EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Mr J Debont	**v**	Icomm Communications Limited

Heard at Cambridge partly by CVP **On:** 23 September 2020

Before: Employment Judge Finlay
Members: Ms A Carvell and Mr A Chinn-Shaw

Appearances
For the Claimant: Mr R Debont (claimant's father)
For the Respondent: Mr A Chaudhry (Director) – by telephone

RESERVED JUDGMENT

The unanimous judgment of the tribunal is as follows:

1. The claimant's complaints of (automatic) unfair dismissal for making a protected disclosure (section 103A Employment Rights Act 1996 (ERA)) and detriments on the ground that he had made a protected disclosure (section 47B ERA) fail and are dismissed.

2. The claimant's complaint of direct age discrimination (section 13 Equality Act 2010) fails and is dismissed.

3. The claimant's complaint that he is entitled to payment for accrued but unused holiday (regulation 14 Working Time Regulations 1998) succeeds.

4. The claimant's complaint that the respondent breached his contract of employment by failing to pay to him a week's notice pay succeeds.

5. The respondent is ordered to pay to the claimant the total sum of £420.76 in respect of items 3 and 4 above.

REASONS

Introduction

1. This claim was heard on 23 September 2020. Following a telephone case management hearing on 22 September, the parties agreed that as Mr Chaudhry could not attend the hearing in person due to being required to quarantine, it would proceed partly by cloud video platform (CVP). Accordingly, the tribunal and the claimant (with his representative) attended in person whilst the respondent appeared by CVP. The tribunal was grateful to both parties for their flexibility in allowing the hearing to proceed.

2. The tribunal heard evidence from the claimant and from Mr Chaudhry, the Director of the respondent company. We had been provided with a bundle of documents by the claimant to which the respondent added a number of emails. Both the claimant and Mr Chaudhry had made written witness statements which they verified in evidence.

3. The claimant brought complaints of (automatic) unfair dismissal for making a protected disclosure and detriments on the ground of the protected disclosure, of direct age discrimination, for unpaid holiday pay and of breach of contract in respect of notice pay. A preliminary hearing took place on 16 January 2020, at which the Employment Judge set out the issues which potentially fell to be determined by the tribunal at the final hearing. We saw no reason to deviate from that list of issues and were not invited to do so by either party.

The facts

4. The respondent is a small company in Northampton providing IT support and services. It employs less than six staff and has no internal HR resource. It is run by Mr Attique Chaudhry, its Director.

5. The claimant was born on 20 January 2001. He is looking to develop a career in IT. As identified at the preliminary hearing in January, he has a speech related problem, although he was able to give clear evidence to the tribunal.

6. On 5 September 2018, the claimant commenced a full time IT course at a college in Northampton. At the time he had been looking for an apprenticeship through 3AAA, a large national training provider. Through 3AAA, the claimant had applied for an apprenticeship at a local college but had not been successful. However, 3AAA then notified him of a new opportunity at the respondent. The job description provided stated that this would be a full-time role and it set out in detail the training to be provided by 3AAA.

7. The claimant applied for the role and having been interviewed by DD of the respondent, was successful along with a 20 year old man, KH.

8. On 19 September, the respondent was notified by 3AAA that they had a change in leadership and that the new MD was “conducting an internal review of (their)

quality procedures." Their email stated that all apprenticeship enrolments would be postponed until 1 November. It proposed various alternatives, including that the claimant and KH start on 25 September but not enrol as apprentices until 1 November. They would need to be paid NMW rates until 1 November when their pay could be reduced to the apprentice rates. This would then have been a reduction from £4.70 per hour to £3.20.

9. This was the option chosen by the respondent, save that in subsequent emails between DD of the respondent and 3AAA it was agreed that during the time that the respondent was paying the higher amount, 3AAA would reimburse the respondent for the difference. The claimant was then offered a two week trial by DD, because the respondent was no longer able to offer the apprenticeship. The claimant was able to negotiate a two week break from his college course which meant that he would be able to return to it if the trial were unsuccessful, without having to pay any fees. He worked for the respondent full time for the first two weeks. After the two week trial he returned to his college course and worked for the respondent part time for the remainder of his employment there, working an average of approximately 27 hours per week. He was able to fit in his full time course and part time job by working weekends and by not taking any holiday. He continued to work for the respondent until 1 March 2019.

10. The claimant received no offer letter or contract from the respondent. Neither he nor his parents signed any agreement with 3AAA. The respondent paid his wages through their PAYE system and ultimately provided him with a P45. He was line managed firstly by DD and then after DD had left, by Mr Chaudhry. Throughout this period, the respondent paid the claimant at NMW rates, not the lower apprentice rate of pay. The difference was recorded on his payslips as 'other hourly rate', the respondent no doubt hoping to recover this additional pay from 3AAA.

11. In the meantime, it came to light that 3AAA had significant problems, with allegations of fraud made against it. The government withdrew all funding to 3AAA and the company ceased trading and went into administration before the end of 2018.

12. After it had become apparent to the respondent that 3AAA would not be able to provide training or funding, the respondent spoke to the claimant and to KH inviting them to source alternative training providers so they could become apprentices as they would have been under 3AAA. KH was able to do so, with the result that from February or March 2019, his pay dropped to the apprentice rate.

13. The claimant had continued with his existing college course. It seems that sometime in early 2019, it became apparent to the respondent that the claimant's training arrangements would not qualify him as an apprentice such that the respondent could reduce his pay and obtain support from the provider. It is not relevant whether this was the true situation – the important thing is that the respondent believed it to be so.

14. Matters came to a head at the end of February 2019. On 28 February, the claimant was not working, but checked his bank account and discovered that his February wages had not been paid in. He texted Mr Chaudhry who responded by saying that it should be resolved that day or the following day.

15. On the following day (1 March), the claimant went to the respondent's office and asked for his February payslip. He was given it and noticed that his pay was still recorded at the NMW rate for a 17 year old (£4.30 per hour), and not the rate for an 18 year old (£5.89) even though he had turned 18 during January. The claimant challenged Mr Chaudhry about this and he told the tribunal that he said to Mr Chaudhry: "I think there's something wrong with my payslip. The hourly pay has not gone up due to my age". We accept the claimant's evidence that this was the gist of what he said, if not the actual words verbatim.

16. Mr Chaudhry agreed to have a look at it and to see what had happened. The claimant waited at the office for 10 to 20 minutes and then Mr Chaudhry returned with an amended payslip for the correct amount. This new payslip showed the amount which was actually paid to the claimant and the parties agree that the claimant was paid the correct pay for the entire period of his employment up to 1 March.

17. In addition to handing the claimant the new payslip, Mr Chaudhry also presented the claimant with his P45. He explained that he was having to let him go, saying that he would be earning more than KH for less hours which was unfair. However, Mr Chaudhry also said that the claimant could come back to the respondent as an apprentice after he had completed his college course. Again, this is the claimant's recollection and we accept that it was the gist of what Mr Chaudhry told him.

18. The claimant wrote to Mr Chaudhry later that day in a letter described as a 'grievance letter'. In it, the claimant put forward various claims and invited Mr Chaudhry to make an offer of compensation to avoid an employment tribunal claim. Mr Chaudhry did not respond, believing that the respondent had no responsibility for the matters raised due to the special nature of the 'apprentice' relationship.

<u>The Law</u>

Status

19. The law distinguishes between employees, workers and self-employed independent contractors. There are several definitions of 'employee', but for the purpose of complaints brought by this claimant, it is the wording in section 230 (1) and (2) ERA which is relevant. An employee is defined by section 230 (1) as "*an individual who has entered into or works under….a contract of employment*". Section 230 (2) then goes on to say that a contract of employment means "*a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing*"

20. In order to determine whether there is a contract of service, the caselaw provides that courts and tribunals should take a 'multi-factorial' approach. Many factors may be considered, but those of most significant importance will often be personal service, control and mutuality of obligation.

21. A 'worker' in this context of the complaints brought by this claimant is defined by section 230 (3) ERA as: "*an individual who has entered into or works under (or, where the employment has ceased, worked under)*
    (a) a contract of employment; or
    (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual."

Apprenticeships

22. There are many different types of apprenticeship, under both the common law and under statute. Many apprentices will be employees, for example those engaged under a contract of apprenticeship (a form of agreement emanating under common law – see also section 230 (2) ERA set out above), an apprenticeship agreement (which complies with conditions specified in the Apprentices, Skills, Children and Learning Act 2009 (ASCLA)), or an English approved apprenticeship (which also derives from ASCLA).

23. In a contract of apprenticeship, the training of the individual will be the primary purpose of the arrangement, with the undertaking of work for the employer being of secondary importance. Those employed under contracts of apprenticeships have enhanced rights on termination of employment.

24. An approved English apprenticeship agreement is an agreement which:

    24.1. Provides for an individual to work as an apprentice in a sector for which the Secretary of State has published an approved apprenticeship standard;
    24.2. Provides for the apprentice to receive training in order to assist the apprentice to achieve the approved apprenticeship standard in the work done under the agreement; and
    24.3. Satisfies any other conditions specified by the Secretary of State in regulations.

    An approved English apprenticeship agreement is a contract of service under ASCLA.

25. Between September 2018 and March 2019, the national minimum wage for an employee aged 17 was £4.20 per hour, for an employee aged 18 was £5.90 and the apprenticeship rate was £3.70.

Public interest disclosure (whistleblowing)

26. A worker who makes a disclosure of information may qualify for protection under what is commonly known as 'whistleblowing' law.

27. Section 43B ERA sets out what constitutes a 'qualifying disclosure', in other words a disclosure which qualifies for that protection if made in accordance with any of section 43C to 43H. A qualifying disclosure must be, in the reasonable belief of the worker making the disclosure, made in the public interest. Thus the tribunal has to determine firstly whether the worker subjectively believed that his disclosure was in the public interest and only then whether the worker's belief was objectively reasonable. There can be no qualifying disclosure unless the worker believed that he was making it in the public interest, whatever the tribunal may think when applying an objective standard.

Direct discrimination

28. The Equality Act 2010 (EqA) gives protection to employees and workers (as well as a wider category of individuals not relevant to this claim).

29. Section 13 EqA deals with direct discrimination and states that a person discriminates against another if, "*because of a protected characteristic*", he treats that other less favourably than he treats, or would treat others.

30. A claimant who complains of direct age discrimination therefore needs to show that, because of his age, he has been treated less favourably than a comparator whose circumstances (other than age) are not materially different to his own. That comparator can either be a real person or a hypothetical comparator.

Accrued holiday pay

31. A worker is entitled to 5.6 weeks' paid annual leave in each leave year (inclusive of bank holidays). This is the effect of regulations 13 (1) and 13A of the Working Time Regulations 1998 (WTR). The worker's leave year begins on the day in which he commences employment, unless there is an agreement between employer and employee to the contrary.

32. By regulation 14, a worker is entitled on termination of employment to payment for accrued but unused holiday in his final leave year. Where there is no agreement between employer and employee to the contrary, regulation 14 provides a formula for calculation of the entitlement when termination occurs part way through a leave year. The formula is

    "(A x B) − C
    Where:
    - A is the period of statutory leave to which the worker would have been entitled for the whole of the leave year in which employment ends, calculated in accordance with regulations 13 and 13A.
    - B is the proportion of the worker's leave year which expired before the termination date, expressed as a fraction.
    - C is the period of leave taken by the worker between the start of the leave year and the termination date."

33. Regulation 15A sets out the rules by which a worker accrues holiday in the first year of employment, but those accrual rules do not affect the calculation using the formula in regulation 14.

34. The way in which statutory holiday pay is calculated is set out in sections 221 to 229 ERA and depends on whether or not the worker has 'normal working hours'. Where the worker does not have normal working hours, his holiday pay is calculated as an average of all remuneration earned in the previous 52 weeks, or the number of complete weeks the worker has been employed if less than 52.

Breach of contract/Notice Pay

35. When the employment of an employee is terminated, he is entitled by section 86 ERA to receive a minimum period of notice from his employer. The minimum period of notice for an employee who has been employed for more than one month but less than two years is one week.

36. If the employee's contract of employment provides for a longer period of notice than this statutory entitlement, then the contractual notice period will prevail over the statutory minimum notice period. Any contract which does not provide for notice periods, or which allows the contract to be terminated on shorter or no notice, is automatically varied so that the statutory notice period applies. Thus section 86 effectively imports the statutory provisions into the contract of employment.

Conclusions

37. Applying the relevant law to our findings of fact we have reached the following conclusions.

Status

38. We are satisfied that for the claimant was an employee of the respondent from 25 September 2018 to 1 March 2019. We are satisfied that he worked under a contract of employment, albeit that he was not provided with a written document. The claimant provided his personal service to the respondent. He could not, for example, send a substitute to work in his place. He reported to more senior people at the respondent (DD and subsequently Mr Chaudhry) and he worked under their instruction and control. There was mutuality of obligation in that the claimant was obliged to work as instructed by the respondent and the respondent was obliged to provide him with work and to pay the claimant for the hours which he spent carrying out that work. The respondent did so pay the claimant, issuing the claimant with payslips via its PAYE system. On termination of employment, it issued him with a P45.

39. The respondent has argued vehemently and consistently throughout this claim that the claimant was not an employee of the respondent. Mr Chaudry argued

that the claimant was taken on as an apprentice and that the usual rules and definitions relating to employees do not apply. He is mistaken.

40. We have not seen any documentation relating to the respondent's agreements with 3AAA, with KH or with the training provider providing the training to KH. It is, however, clear from the job description that we have seen, as well as the email correspondence in September 2018 that the intention was for the claimant to be employed by the respondent with training provided by 3AAA. However, the difficulties at 3AAA meant that an alternative arrangement was agreed between the respondent and 3AAA, such that the claimant commenced work for the respondent being paid at NMW rates with 3AAA having agreed to refund to the respondent the difference between those rates and the apprenticeship rates. The key wording in the email from 3AAA to the respondent of 19 September sent at 18:18 is: "*Naturally, you would reduce their salary back to the agreed rate* ***once enrolled on the apprenticeship***" (emphasis added). In the event, the claimant was never enrolled on the apprenticeship and he was paid at the NMW rates throughout his time at the respondent. He continued to attend the course he had commenced before he worked for the respondent, but this was entirely separate from his work for the respondent and was in no way training provided by the respondent as part of an apprenticeship. Indeed it seems that the respondent for a significant period was unaware of the details of the course being undertaken by the claimant. In short, unlike KH the claimant was never an apprentice of the respondent in the sense that he could be paid at the apprentice rate and the respondent could obtain funding.

41. However, this conclusion may not matter to the outcome of the claimant's claim. Even if he were an apprentice, he would still have been an employee of the respondent for the reasons set out in paragraph 38 above. Even if we are wrong about him being an employee, the claimant was at the very least a 'worker', such that he would still be entitled to the protection provided by the EqA and to whistleblowers by the ERA, as well as the rights to paid annual leave afforded by the WTR.

42. Mr Chaudry's error is to assume that he does not owe those employment law obligations to an apprentice, that somehow it is a matter for the training provider. He is wrong on two counts. Firstly, the claimant was not an apprentice in this sense and secondly, even if he were, the respondent would still have those obligations to him as employer.

Public interest disclosure/whistleblowing

43. This complaint falls at an early hurdle. When giving evidence, the claimant was asked specifically whether he believed that the disclosure he made to Mr Chaudry was made in the public interest. He replied that he did not. His disclosure was made with the sole purpose of correcting the error made in his own wage slip and ensuring that he was paid the correct amount. The claimant therefore lacked any subjective belief that he was making a disclosure in the public interest and this complaint must therefore fail.

Direct age discrimination

44. The claimant alleged two detriments, the first being payment at less than the NMW and the second being his dismissal. However, the claimant agreed at the final hearing that at no time was he paid less than the correct NMW amount. Accordingly he suffered no detriment in relation to his pay.

45. The claimant was dismissed by the respondent on 1 March 2019 and his dismissal is capable of constituting less favourable treatment. For this complaint to succeed, however, the treatment must be because of his age. It is therefore necessary to consider the reason for the dismissal.

46. Having heard the evidence of Mr Chaudhry, we are satisfied that the reason why the respondent dismissed the claimant was because the respondent would not be able to use the apprenticeship regime to reduce the claimant's pay to the apprentice rate and would not be able to benefit from any government funding. Whether or not it was actually correct, we accept Mr Chaudhry's evidence that he came to the understanding that the college course being pursued by the claimant would not qualify the claimant for the apprentice rate of pay or any government training funding. The realisation on 1 March that the respondent would have to pay the claimant an additional £1.70 per hour now that he had turned 18 was the catalyst for the dismissal at that time, but we consider from his evidence that Mr Chaudhry would have terminated the claimant's employment then or shortly afterwards in any event. This rationale is entirely consistent with Mr Chaudhry telling the claimant that he had to let him go as otherwise he would be paying him more than KH for the same work, but also with Mr Chaudhry telling the claimant that he would be welcome to return to the respondent the following year as an apprentice.

47. The reason for the dismissal was not therefore the claimant's age, but the fact that the claimant could not at that time be engaged as an apprentice. KH is not an appropriate comparator because his material circumstances, excluding his age, were not the same. KH was an apprentice and therefore not entitled to the higher rate of pay. Furthermore, we are satisfied that the respondent would have dismissed a hypothetical comparator of a different age if that comparator was not an apprentice and by retaining him or her, the respondent would have had to pay him/her more. The complaint of direct age discrimination therefore also fails.

Payment for accrued but unused holiday

48. As a worker of the respondent the claimant was entitled on termination of employment to be paid by the respondent for the holiday he did not take during the leave year. He was employed between 25 September 2018 and 1 March 2019 which we calculate is 154 days of the leave year. He took no holiday during this period. We conclude from his evidence and that of Mr Chaudhry that he did not have normal working hours.

49. Using the formula set out above, the calculation is therefore:

5.6 x 158/365 = 2.42

He is therefore entitled to 2.42 x a week's pay.

50. The claimant worked for 22.5 weeks. Over that period his payslips show that he earned £2,768.20. £2,768.20 divided by 22.5 = £123.03. The claimant is therefore entitled to 2.42 x £123.03 = **£297.73** in respect of accrued holiday on termination of employment.

Breach of Contract/notice pay

51. The claimant had been employed by the respondent for more than one month but less than two years. He is therefore entitled to payment of one week's notice. His average weekly pay was £123.03 (see above) and he is therefore entitled to payment of **£123.03**.

52. As an endnote we observe that both parties were let down badly by the demise of 3AAA, leaving both in a position of uncertainty. It is unfortunate that a hardworking and committed young person who was clearly well regarded by the respondent lost his job. Having heard evidence from Mr Chaudhry, we do not accept that the respondent was intent on abusing the apprenticeship system or taking advantage of young workers, as suggested by the claimant's representative. However, we would recommend that if the respondent is to continue to engage apprentices, it would benefit from some specialist HR or legal advice. This area of law is complex even for large and highly resourced companies.

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Employment Judge Finlay

Date: 1 October 2020

Sent to the parties on:

.....23/10/2020.....

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For the Tribunal Office