claimant at David Lloyd. The Claimant asked him about the underpayments. Mr Pinar simply brushed the Claimant's concerns aside, saying that it was not his problem. When the Claimant asked whose responsibility it was to deal with the issue, he said "I don't care, I don't do anything with that money". The Claimant did not let the issue drop, to which Mr Pinar said "*Stop it, stop it. From tomorrow on, you are no longer a member of David Lloyd staff – you are sacked*".

Relevant legal principles

19. Section 104 ERA provides as follows:

104.— Assertion of statutory right.

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee—

(a) brought proceedings against the employer to enforce a right of his which is a relevant statutory right, or

(b) alleged that the employer had infringed a right of his which is a relevant statutory right.

(2) It is immaterial for the purposes of subsection (1)—

(a) whether or not the employee has the right, or

(b) whether or not the right has been infringed; but, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith.

20. In terms of the burden of proof, the employee acquires an evidential burden to show — without having to prove — that there is an issue which warrants investigation, and which is capable of establishing the competing automatically unfair reason that he is advancing. However, once the employee satisfies the Tribunal that there is such an issue, the burden reverts to the employer, who must prove, on the balance of probabilities, which one of the competing reasons was the principal reason for dismissal.

Analysis, conclusions and associated findings of fact

21. During the hearing there was a dispute between the parties as to the extent of underpayments suffered by the Claimant. Having listened to the witnesses and having spent some time going through the documents at the hearing, I accept the Claimant's evidence about the underpayments.
22. Turning to the reason for dismissal, Ms Broom said that the Respondent's reason for dismissing the Claimant was his poor performance. However, Ms Broom could provide no evidence in support of this, other than saying that some time prior to June, Mr Pinar contacted her to ask whether he could terminate the Claimant's employment for failing his probationary period. Ms Broom advised that Mr Pinar could not terminate the Claimant's employment for that reason because he was outside the probationary period.
23. During his evidence, the Claimant said that he had received no negative feedback about his performance; indeed, the Claimant said that he was told he was doing a good job. As Ms Broom had no direct evidence of complaints

about the Claimant's performance, there was nothing from which I could properly and fairly conclude that the Respondent was genuinely unhappy with the Claimant's performance. There was no investigation leading up to the Claimant's dismissal, or any disciplinary process. I had no evidence before me to dispute what the Claimant said about his interactions with Mr Pinar or others in the company. I was surprised that prior to attending the hearing today that Ms Broom had not sought to obtain Mr Pinar's response to the allegations made by the Claimant. Even if she had, it is likely that he would have needed to attend to give evidence as the decision maker in this case.

24. I accept the Claimant's account of his conversation with Mr Pinar as set out at paragraph 18 above. Indeed, there was no challenge to it by Ms Broom or any evidence to suggest that the Claimant's version was inaccurate. It was not difficult for me to conclude that the Claimant was not dismissed for poor performance but because the Claimant alleged that he had been underpaid and wanted to know when he would be reimbursed for such underpayments.
25. For the above reasons, it is my decision that the claim of automatic unfair dismissal is well founded and succeeds.
26. Having given the parties my decision, I was provided with a schedule of loss by the Claimant. The Claimant's representative confirmed that the total amount the Claimant was seeking was £1,551.24. I therefore made an order for the Claimant to be paid that amount by the Respondent.

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Employment Judge Hyams-Parish
11 June 2020

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