



EMPLOYMENT TRIBUNALS

Claimant: Mr T McIntosh

Respondent: Islington Council Legal Services

Heard at: London Central

On: 23 and 24 November 2020

Before: Employment Judge Davidson

Ms H Ewing

Professor J Holgate

Representation

Claimant: in person

Respondent: Mr R O'Dair, Counsel

RESERVED JUDGMENT

The claimant's complaint of victimisation fails and is hereby dismissed.

Employment Judge Davidson

Date 9 December 2020

JUDGMENT SENT TO THE PARTIES ON

10/12/2020.

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FOR EMPLOYMENT TRIBUNALS

REASONS

Issues

1. This is a claim for victimisation arising out of the late payment of four days' pay following the termination of the Claimant's employment by reason of voluntary redundancy. The issues in the case had been agreed at a Case Management Hearing before EJ Norris on 30 June 2020.

1.1. It was accepted that the Claimant had carried out a protected act. The issues for the hearing were set out as follows:

a) Did the Respondent make a deduction to the Claimant's salary in December 2019 because he had carried out the protected act(s)?

b) Did the Respondent fail to communicate with the Claimant between January and March 2020 in relation to the deduction because the Claimant had done a protected act, or more than one, or because his previous claims had been successful?

In each case, the person at the Respondent on whom the Claimant relies as having been influenced in her conduct, whether consciously or not, by the protected acts is Ms K Hambis.

1.2. At the start of the hearing, the Claimant stated that he also regarded Mr Marius Lewis as a person who may have been influenced by the protected act in his conduct. Until he received the amended ET3, the Claimant had not been aware that his tribunal award had been processed by Marius Lewis, who had also been involved in the non-payment of his salary arrears in January 2020. The tribunal agreed to include the conduct of Marius Lewis in its deliberations on the issue of victimisation.

Evidence

2. The following evidence was before the tribunal:

2.1. The tribunal heard live evidence from the Claimant, on his own behalf, and from Kim Hambis (Human Resources Business Partner), Marius Lewis (HR Advisor) and Henrietta Woo Kai Fong (Deputy Payroll Manager) on behalf of the Respondent. The tribunal also had sight of a witness statement from Anne Rowe (Business Support Officer to Directors) but she was unable to attend the hearing due to ill-health.

2.2. There was a bundle of documents before the tribunal running to just over 100 pages. Further documents were added during the course of the hearing.

Facts

3. The tribunal found the following facts on the balance of probabilities.

3.1. The respondent is a London Borough providing a range of services including Housing. The Claimant worked as a Housing Assistant since 1995. In 2019 he brought a claim in the employment tribunal which was successful and he was awarded £7,451.67 which was paid to him in November 2019.

- 3.2. Shortly before his tribunal hearing in November 2019, the Respondent invited volunteers for redundancy and the Claimant expressed an interest. He was told that his application for voluntary redundancy would be accepted and he was invited to a meeting with the Director of Homes and Communities, Jo Murphy, on 27 September 2019 to finalise this. She also held meetings on that day with the other five or six volunteers for voluntary redundancy.
- 3.3. At the meeting with the Claimant (as with all the volunteers for redundancy), Jo Murphy had a pre-prepared letter which had been drafted by Kim Hambis. This included the last day of service, being 12 weeks from the date of the letter, reflecting the Claimant's notice period. The Claimant says he did not see the letter in the meeting. As a result of their discussions at that meeting, Jo Murphy agreed to certain changes to the letter, which she communicated by email on 1 October 2019 to Kim Hambis. The requested changes were insertion of a garden leave period and confirmation of a leaving party. Kim Hambis made the requested changes to the letter but did not change the date of the letter and, therefore, the calculation of the last day of service as 22 December 2019 did not change either. She explained this as a reflection of her understanding that notice of termination should still be regarded as having been given on 27 September when the meeting took place and the amendments to the letter were not substantive. She did not regard these matters as adjusting the date that notice of termination was given.
- 3.4. Kim Hambis sent the letter (still dated 27 September) back to Jo Murphy and her PA, Ann Rowe, to be sent to the Claimant and copied to HR Advice so that they would know the last day of service. Ann Rowe saw that the letter was dated 27 September 2019 but it was being sent on 3 October. She assumed that the date of the letter should be updated to reflect the date it was sent but did not appreciate that this would affect the last day of service. This therefore remained in the letter as 22 December 2019. This was the content of the letter that the Claimant signed on 14 October to confirm his acceptance of the terms. Kim Hambis was sent a copy of this letter, at her request for her records, but states that she did not actually read it because she had drafted it and could see no need to read it. The Claimant's last day at work was 31 October and the remainder of his notice period was spent on garden leave.
- 3.5. During November 2019, the Claimant's Employment Tribunal claim was heard and he received Judgment in his favour on 13 November. The legal department instructed HR to make the award to the Claimant and Marius Lewis processed the payment in late November 2019 as this was part of his HR role.
- 3.6. In December 2019, the Claimant checked his final payslip and saw that he had been underpaid by four days, as he calculated his notice period to run from 3 October, which was the date on the letter, which would have meant his period of service ended on 26 December, not 22 December. He told his former line manager immediately but received no response from him. He then raised the issue by email to Kim Hambis on 7 January 2020. She replied to him the next day saying she would look into it for him. On 8 January, she passed the query to Marius Lewis having checked the situation and accepting that four days' pay was owed to the Claimant. Marius Lewis responded to her, confirming he had asked payroll to action payment. At this point both Kim Hambis and Marius Lewis assumed that the matter had been resolved and the payment would be made.

- 3.7. Kim Hambis states that she assured the Claimant by phone on or about 13 January that he would be paid. We accept that it was her genuinely held view at the time that payment was being processed. The Claimant disputes that there was a telephone call. Kim Hambis recalls being in a public area and taking the call on her mobile. The Respondent has no relevant phone records to shed light on this conflict of evidence. The Claimant's phone records are inconclusive. We make no finding on this as we do not consider it relevant to the issues we have to decide.
- 3.8. We were told that there were two ways in which Marius Lewis could process a payment of four days' pay to a former employee. He had a choice between simply processing a payment equivalent to four days' pay to an ex-employee (similar to a post-termination payment of commission or overtime) or adjusting the Claimant's actual leaving date so that the extra days would be paid automatically through payroll. The second route is a more accurate reflection of the situation but involved more paperwork. In order not to have to do the paperwork, Marius Lewis chose the easier route and instructed payroll to make the payment, having first obtained managerial approval.
- 3.9. When Wendy Wong of Payroll received the request on 13 January, she queried why the last day of service had not also been changed and referred it to Henrietta Fong. Nothing happened after that. The payment was not made, nor was the problem referred back to HR for further instructions. We were told that payroll cannot themselves change the termination date but there was no communication back from Payroll to HR to resolve this. The issue seems to have fallen through the cracks within the Payroll department.
- 3.10. As a result, the Claimant was not paid the four days owing to him and he realised this on the payroll date at the end of January. He contacted ACAS and asked for an Early Conciliation number so that he could bring a claim in relation to the non-payment.
- 3.11. When the Respondent learned of the tribunal claim in early March 2020, the legal department instructed HR to ensure payment was made and this was finally done by way of amending the last day of service and paying a further four days through payroll. This generated a second P45 showing the last day of service as 26 December 2019.

Submissions

4. The case of each party can be summarised as follows:
 - 4.1. The Claimant complains that the catalogue of errors is attributable to his protected act in bringing tribunal proceedings in 2019. Kim Hambis was a notetaker at some of the meetings which were part of those proceedings. Marius Lewis was the person in HR who authorised payment of the tribunal award. They were both therefore aware of the protected act. He argues that the litany of failures exhibits a negative attitude towards him. In particular, he points to Kim Hambis's decision not to amend the Claimant's termination date when the notice letter was amended as a deliberate decision to try to get away with paying him a lesser sum. He also complains that her failure to read the final version of the letter sent to him resulted in the error not being spotted.
 - 4.2. He contends that the following failures must be seen as a whole to show that he has been victimised:
 - 4.2.1. No clear policy on the date of the voluntary redundancy letter

- 4.2.2.No communication with the Claimant about the Notice Date
- 4.2.3.Failure to amend the last day of service on the voluntary redundancy letter once the date had changed
- 4.2.4.Failure to pay the correct amount in December
- 4.2.5.Failure to rectify the non-payment in January
- 4.2.6.Failure to clarify with the Claimant what was happening
- 4.2.7.Failure to communicate with him when payment was made

4.3. The Respondent accepts that there were errors in its processes but puts this down to human error. On further investigation, it has identified the first error being the failure to change the last day of service when the date of the letter was changed. It was Ann Rowe who changed the date of the letter, without being asked to do so, as this was something she would generally do. In this case, she did not realise that changing the date of the letter would have a knock-on effect on the last day of service. The second error was the failure of payroll either to process the payment or refer back to HR that they could not process it. The Respondent states that neither of these errors were committed by people who were aware of the Claimant's previous case. Those that were aware of it, did what was necessary to arrange the payment.

4.4. In response to the Claimant's contention to take the various failures as a whole, the Respondent argues that each must be considered as stand-alone matters.

Law

5. The relevant law is contained in s27 of the Equality Act 2010. Victimisation occurs if a person subjects another person to a detriment because they have done a protected act. In this case, there is no issue regarding the protected act (previous tribunal case) or the detriment (not being paid on time and lack of communication). The issue turns on whether the detriment happened 'because of' the protected act. In order to determine this, the tribunal must make a finding regarding the motivation of the individual(s) concerned. The protected act need not be the sole or principal motivation, as long as it was a material contributing influence on the conduct.

Determination of the Issues

6. We determine the issues as follows:
- 6.1. The Respondent accepts that there was a protected act.
 - 6.2. The Respondent accepts that the Claimant was underpaid by four days in December 2019. There is a conflict of evidence regarding any communication with the Claimant between January and March but it is accepted that the payment was not made until March and no confirmation of the payment being made was ever made. It simply appeared in the Claimant's bank account. There is a conflict about whether there was a telephone conversation on 13 January but we find that, either way, this makes no difference.
 - 6.3. We note that there has been a catalogue of errors but, having looked at these in the round, we consider that we must look at each detriment in order to ascertain the motivation of the protagonist.
 - 6.4. The first detriment is the short payment of four days. It is clear from the evidence that this came about because the original date of leaving service was based on notice of termination being given on 27 September. The amendments to the letter

of notice discussed between Jo Murphy and the claimant resulted in a delay in sending out the letter. Kim Hamblis took the view that these amendments were just minor details but they did not change the fact that notice had been given on 27 September. The Claimant argues that these were, effectively, a counter-offer to the voluntary redundancy offer and notice could only have been issued once those matters had been incorporated in the dismissal letter.

- 6.5. We do not need to form a view which position is correct as the Respondent accepted the Claimant's position that he was owed four days' pay, based on the date of the notice letter having been changed to 3 October. The issue is whether Kim Hamblis tried to reduce his payment by four days by not changing the date of the letter herself and therefore not amending the last day of service. The Claimant also criticises her for not correcting the last day of service on the letter once she received a copy of it which was dated 3 October.
- 6.6. We find that Kim Hamblis's view that the date of the letter should remain as 27 September was not an unreasonable view. She has explained her reasons and we accept these. Had the date of the letter not been changed by Anne Rowe, it is possible that the Claimant would have noticed that and had the opportunity to put forward his position that, as the letter had been issued a few days after the meeting, the last day of service should be changed from 22 December to 26 December.
- 6.7. In the event, the Claimant signed the letter and did not notice any error. He criticises Ms Hamblis for not spotting the error but we do not find this criticism well-founded. She was dealing with numerous employees and was familiar with the content of the letter, as she had drafted it. There was no particular reason for her to review it, nor is it clear that she would necessarily have spotted the error had she done so. We have also taken into account her heavy workload and the fact she was not always working out of a proper office.
- 6.8. When the Claimant raised the underpayment, Kim Hamblis did not seek to maintain her position that the last day of service should have been 22 December. She readily accepted that there had been an error and took steps to remedy it.
- 6.9. Therefore, in relation to the first detriment, although we accept that there was a chain of events which led to the underpayment which began with Ms Hamblis, we do not see that she acted at any stage with malice and we find no evidence that the motivation for regarding notice having been given on 27 September instead of 3 October was the Claimant's previous tribunal claim. The actual administrative error was committed by Anne Rowe and her actions were not driven by any negative motivation against the Claimant.
- 6.10. The Second detriment is the failure to communicate with the Claimant. Whether or not there was a telephone conversation on 13 January, there was no subsequent communications until and including the eventual payment of the outstanding payment which, of itself, would be sufficient for the Claimant to rely on. If there was a conversation on 13 January, the Claimant would have been told that he would receive his payment shortly. Given that he did not receive the payment, that conversation does not particularly assist the Respondent. The issue is that he did not receive the payment until he brought proceedings. Once the mistake had been discovered, nobody contacted the Claimant to explain what had happened.
- 6.11. The individuals who are accused of victimisation are Kim Hamblis and Marius Lewis. They were the only people involved in the failure to pay in January 2020

who were aware of the Claimant's previous tribunal claim, albeit (particularly in the case of Marius Lewis) in a peripheral way. However, they did all they thought was necessary to ensure that the original mistake was rectified. The email evidence shows that they responded efficiently and reasonably. Once Marius Lewis had obtained authorisation for the payment and sent the instruction to Payroll, he was entitled to consider the matter dealt with. If there had been a problem with the payment, he would have expected Payroll to bring this to his attention. Ms Fong has accepted that the fault lay within her department.

- 6.12. It is also clear from the evidence that it is not the Respondent's practice to notify former employees of payments being made to them. While that may have some justification for routine payments which the employee is expecting, it was an unfortunate practice in relation to the Claimant
- 6.13. On the basis of this evidence, we do not find that Kim Hamblis or Marius Lewis contributed to this detriment.
- 6.14. In conclusion we find that the Claimant has not made out his complaints of victimisation and his claims therefore fail.

Employment Judge Davidson

Date 9 December 2020

JUDGMENT SENT TO THE PARTIES ON

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