Case Number: 3301680/2011

EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Ms C Reyes	v	(1) Mr Jarallah Al Malki (2) Mrs Al Malki

Heard at: Watford **On**: 17 November 2020

Before: Employment Judge Hyams, sitting alone

Appearances:

For the Claimant: Mr P McCorkell, solicitor
For the Respondents: Not present and not represented

RESERVED JUDGMENT

1. The respondents owe the claimant the sum of £4,763.96 in the form of unpaid wages.

2. The respondents failed to permit the claimant to take the breaks during the working day to which she was entitled as a result of regulations 10 and 12 of the Working Time Regulations 1998 and must pay the claimant £1250.00 as compensation for such failure.

3. The respondents owe the claimant £630.50 by way of accrued holiday pay.

4. The respondents failed to give the claimant a statement of particulars of employment, or any itemised statements of her pay, contrary to sections 1 and 8 of the Employment Rights Act 1996.

5. The respondents must pay the claimant the sum of £1,600.00 as compensation for the failure to give the claimant a statement satisfying the requirements of section 1 of the ERA 1996.

6. The claims of direct discrimination within the meaning of section 13 of the EqA 2010, indirect discrimination within the meaning of section 19 of that Act, and harassment within the meaning of section 26 of that Act, contrary (in all cases) to section 39 of that Act, fail and are dismissed.

REASONS

Introduction; the claims and the manner in which I heard them

1 In these proceedings, the claimant claims

1.1 unlawful deductions from her wages, contrary to section 13 of the Employment Rights Act 1996 ("ERA 1996");

1.2 direct discrimination because of her race within the meaning of section 13 of the Equality Act 2010 ("EqA 2010"), contrary to section 39 of that Act;

1.3 indirect discrimination within the meaning of section 19 of that Act, contrary to section 39 of that Act;

1.4 harassment within the meaning of section 26 of that Act, contrary to section 39 of that Act;

1.5 breaches of the Working Time Regulations 1998, SI 1998/1833 ("the WTR 1998") through failures to give her requisite breaks and holidays; and

1.6 breaches of sections 1, 4 and 8 of the ERA 1996, in that the respondent did not give the claimant a statement of her terms and conditions, and/or an updated such statement, or itemised statements of her pay.

2 The claim was presented on 13 June 2011. The case was the subject of an appeal to the Supreme Court, which ruled in the claimant's favour as far as the jurisdiction of the tribunal was concerned. The Supreme Court reference is [2017] UKSC 61 and the best ICLR report of the judgments in the case is [2019] AC 735.

3 The case was also the subject of several preliminary hearings during 2020, the final one of which was held by Employment Judge R Lewis ("EJ Lewis") on 19 June 2020. The respondents were implicitly invited by what EJ Lewis said in paragraph 6 of his case management summary signed on that day and sent to the parties on 6 July 2020, to "apply to submit a response or defend the proceedings", but they had not done so by the time of the hearing before me of 17 November 2020.

4 However, the claimant did not attend the hearing of 17 November 2020. As a result of such non-attendance, Mr McCorkill applied for the adjournment of the hearing. I was not inclined to grant that application, since I could see no practical purpose

that would be served by granting it and it appeared to me to be in the interests of justice in the circumstances to consider and decide the matter on the evidence before me. That was not least because (1) the claimant had made a detailed witness statement with, as Mr McCorkill told me, his assistance and that of a member of the respondent's staff (based in the United States) who speaks the claimant's native language, which is Tagalog, and (2) that witness statement was not going to be subjected to cross-examination, so that (3) I could, unless it appeared to me to be unreliable, accept it in its entirety. Whether the claim would succeed in all respects was, however, another matter as Mr McCorkill himself appropriately pointed out. That was because of the need to satisfy the legal elements of the various claims, and there was some case law which suggested that some of them could not succeed. Mr McCorkill referred me to the decision of the Supreme Court in *Onu v Akwiwu* [2016] UKSC 31, [2016] ICR 756. I then referred myself and Mr McCorkill to the decision of the Court of Appeal in *Mruke v Khan* [2018] EWCA Civ 280, [2018] ICR 1146, and pointed out that if the claimant's treatment was because of her "socio-economic circumstances ... and not her nationality or national origins" (using the words of Singh LJ in paragraph 55 of his judgment in that case, with which Hickinbottom and Patten LJJ agreed), then the claim of direct discrimination had to fail.

5 Mr McCorkill, when I put that view to him, (1) did not press his application for an adjournment and (2) proposed that he be given 7 days to file written submissions in support of the claim. I agreed with that proposition, but before I ended the hearing, I asked about the provision, criterion or practice ("PCP") within the meaning of section 19 of the EqA 2010 which it was said had been applied here. Mr McCorkill referred me to that which was accepted by an Employment Tribunal in a comparable case. That case was that of *Ale v Chugani*, Case number 2601528/2016. There, the following PCPs were accepted by the tribunal as falling within section 19 of the EqA 2010:

> "(a) the requirement of employment that the employee did not speak English;
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> (b) that it was a requirement of employment that the employee did not understand or have knowledge of work place rights within the UK."

6 Mr McCorkill put before me and I read a document which described itself as an "Expert Witness Report" made by Dr Aidan McQaude, who is a former "Director of Anti-Slavery International", which is the charity which (1) was formed in 1839 as (as Dr McQuade put it in paragraph 21 of that statement) "the then Anti-Slavery Society" and (2) was "the successor of an earlier organisation founded by William Wilberforce and Thomas Clarkson". That document was part of an 86-page bundle of documents which was put before me. That bundle did not include one document of which there was a copy in the tribunal's file but to which it was necessary to refer. I refer to that document in paragraph 16 below.

7 Having read the claimant's witness statement, the documents in that bundle, and the tribunal's file, I made the following findings of fact relevant to the claims made in these proceedings.

The facts

8 The claimant is a single mother, of Phillipine nationality. She was employed by the respondents from 19 January 2011 to 14 March 2011 as their domestic servant. She had previously been employed by them as such a servant in first China and then Saudi Arabia. When she arrived in the United Kingdom, the respondents took away her passport from her.

9 The claimant lived in the respondents' home (which was a relatively small flat, not a house), sleeping on a duvet (not even a mattress) on the floor of the bedroom of one of the respondent's three children.

10 Only one of those three children (the one who was aged seven at the time) went to school. The claimant did not get any days off, and she was required to work from 6.00am onwards, initially doing cleaning work, and then preparing breakfast for the respondents and their family. One of the respondents' children was disabled, and the claimant was required to look after his needs during the day until the claimant started helping the second respondent prepare dinner. That would occur at 4pm. The respondents would eat dinner at 5pm, after which they would go to sleep until about 9pm. During that time, the claimant would again care for the respondents' children. When she was not taking care of the children, the claimant would clean and organise the flat.

11 After 9pm the claimant would assist the second respondent to prepare supper, which would be eaten by the respondents at about 11pm. The claimant would then wash and clear up. She would finish work at about 12 midnight.

12 The claimant was initially not permitted to go out of the respondents' home unless she was with the respondents' family or one or more of the respondents' children. On one occasion when she was outside the flat with one of the children, the claimant got into a conversation with a woman. She was seen by the second respondent speaking to the woman, and after that the respondents did not permit the claimant to leave the flat except to take out rubbish.

13 The respondents did not permit the claimant to make contact with her family in the Phillipines and the respondents did not pay the claimant. In desperation, on 14 March 2011, when the respondents had left the flat to take the seven year old child to school, the claimant left the two children in her care with a neighbour and went to the police station. She told the police that she was scared of her employer, and the police accompanied her to the flat, to which the respondents had returned. The police asked the first respondent for the claimant's passport, and he handed it over. The police pointed out that the claimant's visa did not permit her to work in the United Kingdom, and asked the first respondent why he had not paid the claimant. The first respondent said that he had forgotten to do so.

14 The claimant has been regarded by the United Kingdom Border Agency as having been trafficked into the United Kingdom. The claimant was given shelter by a charity after she left the respondents' flat.

15 The claimant was unable to obtain work in the Philippines in part because she had not finished her college education, but also because she had not previously worked and did not have any references. In any event, the claimant was unable to support herself or her daughter in the Philippines and the only way in which she could earn any money was by working abroad, and in the circumstances only as a live-in domestic worker. The respondents knew that, and exploited that vulnerability of the claimant's by employing her and then failing in that regard to comply with United Kingdom laws on employment.

16 On 7 June 2011, solicitors acting on behalf of the respondents (RPC) sent a letter to the claimant's representative, which was North Kensington Law Centre, denying liability but enclosing a cheque in the sum of £1000. That sum was agreed by the claimant to have been received by her at that time.

The claimant's financial remedy claim

17 The claimant claims for working 18 hours a day for 54 days the sum of £4,763.96, which is the then-applicable national minimum wage of £5.93 per hour for 972 hours, minus the sum of £1000 which has been paid.

18 The claimant is now domiciled in the United Kingdom. She calculates that if she had been treated properly by the respondents then she would have worked for them for 48 hours per week at the national minimum wage rate of £5.93 for a further 26 weeks, and she claims £7,400.64 for lost income as a result. She did not receive any state benefits during that 26-week period.

19 The claimant claims in addition

19.1 £1250 for a failure to provide the requisite breaks during the working day (presumably under regulation 30(3)(b) of the WTR 1998),

19.2 £631.99 for accrued holiday pay (under regulation 30(1)(b) of the WTR 1998; the calculation was of that sum on the basis that the claimant in practice worked 17.5 hours a day every day of the week and that she had worked for 57 days of the year, so that the calculation was 17.5 x £5.93 x 7, multiplied by 5.6 and multiplied again by 57/365), and

19.3 £2,905.72 for the failure to give the claimant payslips or a statement of her employment particulars, i.e. for a failure to comply with sections 1, 4 and 8 of the ERA 1996.

20 The latter claim was difficult to comprehend, since the only power to award compensation for a breach of those sections is in section 38 of the Employment Act 2002 ("EA 2002"), which applies only to a failure to comply with section 1

and/or 4 of the ERA 1996, and provides for a maximum award of 4 weeks' pay, to which the limit in section 227(1) of the ERA 1996 applies. Calculating the claimant's weekly pay for the hours which she actually worked as 17.5 (i.e. even taking the claim as being one for 17.5 rather than 18 hours per day) x 7 x £5.93, but bearing in mind that the maximum weekly pay as a result of section 227(1) was £400 in March 2011, the maximum award applicable at the time of the failure in question was £1,600.00. In his written submissions, Mr McCorkill sought the payment of that sum, only, and not the claimed sum of £2,905.72.

The relevant case law

21 It is necessary to refer here only to the case law concerning claims of discrimination and possibly (it is not clear whether the claim of harassment added anything to the claim of direct discrimination) harassment within the meaning of sections 13, 19 and 26 of the EqA 2010.

22 As indicated above, the key cases on the law of discrimination in this situation are *Onu v Akwiwu* [2016] UKSC 31, [2016] ICR and *Mruke v Khan* [2018] EWCA Civ 280, [2018] ICR 1146, [2018] IRLR 526, to which I now turn.

Direct discrimination within the meaning of section 13 of the EqA 2010

23 In relation to the question whether or not the claimant was discriminated against directly because of her race, I found the following passage in the judgment of Singh LJ in *Mruke* to be particularly helpful and illuminating:

> '41. As I have mentioned, the Employment Appeal Tribunal considered that the present case raised the same point of law as *Onu v Akwiwu* . At that time those cases had been decided by this court and the appeal tribunal considered itself to be bound by this court's decision. When those cases reached the Supreme Court [2016] ICR 756 the issue of law that had to be determined was formulated by Baroness Hale of Richmond DPSC in the following way, at para 14: "Does discrimination on grounds of immigration status amount to discrimination on grounds of nationality under the 1976 and 2010 Acts?"
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> 42. The Supreme Court answered that question in the negative: see paras 23–26. At para 26, Baroness Hale DPSC said:
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> > "The reason why these employees were treated so badly was their particular vulnerability arising, at least in part, from their particular immigration status … It had nothing to do with the fact that they were Nigerians. The employers too were non-nationals, but they were not vulnerable in the same way."
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> 43. At para 22 Baroness Hale DPSC said:

> "Parliament could have chosen to include immigration status in the list of protected characteristics, but it did not do so. There may or may not be good reasons for this—certainly, Parliament would have had to provide specific defences to such claims, to cater for the fact that many people coming here with limited leave to remain, or entering or remaining here without any such leave at all, are not allowed to work and may be denied access to certain public services. So the only question is whether immigration status is so closely associated with nationality that they are indissociable for this purpose."

44. Ms Monaghan submits that the issue in that case was different from the issue which arises in the present case. Certainly, in one sense, that is true. So much is clear from the formulation of the issue of law in that case, which I have already quoted. However, it seems to me that some assistance as to the relevant principle can be found in the judgment of Baroness Hale DPSC in that case. In particular the way in which she posed the question at the end of para 22 is significant. With a slight variation to reflect the circumstances of the present case, the question could be reformulated in the present case as follows: "Whether the socio-economic circumstances of the claimant are so closely associated with her nationality and/or national origins that they are indissociable for this purpose."

45. When the question is formulated in that way, it seems to me that the answer is clear. The two are not indissociable. The fact is that the reason why the employer employed the claimant was to do with the package of socio-economic characteristics which she had: in particular that she was uneducated, illiterate and very poor. It was that situation which compelled her no doubt to take up employment for a pittance and to put up with the working conditions which she did in the employer's home. However, that does not lead to the conclusion that there was discrimination on any of the grounds which were proscribed by the 1976 Act, in particular the claimant's nationality and/or her national origins.

46. At the heart of Ms Monaghan's submissions under the first ground is the argument that the employment tribunal in the present case fell into error because it took account of the employer's "motive" for taking the decision that she did when it set out the definition of the hypothetical comparator which was necessary in this case. She submits that the ground for treating the claimant in the way that she was by the employer was that she was from Tanzania, in other words her nationality and/or national origins, even if the motive for recruiting her from Tanzania was that she would have certain socio-economic characteristics which made it more likely that she would be willing to work for very little.

47. Ms Monaghan submits that this approach is contrary to fundamental principles of discrimination law: see e g *R (E) v Governing Body of JFS (United Synagogue intervening)* [2010] 2 AC 728 , paras 13–23, per Lord Phillips of Worth Matravers PSC. In that judgment, which set out those principles by

reference to well-known authorities, Lord Phillips PSC made it clear at para 13 that the word "grounds" in the 1976 Act is ambiguous:

> "It can mean the motive for taking the decision or the factual criteria applied by the discriminator in reaching his decision. In the context of the 1976 Act 'grounds' has the latter meaning. In deciding what were the grounds for discrimination it is necessary to address simply the question of the factual criteria that determined the decision made by the discriminator …"

48. One of the authorities on which he relied for that well-established principle was the decision of the House of Lords in *R v Birmingham City Council, Ex p Equal Opportunities Commission* [1989] AC 1155, which arose under the Sex Discrimination Act 1975. In that case Lord Goff of Chieveley said, at p 1194:

> "There is discrimination under the statute if there is less favourable treatment on the ground of sex, in other words if the relevant girl or girls would have received the same treatment as the boys but for their sex. The intention or motive of the defendant to discriminate … is not a necessary condition of liability; it is perfectly possible to envisage cases where the defendant had no such motive, and yet did in fact discriminate on the ground of sex."

49. In the *Governing Body of JFS* case [2010] 2 AC 728, para 20 Lord Phillips PSC said:

> "Whether there has been discrimination on the ground of sex or race depends upon whether sex or race was the criterion applied as the basis for discrimination. The motive for discriminating according to that criterion is not relevant."

50. I do not accept this submission by Ms Monaghan. As the quotation from Lord Goff in *R v Birmingham City Council, Ex p Equal Opportunities Commission* [1989] AC 1155 makes clear, the question of whether discrimination took place on a prohibited ground can often be answered by asking the "but for" question: but for the claimant's nationality and/or national origins would she have been treated more favourably? The answer, it seems to me, is clear. She might or might not have been but that would depend on her socio-economic circumstances.'

Indirect discrimination within the meaning of section 19 of the EqA 2010

24 *Onu v Akwiwu* concerned the possibility of a claim not only of direct but also indirect discrimination because of race succeeding in that case. The possibility of a claim of indirect discrimination succeeding was discussed by Lady Hale in paragraphs 31-33 of her judgment, in which she also helpfully set out the relevant part of section 19 of the EqA 2010:

'**Indirect discrimination**

31. Mr Allen accepts that this is not a case of indirect discrimination. It is direct discrimination or nothing. In my view he is wise to do so, but the fact that these cases cannot be fitted into the concept of indirect discrimination is further support for the view that the mistreatment here was not because of the employees' race but for other reasons. Indirect discrimination is defined in section 19 of the 2010 Act thus:

> "(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
>
> "(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if— (a) A applies, or would apply, it to persons with whom B does not share the characteristic, (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it, (c) it puts, or would put, B at that disadvantage, and (d) A cannot show it to be a proportionate means of achieving a legitimate aim."

32. The concept in the 1976 Act was differently worded, but the basic principle is the same. An employer or supplier has a rule or practice which he applies to all employees or customers, actual or would-be, but which favours one group over another and cannot objectively be justified. Requiring all employees to sport a moustache is obviously indirectly discriminatory against women. The problem in this case is that no one can think of a "provision, criterion or practice" which these employers would have applied to all their employees, whether or not they had the particular immigration status of these employees. The only PCP which anyone can think of is the mistreatment and exploitation of workers who are vulnerable because of their immigration status. By definition, this would not be applied to workers who are not so vulnerable. Applying it to these workers cannot therefore be indirect discrimination within the meaning of section 19 of the 2010 Act.

33. In disclaiming any reliance on indirect discrimination in these cases, Mr Allen urges the court not to rule out the possibility that, in other cases involving the exploitation of migrant workers, it may be possible to discern a PCP which has an indirectly discriminatory effect. I am happy to accept that: in this context "never say never" is wise advice.'

Section 26 of the EqA 2010

25 Section 26 of the EqA 2010 provides so far as relevant:

"(1) A person (A) harasses another (B) if–

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of–

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

...

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account–

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect."

My conclusions

26 I address first several questions of principle. Before doing so, I record that I regarded the fact that the claimant did not have the right to work here as irrelevant in the circumstances.

Direct race discrimination

27 Despite Mr McCorkill's valiant attempt to persuade me to the contrary by what he said in paragraphs 24-33 of his written closing submissions, I could see no basis for distinguishing the decisions in *Onu v Akwiwu* and *Mruke v Khan*. In my judgment, the claimant here was treated in the manner in which she was in fact treated by the respondents because of her vulnerability resulting from her socio-economic circumstances and her immigration status. It was not (as far as section 13 of the EqA 2010 is concerned) because of her race.

Harassment

28 Similarly, and for the same reasons, the manner in which the claimant was treated by the respondents was not harassment within the meaning of section 26 of the EqA 2010. That is because in my judgment, for the purposes of that section, the way in which the claimant was treated by the respondents related to her socio-economic circumstances and her immigration status, and not to her race.

Indirect discrimination

29 Mr McCorkill's written closing submissions in support of the proposition that the claimant was indirectly discriminated against included (in paragraph 42) that "the Respondents equally made a conscious decision to employ someone who was not British and therefore unaware of their employment rights, and particularly intended to employ someone from the Philippines believing them to have a subservient attitude." That was much more like a submission in support of the claim of direct discrimination because of race, and illustrated the difficulty of contending that the claim could be about indirect race discrimination rather than direct race discrimination. In any event, nothing in paragraphs 40-44 of Mr McCorkill's written closing submissions persuaded me that the claim of indirect discrimination could succeed. My conclusion that that claim could not succeed was arrived at for the following reasons.

30 Like Robin Allen QC in *Onu v Akwiwu*, I could not identify an applicable PCP which fell within the meaning of section 19 of the EqA 2010. Such a PCP is one which applies to all persons, which is apparently neutral and which is disadvantageous to the claimant to whom it is applied because she or he cannot comply with it. In this instance, the claimed PCPs (set out in paragraph 5 above) were to the disadvantage of the claimant because she could comply with them, and they were disadvantageous to her because, having complied with them, she was mistreated by the respondents. Those are not, in my judgment, PCPs falling within the meaning of section 19 of the EqA 2010. I am not bound by the decision of the Employment Tribunal in *Ale v Chugani*, and I decline to follow it.

31 Those determinations meant that the claim for future loss of earnings, i.e. in respect of the period after 14 March 2011, had to fail, as did the claim for compensation for injury to feelings and for aggravated damages.

The claim for unpaid wages

32 I have concluded that the claim stated in paragraph 17 above is well-founded on the facts. The respondents should have paid the claimant £4,763.96 more than they did in fact pay her for her work done for them in the United Kingdom.

The claim of a breach of the Working Time Regulations 1998

33 In addition, I accepted the claim for £1250 for a failure to provide the claimant with requisite breaks during the working day. While that was in one sense quite a high sum, it was in my view wholly appropriate bearing in mind the circumstances as I have found them to be.

34 As for the claim for accrued holiday pay, I could not agree with the calculation made on the claimant's behalf. She started working for the respondents on 19 January 2011. She stopped doing so on 14 March 2011. Including both of those days in the calculation (i.e. giving the claimant the benefit of any doubt in that regard), that is a period of 55 days. If, as claimed, she worked 17.5 hours per day

for 7 days per week, then her weekly wage was £5.93 x 17.5 x 7 = £726.425. However, the claimant also claimed (as stated in paragraph 17 above) that she worked 18 hours per day, and as is clear from the factual findings stated in paragraphs 10 and 11 above, I have accepted that she did so. Accordingly, I concluded that the holiday pay claim should be calculated by reference to an 18-hour day. Thus, the claimant's weekly wage should have been £747.18. Since the claimant's entitlement was to 5.6 weeks of holiday per year, her entitlement in regard to accrued holiday pay was to 55/365 x 5.6 x £747.18, which is £630.50.

The claim for compensation for the failure to give the claimant statements complying with sections 1, 4 and 8 of the ERA 1996

35 However, while I regarded it as being just and equitable to award under section 38 of the EA 2002 four rather than merely two weeks' pay in respect of the failure to give the claimant a statement complying with section 1 of the ERA 1996 at any time (and, by implication, any statement complying with section 4 of that Act), that was all that I could lawfully award in that regard and in regard to the failure to give her itemised pay statements, contrary to section 8 of the ERA 1996. Accordingly, I concluded that the claimant should be awarded four weeks' pay under the EA 2002. I calculated it in the manner in which Mr McCorkill did in his written closing submissions to which I refer in paragraph 20 above. Accordingly, the sum which I concluded should be awarded under section 38 of the EA 2002 was £1,600.00.

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Employment Judge Hyams
Date: 27 November 2020

Sent to the parties on:

1/12/2020

N Gotecha

For the Tribunal Office