Case Number: 3333881/2018
3333882/2018

EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr L Fox **v** **Mr Kambala Thetika t/a Nimy Collezioni**

Heard at: Watford **On**: 21,22 and 23 July 2020

Before: Employment Judge Smail
Members: Mrs K Knapton
Mrs I Sood

Appearances
For the Claimant: Assisted by his father Mr F Fox
For the Respondent: Dr Ivor Ibakakombo

JUDGMENT

1. The claimant was employed by Kambala Thetika t/a Nimy Collezioni.

2. The Acas certificate, dated 17 September 2018 naming the perspective respondent as Nimy Collezioni is sufficient to cover Mr Thetika t/a Nimy Collezioni.

3. In the alternative, the First Respondent is substituted by Mr Kambala Thetika t/a Nimy Collezioni.

4. The claim for unauthorised deductions of earnings is well-founded. The respondent has however, discharged its liability by paying the £1,156 in any event albeit without prejudice to his position on liability.

5. The claimant was constructively dismissed without notice by the respondent and is entitled to a notice payment of £206.64.

6. The respondent did fail to issue written particulars of employment under s.1 of the Employment Rights Act 1996 and must pay 4 weeks' pay to the claimant in the sum of £826.56.

7. The claimant is a disabled person, and was so at all material times, by reason of Asperger's syndrome together with Dyspraxia.

8. The respondent directly discriminated against the claimant by:

a. Purporting to deduct £1,156 from his salary to pay to HMRC when withholding that money in the business.

b. Purporting to provide a written statement of particulars in compliance with s.1 of the Employment Rights Act 1996 in July 2018 but refusing to backdate it to reflect the claimant's length of service from 29 March 2018, and

c. By naming Nimy Collezioni Embroidery Limited on the contract, which is a company that does not exist.

9. The compensation for injury to feelings in respect of this discrimination that the respondent must pay the claimant is £6,000.

10. The total sum the respondent must pay the claimant is £7033.20. This must be paid within 14 days from the date this Judgment is sent to the parties.

11. The tribunal does not award a financial penalty against the respondent under s.12A of the Employment Tribunals Act 1996 because it is not satisfied that the respondent has the means to pay it at present.

REASONS

1. The claimant brought two claim forms in identical terms save that case number 3333881/2018, presented on 8 October 2018, had two respondents named, Nimy Collezioni and Kambala Alpha Thetika. The second claim form under case number 333382/2018, also presented on 8 October 2018, only named Nimy Collezioni. One Acas certificate was obtained naming the prospective respondent as Nimy Collezioni. The date of the early conciliation notification was 30 August 2018 and the date of the certificate was 17 September 2018. Nothing in this case turns on time limits. There is however confusion about the identity of the employer.

2. The claimant claimed unfair dismissal, disability discrimination, unauthorised deductions of earnings, notice pay, no written particulars of employment and a declaration as to the terms of a pay statement. The unfair dismissal claim was rejected because the claimant did not have two years' service.

FINDINGS OF FACT

The identity of the employer

3. The claimant was employed as a Shop Assistant at the respondent's clothing shop in Milton Keynes between 29 March 2018 and 10 September 2018, some 5 months and 11 days. Mr Thetika persuaded Employment Judge Johnson at the preliminary hearing that the name of the First Respondent should be Nimy Collezioni Embroidery Limited. Mr Thetika remained named as a Second Respondent although we understand the matter of the Acas certificate was discussed by Employment Judge Johnson. Indeed, examination of the file suggests that it was Employment Judge Manley's intention to accept the claim against Nimy Collezioni only but it is unclear whether that was ever communicated to the parties. The issue of the Acas certificate remains one for determination.

4. The following facts emerge:

    4.1. Mr Thetika told the claimant that he was deducting sums form his pay for tax and National Insurance. As a matter of fact, the sums agreed in total to be £1,156, were not paid to HMRC; they were kept by the business.

    4.2. The claimant and his father pushed for written terms of employment and payslips. Mr Thetika produced a draft contract in the name of Nimy Collezioni Embroidery Limited, dated 1 July 2018. We accept from the claimant that Mr Thetika refused to backdate it to the beginning of the claimant's employment. Mr Thetika told us that his accountant had recommended that the claimant be treated as self-employed.

    4.3. There was however no reality to the suggestion that he claimant was self-employed. He was a shop assistant in the respondent's business whoever the respondent was. The claimant was not working for his own business.

    4.4. Nimy Collezioni Embroidery Limited has never existed as a Limited Company on Companies House records so it cannot be the employer. The draft contract was wrong. The information given to Employment Judge Johnson was wrong.

    4.5. The claimant was paid from Mr Thetika's personal account which may, or may not, have been an account in his name as a sole trader. He was not paid from the account of any limited company because no limited company, potentially relevant to this case, had a bank account.

    4.6. Mr Thetika told us that he traded as a sole trader as Nimy Collezioni Embroidery before recruiting the claimant.

4.7. We have seen a bank statement from Lloyds Bank for March 2019 bearing the name Nimy Collezioni Embroidery which we were told by Mr Thetika, and we accept, is Mr Thetika's sole trader account. It is not a limited company's account.

4.8. Mr Thetika incorporated Nimy Collezioni Limited on 9 January 2018. He applied to strike the company off the register on 17 October 2019. It was dissolved upon his application on 14 January 2020. There was a note on the Companies House record that first accounts made up to 31 January 2019 were due by 9 October 2019. Instead of filing any accounts, Mr Thetika applied to dissolve the company.

4.9. There is no other evidence that Nimy Collezioni Limited actually traded ever. In confused evidence in front of the tribunal, Mr Thetika told us that the company traded between June 2018 and August 2018. We do not accept that evidence but we note that the claimant was recruited by the respondent in March 2018 and left in September 2018 so dates outside the period that Mr Thetika claims Nimy Collezioni traded; not that we accept that evidence.

4.10. We find that after analysis of all the evidence, the clear position, at the end of the day, is that the claimant was employed by Mr Thetika individually. Mr Thetika may have used the trading name of Nimy Collezioni. It does not matter. The relevant legal personality of the employer was Mr Thetika himself, whether trading as Nimy Collezioni or not. We have to say we are unimpressed by the attempt to portray the employer as Nimy Collezioni Embroidery Limited when, on any view, that company never existed. We find that Nimy Collezioni Limited never traded and never employed the claimant. It seems that the web of confusion has been woven to mislead the position in respect of tax, National Insurance and employment rights.

4.11. We find that the Acas certificate in the name of Nimy Collezioni suffices to cover Mr Thetika trading as Nimy Collezioni. If we are wrong about that, we grant the claimant's application to amend the respondent's name to be Kambala Thetika t/a Nimy Collezioni. We understand that if this amendment is necessary it is made on the last day of the hearing before submissions were made. This is justified because, we find, Mr Thetika has played fast and loose with the correct identity of his business. He is not prejudiced in any way evidentially in that he has been able to participate fully in the proceedings from the beginning. It is just and equitable to make the amendment at this time because, in truth, the correct identity of the respondent has been concealed.

5. <u>Arrears of pay</u>

5.1. We are grateful however to Mr Thetika who, without prejudice to his liability position, paid today the £1,156 deducted for apparently

HMRC purposes, to the claimant before us today. That discharges the liability for that amount.

5.2. The claimant purported to claim £10,118 consequential loses for the late payment and other consequential loses. The schedule he put before us does not reasonably flow from the failure to pay the £1,156. The losses claimed do not flow from that failure on any view and we reject that schedule of loss in its entirety.

6. Notice pay

6.1. The claimant tells us in his claim form that he did not work at the shop between 21 August 2018 and 10 September 2018. He tells us he was waiting for Mr Thetika's position on his employment to be made clear.

6.2. The dispute about absence of contract and payslips was first put into writing by the claimant on 9 July 2018. He was then given the draft contract which was not backdated to 29 March 2018 and bore the incorrect name of the respondent on it. The claimant refused to sign it because it was not backdated; that was the issue within his knowledge at the time. That impasse prevailed over the next few days until it seems that Mr Thetika offered to change the basis of the employment to reduce the claimant's hours from 28 to 22 and to have him work on a self-employed basis. The claimant did not accept this and left. This attempt unilaterally to change the claimant's contract, which had been on the basis of being paid the minimum wage for 28 hours a week, amounted, in our judgment, to a repudiatory breach of contract that the claimant was entitled to accept by way of claiming a constructive dismissal.

6.3. The respondent failed to give 1 weeks' notice of dismissal and so the respondent is liable for one week's pay which is 28 hours at the minimum wage rate of £7.38, making £206.64. Therefore, the notice pay claim is upheld.

7. Failure to provide written particulars

7.1. An employer is under an obligation to provide written terms of employment within 8 weeks of employment. This would have been by the end of May 2018. The respondent purported in July to provide a written statement but it was not backdated to 29 March 2018 and it had the wrong employer's name on it.

7.2. The tribunal has a discretion to award between 2 to 4 weeks' pay for breach of this obligation. We award 4 weeks' pay. The July contract with the wrong employer and a wrong start date was not a bona fide attempt at providing the appropriate contract. Accordingly, 4 x £206.64 is £826.56. That is added to the total.

8. Declaration of pay details

8.1. No deductions were paid to HMRC. The claimant has now been paid, fully, on the basis of the minimum wage at 28 hours a week. The indebtedness for that has been agreed £1,156. In fact, Mr Thetika has paid £1,160.

8.2. In the unlikely event that anyone now is interested in the tax position on those amount, this declaration serves to cover the matter.

9. Disability

9.1. The claimant has a long-standing diagnosis of Asperger's syndrome with dyspraxia. We reject Mr Thetika's evidence that he was not told about this. He was expressly told about it both by the claimant and the claimant's father at the time of first recruiting the claimant. We accept from the claimant that he makes it his business to disclose the condition so that problems do not result later. We find that his father, Mr Frank Fox, also discussed with Mr Thetika the potential benefits of employing a disabled person in connection with grants and so forth. It makes sense to us that this discussion took place. On the balance of probability, the respondent know that the claimant was a disabled person.

9.2. We are satisfied that the condition was long-term. This much is conceded by the respondent. Further, we are satisfied that it has an adverse effect on normal day-to-day activities and satisfies the definition of disability under the Equality Act 2010.

9.3. The claimant tells us, and we accept, that the condition causes him to be unable to concentrate for any significant length of time. He also has a tendency to take everything literally so not being able to deal with irony and jokes and so forth. We ourselves saw the claimant struggle with concentration under cross examination yesterday and in today's submissions. He struggled to count the £1,160 paid to him in notes this morning; he struggled to complete his submissions and his father had to take over. There is evidence of the diagnosis from 2008 in the bundle from a letter from Jenny Wilson, a Chartered Psychologist. GP records from 2018, around the relevant time, record the condition and also make reference to a tendency to become frustrated and angry consistent with the condition. There is confirmation also of an inability to concentrate on things such as reading a newspaper or watching television for any length of time.

9.4. On the balance of probability, we find that the claimant was a disabled person and the respondent knew about it.

10. Type of disability discrimination

10.1. A claim of indirect discrimination was identified before Employment Judge Johnson but has not been developed before us so we reject it.

10.2. The disability discrimination argument that has been developed before us was a claim of direct discrimination by the respondent treating him less favourably than he treats, or would treat, because of the claimant's disability.

10.3. There is no actual comparator in this case. The hypothetical comparator is someone of the same abilities as the claimant but who is not disabled.

10.4. The less favourable treatment is the breach of employment rights, that is to say -

(a) Not providing written terms and conditions of employment within 8 weeks;

(b) When providing these in July 2018, not backdating them to the beginning of employment and having the wrong respondent named as the employer on the contract, and

(c) Deducting £1,156 from the claimant's earnings purporting to do so on behalf of the HMRC but not in fact accounting to HMRC and keeping the money.

10.5. The claimant's argument is that had he not been disabled the respondent would not have done this. In other words, that he was taken advantage of.

10.6. In these cases, we have to apply the burden of proof under the Equality Act 2010. This is provided for in s.136(1), which provides: "This section applies to any proceedings relating to a contravention of this Act". Sub section (2) provides "If there are facts from which the court could decide in the absence of any other explanation that a person contravened the provisions concerned, the Court must hold that the contravention occurred". By sub section (3), sub-section (2) does not apply if the employer shows that it did not contravene the provision". Following the Court of Appeal case of Igen v Wong [2005] IRLR 258 what this means is that if there is a prima facie case of discrimination, the burden switches to the respondent to show that discrimination played no role whatsoever.

10.7. There are facts from which we could conclude that the claimant was treated less favourably than a hypothetical comparator because of his disability. It is the three significant breaches of employment rights we have listed above. Accordingly, the burden transfers to the respondent to persuade us, on the balance of probability, that

disability played no role whatsoever. There is every possibility the Claimant was taken advantage of.

10.8. We have already rejected the evidence that Mr Thetika did not know that the claimant was disabled. As we have found above, there were express conversations addressing the matter between Mr Thetika and Mr Fox senior and junior at the outset of his employment.

10.9. The respondent's defence here is essentially that the business was in a parlous financial position. We have seen that the credit card payment facility was suspended by World Pay because of abuse by a customer. The claimant explained to us that the abuse was a fraudulent abuse by a customer.

10.10. The respondent has also talked about advice from his accountant about trying to have the workers on a self-employed basis. We have not heard from the accountant nor seen any advice given under his name. Indeed, we would have been most interested in hearing from such an accountant to give an explanation for some of the advice attributed to him. For example, seeking to treat a shop assistant as a self-employed person in their own right. We would have been most interested to examine the rationale for that advice which, to our mind, seems misconceived.

10.11. The effect of the respondent's position is that he would have to demonstrate or persuade us, on the balance of probability, that he would have treated a non-disabled person, with the same abilities, in the way the claimant was treated in this case.

10.12. Bearing in mind the less favourable treatment consists of three significant breaches of employment rights, we do not find that the respondent persuades us that he would have treated a non-disabled person in the same way. There is no doubt that the claimant was pleased to find work which will not always be easy for him to find with his condition. He enjoyed the job but he was concerned about the matters of employment rights that he had to raise. But the fact that he was a vulnerable person seems to us to have given the respondent the opportunity to take advantage of it and we are not persuaded that he would have treated a non-disabled person in the same way. That is to say we are not persuaded that he would have breached fundamental employment rights in the same way. Accordingly, Mr Thetika is liable for directly discriminating against the claimant.

REMEDY

11.1. There are now three matters that remain to be dealt with in this hearing.

11.1.1. First of all, whether the claimant should be compensated for any injury to feelings that he suffered as a result of the discrimination we have found?

11.1.2. Secondly, whether the tribunal should impose a penalty against the respondent for breach of employment rights with aggravated features, and

11.1.3. Thirdly, totalling up the award to be made.

11.2. Let me explain about the penalty. Under s.12A of the Employment Tribunals Act 1996, by ss.1:

> "Where an Employment Tribunal determining a claim involving an employer and a worker
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> (a) Concludes that the employer has breached any of the worker's rights to which the claim relates, and
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> (b) Is of the opinion that the breach as one or more aggravating features,
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> the tribunal may order the employer to pay a penalty to the Secretary of State whether or not it also makes a financial award against the employer on the claim."

11.3. By ss.2:

> "The tribunal shall have regard to an employer's ability to pay—
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> (a) in deciding whether to order the employer to pay a penalty under this section;
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> (b) (subject to subsections (3) to (7)) in deciding the amount of a penalty."

11.4. By ss.3:

> "The amount of a penalty under this section shall be—
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> (a) at least £100;
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> (b) no more than £5,000."

11.5. This section does not apply where ss.5 or 7 applies.

11.6. By paragraph 4:

> "Subsection (5) applies where an employment tribunal—
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> (a) makes a financial award against an employer on a claim, and
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> (b) also orders the employer to pay a penalty under this section in respect of the claim".

11.7. By ss.5:

> "In such a case, the amount of the penalty under this section shall be 50% of the amount of the award, except that—
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> (a) if the amount of the financial award is less than £200, the amount of the penalty shall be £100;
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> (b) if the amount of the financial award is more than £10,000 the amount of the penalty shall be £5,000".

11.8. By ss.6:

> "Subsection (7) applies, instead of subsection (5), where an employment tribunal—
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> (a) considers together two or more claims involving different workers but the same employer"

11.9 That does not apply in our case so we are looking at the earlier provisions I have identified.

The aggravating features, it seems to us in this case are:

(a) First, that the respondent deducted sums from the claimant's pay saying they were for HMRC but then not accounting to HMRC. That is the first aggravating feature.

(b) The second aggravating feature is purporting to provide written terms but refusing to backdate them to the commencement of employment, and thirdly,

(c) Providing written terms but with the wrong employer's name on it.

12 Injury to feelings

12.1 We now assess injury to feelings. We have heard from the claimant who tells us, and we accept, that he was significantly upset by the fact that he did not get a written contract or payslips. Money was being deducted when he was uncertain for the reason why. The upset caused him to behave badly at home. He became unduly aggressive. He started to question his own position on the matter feeling guilty as to whether he was causing a problem when he should not have done. It seems clear that he lost confidence and he went within himself and hid away from others at home.

12.2 The period is a matter of less than six months, we bear that in mind. He tells us he went to the doctors to get medication and we see that it

is right he went to the doctor to get medication but we do take Dr Ibakakombo's point that the medical notes do not make express reference to troubles from home.

12.3 We have debated which band of the updated Vento guidelines for 2018 we are in. We are not in the top band; we do not think we are in the middle bad; we are in the lower band. A fair sum for the injury to feelings, bearing in mind the six-month period - and bearing in mind the amount deducted totalled £1,156, a proportionate figure - in our judgement, is £6000 by way of compensation for injury to feelings.

12.4 That makes the total award being injury to feelings £6,000, one weeks' notice pay £206.64, no written terms and conditions of employment under the Employment Rights Act 4 x £206.64 = £826.56. That is a grand total of compensation of £7,033.20. We of course do not take into account the £1,156 that was paid over without prejudice and we will exclude that figure from the judgment also as to penalty if it is appropriate to make a penalty.

Penalty

13 As to penalty: we will now turn to that question. This is a sum that is not paid to the claimant but is a sum that is paid to the Secretary of State. Whatever sum is awarded, 50 per cent of that can be paid within 21 days so as to discharge the figure. Presumptively and subject to Dr Ibakakombo observations, the penalty figure would be 50 percent of £7,033.20, which would be £3,516.60. Half of that is £1,758.30. So, if the respondent were to pay that within 21 days, that would discharge the penalty side to things.

14 The aggravating features the tribunal finds are the facts stated earlier that the sums were deducted purportedly to be paid over to HMRC. They were not paid over to HMRC. Secondly, the contract which was purportedly the written particulars of employment under s.1 of the Employment Rights Act 1996, was not backdated to commencement of the employment and, further, bore a name of an employer which simply did not exist.

15 Whilst the degree of breach of employment rights in this case would justify a penalty, we have asked the respondent a series of questions as to his means. We take into account this is Covid period. He suggests the clothing business is his wife's and it has been closed in lockdown. He himself, he tells us, works as a Chef either at Centerparcs or at agencies and again, by reason of lockdown, the work is not there.

16 We are prepared to give the respondent the benefit of doubt on that and for reasons of means we do not award the penalty which we would otherwise have awarded. He will still be indebted to the claimant in the amounts we

have ordered. Those will have to be paid within 14 days otherwise the claimant will be entitled to seek enforcement through the County Court.

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Employment Judge Smail

Date: 4 September 2020……..

Sent to the parties on: 5 October 20

For the Tribunal Office