EMPLOYMENT TRIBUNALS

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was ***V****: video whether partly (someone physically in a hearing centre) or fully (all remote)***. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that I was referred to are in a bundle of 332 pages.**

Claimant: **Mr Z Turek**

Respondents: We Insure Tech Limited (1)
Gary Meek (2)
Audrey Meek (3)

Heard at: Watford by CVP **On: 10 to 12 February 2021**

Before: Employment Judge Lang
sitting with members Mr D Palmer and Ms J Wood

Appearances: For the claimant: Mr L Werenowski (solicitor)
For the respondent: Mr H Grime (solicitor)

JUDGMENT

The unanimous decision of the tribunal is that –

1. The complaint of race discrimination is not well founded and is dismissed.

2. The complaint of breach of contract is well founded and the First Respondent is ordered to pay the claimant £516.88.

3. The complaint of unlawful deductions is well founded and the First Respondent is ordered to pay the claimant £852.50

REASONS

1. By a claim form issued on 17th April 2020 the Claimant brought complaints of race discrimination, notice pay and unlawful deduction of wages arising from his dismissal on 12th March 2020. The claim was brought against three Respondents, his employer (the First Respondent), Mr Gary Meek (the Second Respondent, who was the Director of the First Respondent) and Mrs Audrey Meek (the Third Respondent, who was the Operations Manager of the First Respondent).

The Hearing

2. The hearing took place by Cloud Video Platform (CVP) . We heard evidence from the Claimant and from Mr and Mrs Meek, together with Mark Sanger and Charlie Clark for the Respondents. We had a bundle of documents of 332 pages and we viewed CCTV footage through a private You Tube channel set up by the Respondents with the Claimant's agreement.

3. At the start of the hearing the parties were informed that Mr Palmer was until 17 years ago a serving Police Officer with Thames Valley Police which is the same Force which arrested the Claimant. The parties had no objection to him continuing to hear the case.

The Issues

4. **Direct Race Discrimination - Section 13 of the Equality Act 2010**

   4.1 Did the Respondents subject the Claimant to the following treatment?

      4.1.1 dismissing him on 12 March 2020;
      4.1.2 directing the Police to arrest the Claimant;
      4.1.3 retaining the Claimant's tools;
      4.1.4 withholding his salary;
      4.1.5 demanding repayment of £90,000; and
      4.1.6 failing to deal with his grievance.

   4.2 If so, was this less favourable treatment i.e. did the Respondents treat the Claimant less favourably than it treated or would have treated others in not materially different circumstances? The Claimant relies upon actual comparators of Mark Sanger and Charlie Clark and/or a hypothetical comparator.

   4.3 If there was less favourable treatment, was it because of the Claimant's race?

5. **Breach of Contract**

   5.1 To how much notice was the Claimant entitled? This was agreed at one week.

5.2 Did the Claimant fundamentally breach the contract of employment by an act of gross misconduct? This requires the First Respondent to prove on the balance of probabilities that the Claimant actually committed the gross misconduct.

6. **Unlawful Deduction from Wages**

6.1 It was agreed by the parties that the Claimant was owed 7.5 days' pay at £682 gross.

6.2 If any of the claims succeed and the Claimant was not issued with a Section 1 statement then the Claimant is entitled to two weeks' pay and the Employment Tribunal may award four weeks' pay.

6.3 If any of the claims succeed and the Employment Tribunal is satisfied that there was an unreasonable failure by the First Respondent to comply with the ACAS Code of Practice then an uplift of up to 25% can be awarded.

Findings of Fact

7. The Claimant was employed by the First Respondent from 27 August 2019 as a Workshop Technical Assistant Engineer. The Respondent is a small electrical equipment repair and warranty business / shop operating from premises in Sandhurst. The Second Respondent, Mr Gary Meek is a Director of the First Respondent and his wife, Audrey Meek, the Third Respondent is the Operations Manager.

8. The First Respondent had won a contract from a company called Envirofone, and experienced a large influx of work. There was a large backlog of mobile telephones needing to be repaired. The Claimant was recruited to deal with this backlog and worked alongside 2 other engineers - Mr Mark Sanger who had been employed since 2008 and Mr Charlie Clark who had been employed since December 2018. As well as work for Envirofone ,the First Respondent also dealt with members of the public who walked into the shop with equipment requiring repair.

9. The Claimant worked mainly on what are called DSR's - that is repairing products which had been returned by customers within a 30 day cooling off period but Mr Clark and Mr Sanger also helped with DSR's from time to time.

10. The Claimant was based in a workshop and on most days he worked alongside Mr Clark and Mr Sanger apart from Saturday mornings when he was alone.

11. The Respondents dealt with about 9,000 phones for Envirofone during the course of the contract and there were many hundreds of phones on the premises at any one time.

12. Phones that arrived on the premises were video recorded and their details were entered onto a database by the Customer Services Team.

13. The engineers would then receive the phones in the workshop, repair them, update the database and then place the repaired phone in a grey plastic box with the relevant paperwork. The phones should not be removed from the workshop until the boxes were full and then the phones should only be removed from the workshop in the grey boxes.

14. The Claimant would often not complete the database correctly. This was known to the Respondent and his colleagues but no action was taken against him in relation to this.

15. Although phones were being videoed and logged in on receipt, the Respondents were so busy and overwhelmed with work that there was no effective procedure in place thereafter to monitor the progress of repairs, to highlight phones which were not recorded as being repaired on the system and to monitor the passage of mobile phones from arrival through to repair and to despatch. A larger number of phones simply arrived on the premises and no records were made of any progress thereafter. These were systemic failures and no steps were taken in respect of employees who failed to update the database. This resulted in a situation where by March 2020 the Respondent had records of 787 Envirofone handsets on their premises but only 554 were physically there. In short, the Respondents' stock controls were very poor indeed.

16. In February 2020, the Respondents were informed that Envirofone were terminating the contract with effect from 1 March 2020. This resulted in a redundancy situation. Two members of staff from Customer Services were made redundant and given notice on 2 March 2020. The Claimant was on holiday until 25 February and on his return he was told about the situation.

17. We find the Respondents' version of events to be more likely to be correct in respect of the redundancy. The Claimant said that he would accept the redundancy and leave as he planned to return to Poland. We say this because the Claimant made no mention whatsoever of the redundancy in his grievance or in his claim form. We find it highly likely that he would have done so had he been in any way aggrieved by it.

18. He was told that his employment would end on 31 March but he agreed an earlier termination date of 20 March as he was flying to Poland that weekend. His father was due to go into hospital for a medical procedure.

19. On 5 March Envirofone sent a list of 787 phones that they wanted the First Respondent to return to them. All of the engineers, including the Claimant, together with Mr and Mrs Meek, carried out an audit and they were unable to account for 233 phones.

20. Mr Meek then spent a number of days reviewing the available 3 months of CCTV footage for clues about the whereabouts of the phones. He did not focus solely on the Claimant but looked at all the available footage. He did not see any suspicious activity in the workshop on weekdays but found about six occasions on Saturday mornings where the Claimant was filmed taking phones

out of the workshop and then returning without them. He also thought that the Claimant was deliberately concealing his actions behind a " wall " of phone boxes.

21. The missing phones on the Envirofone list were all DSR phones. Although some had been received in May 2019 – some months before the Claimant started work, there had been a backlog of a number of months and the phones might not have been repaired by the time the Claimant started his employment.

22. We accept that Mr Meek genuinely believed that he had found evidence of wrongdoing on the part of the Claimant. This was on the basis of his CCTV observations, the fact that the Claimant worked mainly on DSR phones and that the Claimant was working alone on Saturdays and had the opportunity to remove phones from the workshop then.

23. Mr Meek contacted the police based on these findings. The police attended at the Respondents' premises on 12th March. Mr Meek showed them the CCTV footage and explained the basis of his belief.

24. The Police arrested the Claimant. He was taken to the Police Station, interviewed and released in the early hours of 13th March.

25. In the meantime, Mr Meek decided to summarily dismiss the Claimant and wrote to him on 12th March. The letter of dismissal did not offer the Claimant the right of appeal.

26. The Claimant asked Mr Meek for the return of his tools but this was refused. The Tribunal concludes that Mr Meek did this because he was aggrieved with the Claimant and thought that he was a thief.

27. In text messages Mr Meek asked the Claimant how he "and his family" would repay the debt. Mr Meek contacted the Claimant's brother in law and asked him for his proposals for repayment. The Claimant's brother in law (who was also Polish) had worked with the Respondents before as a contractor. We find that he did this because he thought the Claimant was responsible for the loss of the phones and suspected that his brother in law might have been involved.

28. The Claimant sent a grievance letter to the Respondent on 3rd April but this was ignored. We find that this was because Mr Meek thought that the Claimant had stolen from him.

29. The Police searched the Claimant's house and examined his phone. They found no further evidence and informed the Respondents that they would not be prosecuting the Claimant on 22nd May 2020.

30. The Respondents have not satisfied us on the balance of probabilities that the Claimant actually stole the phones and committed gross misconduct.

31. We say so firstly because we consider that the CCTV does not show an individual who is seeking to conceal his actions. He took phones out of the

workshop in full view of the CCTV. We do not accept that the Claimant had built a wall of phone boxes to deliberately conceal his actions as the Respondents had concluded. It also seems to us unlikely that an individual who was stealing phones on an industrial scale - over 200 over the course of six months - would do so by this method. An industrial scale theft by this method would have left far more evidence than the few CCTV clips that we and the police were shown.

32. Secondly, the police also searched his home and examined his phone and found no evidence whatsoever.

33. Thirdly, we also have regard to the fact that the Respondents' stock control system and record keeping was so lax that there were multiple points when phones could have been removed from the premises by others either deliberately or accidently.

34. We are satisfied that the Claimant's explanations for the removal of the few phones from the workshop were likely to be correct. He was either taking them to Mr Meek or putting them in the storeroom as they were beyond economical repair.

35. In respect of whether a contract of employment was issued we prefer the Respondents' version of events. He was handed a contract to sign on his first or second day of employment by Mrs Meek. The contract is in the same form as the contract issued to Mr Sanger. It is consistent with the Respondents' administrative challenges that there were mistakes in it and that they did not require it to be signed. We found Mrs Meek to be a credible witness on this point. We think it is likely that the Claimant has simply forgotten that he had been issued with a contract at the start of his employment.

The Law

36. The relevant law in relation to race discrimination is set out at Section 13 of the Equality Act 2010 and Section 136(2) and (3) of the Equality Act 2010 in relation to the burden of proof.

Section 13 states –

(1)A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

Section 136 states -

(1)This section applies to any proceedings relating to a contravention of this Act.

(2)If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3)But subsection (2) does not apply if A shows that A did not contravene the provision.

37. The tribunal found the following extracts from Harvey on Industrial Relations dealing with the burden of proof to be useful –

….on 24 November 2017 the Court of Appeal handed down judgment in the case of Ayodele v Citylink Ltd [2017] EWCA Civ 1913, [2018] IRLR 114

The Court of Appeal went on to overturn the EAT judgment in Efobi v Royal Mail Group [2019] IRLR 352, confirming that the two-stage approach authoritatively expounded in Igen v Wong remains applicable. Elias LJ summarised the position:

"First, the burden is on the employee to establish facts from which a tribunal could conclude on the balance of probabilities, absent any explanation, that the alleged discrimination had occurred. At that stage the tribunal must leave out of account the employer's explanation for the treatment. If that burden is discharged, the onus shifts to the employer to give an explanation for the alleged discriminatory treatment and to satisfy the tribunal that it was not tainted by a relevant proscribed characteristic. If he does not discharge that burden, the tribunal must find the case proved."

Whether considering, then, the legacy legislation or the Equality Act burden of proof provision, the two-stage process remains the starting point. In the first place, the complainant must prove facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent had committed an unlawful act of discrimination against the complainant.

According, to the Court of Appeal in Madarassy v Nomura International plc [2007] IRLR 246, [2007] ICR 867, CA, 'could conclude' must mean 'a reasonable tribunal could properly conclude' from all the evidence before it (also restated in St Christopher's Fellowship v Walter-Ennis [2010] EWCA Civ 921, [2010] EqLR 82). That means that the claimant has to 'set up a prima facie case'. In Madarassy it was held that a difference of status and a difference of treatment was not sufficient to reverse the burden of proof automatically; Underhill P in Hussain v Vision Security Ltd and Mitie Security Group Ltd UKEAT/0439/10, [2011] All ER (D) 238 (Apr), [2011] EqLR 699 warned that this must not be given the status of being a rule of law. Whether the burden has shifted will be a matter of factual assessment and situation specific. The second stage, which only applies when the first is satisfied, requires the respondent to prove that he did not commit the unlawful act.

In deciding whether there is enough to shift the burden of proof to the respondent, it will always be necessary to have regard to the choice of comparator, actual or hypothetical, and to ensure that he or she has relevant circumstances which are the 'same, or not materially different' as those of the claimant, having regard to EqA 2010 s 23 (formerly, within the RRA 1976 at s 3(4)). The question of whether a comparator relied upon is in circumstances which are 'materially different' is a question of fact for the tribunal; and even if there are some material differences within section 23, the treatment of the purported comparator might be of relevance when considering a hypothetical comparator: CP Regents Park Two Ltd v Ilyas UKEAT/0366/14 (16 June 2015, unreported).

If the burden does shift, then the employer is required only to show a non-discriminatory reason for the treatment in question. It is no part of the regime imposed by RRA 1976 s 54A that the employer who is seeking to offer an explanation for what could be seen as discriminatory conduct must show that he acted reasonably or fairly in relying on such a reason: Griffiths-Henry v Network Rail Infrastructure Ltd [2006] IRLR 865, EAT per Elias J at [22]; see for example Johnson v Governing Body of Coopers Lane Primary School UKEAT/0248/09 (1 December 2009, unreported), where unreasonable conduct was found not to be discriminatory.

38. Section 207A of the Trade Union and Labour Relation Act 1992 states as follows –

207A Effect of failure to comply with Code: adjustment of awards

(1)This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.

(2)If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—

(a)the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

(b)the employer has failed to comply with that Code in relation to that matter, and

(c)that failure was unreasonable,

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

39. Race discrimination, breach of contract and unlawful deductions from wages are all jurisdictions set out in Schedule A2

.

Conclusions

40. On the basis of our findings of fact, the breach of contract complaint is clearly well founded and accordingly we award the Claimant £413.50 in respect of one week's pay.

41. The complaint of unlawful deductions also succeeds by agreement and the Claimant is awarded the figure of £682.

42. There is no award under Section 38 of Employment Act 2002 in respect of the Section 1 statement as we are satisfied that a contract was issued to the claimant in the early days of his employment.

43. Turning to the race discrimination complaint and dealing first with the dismissal, we find that Mr Sanger and Mr Clark were not appropriate comparators. They were not filmed leaving the workshop with mobile phones and returning without them, they did not work predominantly on DSR's and they did not work alone on Saturday mornings. We find out that that the appropriate comparator was a hypothetical British comparator to whom these circumstances applied.

44. We find that such a hypothetical comparator would also have been dismissed by Mr Meek. We are not satisfied that the Claimant has set up a prima facie case for race discrimination. Just because he was Polish and was dismissed is not sufficient to reverse the burden. Something more is required and we have looked hard for that something more but we could not identify anything.

45. Even if we are wrong about the appropriate comparator and/or if the burden had shifted to the Respondent to give an explanation, we are satisfied with the Respondent's explanation and satisfied that the dismissal was not discriminatory. He was dismissed because of Mr Meek's findings set out in paragraph 22 above.

46. The same analysis applies to the other five acts complained of. We find that a hypothetical British comparator would have been reported to the Police and arrested, that Mr Meek would have retained their tools, withheld their salary, demanded repayment of the cost of the phones and failed to deal with the grievance. The reason for those actions was that Mr Meek believed that the Claimant had stolen from him and was feeling very hurt and aggrieved. The loss of the phones was devastating to the Respondents.

47. Mr Meek's actions in relation to the tools, the salary, the repayment demand and the grievance were unreasonable but we are satisfied that they were not tainted by race. His actions were motivated by his belief in the Claimant's guilt and we are satisfied that they were not influenced by race either consciously or unconsciously.

48. Finally, we find that the ACAS Code applied to the dismissal for misconduct, that the Respondents failed to comply with the Code and that the failure was unreasonable and accordingly we award a 25% uplift to the breach of contract and wages awards to £516.88 and £852.50 respectively.

_____

Employment Judge Lang

26.2.2021

Date:……

Sent to the parties on:

15/03/2021.

For the Tribunal:

THY……..