



EMPLOYMENT TRIBUNALS

Claimant: Stuart Walton

Respondent: Thuraiajah Sivakumar

Heard at: London South (by cvp) **On:** 31 March & 01 April 2021

Before: Employment Judge Housego
Tribunal Member Rousou
Tribunal Member Mitchell

Representation

Claimant: In person

Respondent: Nicholas O'Brien, of Counsel, instructed by Nag Law Solicitors Ltd

JUDGMENT

1. The Respondent is ordered to pay to the Claimant 4 weeks' pay in respect of failure to provide terms and conditions of employment, that is: £375.44.
2. The claim for unfair dismissal is dismissed.
3. The claim for disability discrimination is dismissed.

REASONS

Summary

1. The Claimant worked nights as a cashier at the Respondent's filling station. He has haemorrhoids, which he says are disabling within the meaning of the Equality Act. He says that the work the Respondent moved him to in July 2018 made his condition worse, and that reasonable adjustments should have been made, principally returning him to his work as a cashier 3 nights a week.

2. Mr Sivakumar accepts that Mr Walton is disabled as claimed. He says that the work made no difference to his condition, and that there were no adjustments that would have made any difference. He would not put Mr Walton back as a cashier, as Mr Sivakumar was, and is, unhappy that Mr Walton intended to keep a commission paid by a company that sorts out customers who have put the wrong fuel in their vehicles. Mr Walton says that the company paying the commission were insistent that it was his money, and as he had no written contract with Mr Sivakumar there was no obligation on him to account to the Respondent for the money.
3. The claim filed was of disability discrimination, unfair dismissal and payments said to be due. These were deductions for the cost of fuel taken by people who drove off, and other commissions paid by companies who attend to customers who have put the wrong fuel in their vehicles, having been contacted by the Claimant.
4. Mr Sivakumar says that he has not dismissed Mr Walton. At a case management hearing on 20 February 2019 the issues were identified by EJ Downs. They were exclusively about disability discrimination.
5. It was accepted by Mr Sivakumar that he had not provided employment particulars as required by S1 of the Employment Rights Act 1996, and so there should be a remedy (of 2 or 4 weeks' pay) by reason of S38 of the Employment Act 2002. He said the reason was that Mr Walton was the son of someone he knew well, and that Mr Walton had never asked for one.
6. EJ Downs recorded that Mr Walton said that he was still employed by Mr Sivakumar and was not bringing a claim for unfair dismissal. However, the claim was not dismissed on withdrawal, although (on 20 February 2019) a claim under S15 of the Employment Rights Act 1996 was dismissed upon withdrawal.
7. On 05 October 2019 Mr Walton emailed the Tribunal to object to being considered still employed, stating that if he had been asked whether he was still employed by Mr Sivakumar he would have said "NO!".
8. On 03 January 2020 at a further case management hearing, EJ Khalil recorded that there was no claim for unfair dismissal, and noted that at the change of work in July 2018 Mr Walton did not have 2 years' service (he started on 07 July 2017). EJ Khalil stated that the "*The claimant remains employed and says that he has not resigned, and the respondent says it has not dismissed him.*". However, the claim for unfair dismissal was not dismissed.
9. The case was adjourned at a full hearing on 01 February 2021. The decision recorded that the issues were as set out in the order of 20 February 2019 by EJ Downs. It was said that Mr Sivakumar was unable to take part in the digital hearing for an (unspecified) age related disability. Mr Sivakumar did not attend that hearing. Mr Walton did attend and said that he had sent in a witness statement and a bundle of documents. Mr Sivakumar then attended by phone in the afternoon. He was unable to explain why he could not attend a cvp hearing. A representative from his solicitor was unable to explain why, after so long, the case was so unprepared, although it was said that there had

been a series of illnesses and a death in the firm. It was apparent to that Tribunal that Mr Sivakumar was not taking the case seriously.

10. An order made by EJ Webster's Tribunal on 01 February 2021 contains the background at paragraph 10 onwards of the Order, and at 17 Mr Sivakumar was reminded that it was his personal responsibility as well as that of his representative. The Orders are at paragraph 18 onwards. Paragraph 19 required Mr Sivakumar, within 7 days, to provide evidence of the caseworker's state of health on the date of that hearing, and the date of his most recent diagnosis. It also required medical evidence regarding Mr Sivakumar's claimed hearing difficulties, and an explanation as to why or how this prevented him from taking part in a cvp hearing, if it did.
11. Mr Sivakumar and his solicitor have ignored that Order, and I refer the file to the Regional Employment Judge to consider what action to take.
12. At the hearing of 01 February 2021 the matter of the unfair dismissal claim and the deductions from wages were not addressed.
13. The two matters of unfair dismissal and deductions were addressed at the start of this hearing. Mr Walton said that he was paid in cash, with payslips, and had no issue with either the amount of pay or the payslips. However, on occasion, he said Mr Sivakumar would demand cash back from him by reason of drive offs. Customers at night time were required to prepay for fuel. However, Mr Walton had to stop the pump manually, from the cash desk, at the prepaid amount, and if he was not quick enough more fuel would be drawn than had been prepaid. Mr Walton said that it was the cost of these amounts which Mr Sivakumar demanded, and was paid back by him, from his cash pay. Mr Walton thought it was about £300 in total, but accepted that none had occurred for about 6 months before he filed his claim. It was this claim which had been dismissed by EJ Downs. There is no other claim for outstanding payments.
14. Mr Sivakumar's position was that Mr Walton remains employed, even now, but has either been off sick (and had exhausted his entitlement to SSP) or was absent from work without authorisation, but no disciplinary action had been taken about the absence.
15. Mr Walton wanted only to return to his 3 nights a week as a cashier. This remained his wish. Mr Sivakumar would not permit this. Mr Walton would (and will) not return to cleaning work starting at 6 am, 6 days a week for 4 hours a day, or the 3 days a week agreed by Mr Sivakumar on 10 July 2018, at Mr Walton's request.
16. Mr Walton says that he wrote on 10 January 2019 (186/197) saying that he wanted to return, and referring to the possibility of being fired (so that he regarded himself as employed at that date). He says that he accepted that he was dismissed in October 2019. On 21 October 2019 the government pension agency, NEST, wrote to him to say that he was no longer contributing to the scheme (156/197). Mr Walton draws attention to his email of 05 October 2019 emailed to Mr Sivakumar's solicitors and the Tribunal (63/197) to state that *"If I had been asked [at EJ Downs' hearing] do I feel I am still employed with Mr Sivakumar I would of clearly stated NO!"*.

17. It follows that there are three possibilities:

17.1. Mr Walton was constructively dismissed by the time he filed his claim form on 21 September 2018, in which he claimed unfair dismissal (or that the form itself was acceptance of an asserted fundamental breach of contract by Mr Sivakumar). This is contradicted by his letter of 10 January 2019 (186/197), in which he indicated that he regarded himself as still employed. However, if he was dismissed by, or on, 21 September 2018, then he had less than two years' service (as he started on 07 July 2017) and the unfair dismissal claim must be dismissed for want of jurisdiction.

17.2. Mr Walton was dismissed in October 2019, either constructively (by the email of 05 October 2019) or by the NEST email resulting from action taken by Mr Sivakumar (there are other reasons why NEST might write such a letter, so this would require findings of fact). He would then have over two years' service. Either way, the claim of unfair dismissal in the claim form of over a year earlier could not sustain that claim. There would have needed to be an amendment to replead the case. It is too late to do that now, eighteen months later, so the claim must be dismissed.

17.3. Mr Walton is still employed, and so cannot claim unfair dismissal, and so the claim must be dismissed. This is the position of Mr Sivakumar, who said so in oral evidence, through his Counsel, and in a letter from his solicitor to the Tribunal of 01 February 2021 (158/197) which states that Mr Walton is included in the monthly return of employees to HMRC.

18. The Tribunal makes no finding of fact as to which of these is the case, but as there is no possibility of the claim being able to proceed it (the claim for unfair dismissal) is dismissed.

The claim

19. The claim is of failure to make reasonable adjustments¹ to deal with the effects of a disability, specifically haemorrhoids.

20. The Respondent (now) accepts that this was a disability, and that at all material times he knew of it.

21. The test for a claim that the Claimant has suffered unlawful discrimination is whether or not the Tribunal is satisfied that in no sense whatsoever² was there less favourable treatment tainted by such discrimination. It is for the Claimant to show reason why there might be discrimination³, and if the Claimant does so then it is for the Respondent to show that it was not. The onus is on the employer to make reasonable adjustments and employers have a duty to make reasonable enquiry to find out what they might be. Employees have an obligation to assist their employer to meet that duty.

The issues

¹ S 20 & 21 EqA

² Igen Ltd & Ors v Wong [2005] EWCA Civ 142, para 14 applying Barton v Investec Securities Ltd, [2003] ICR 1205 para 25.

³ Igen v Wong (above), Madarassy v Nomura International plc [2007] EWCA Civ 33, Laing v Manchester City Council [2006] I.C.R. 159, and Ayodele v Citylink Ltd & Anor [2017] EWCA Civ 1913

22. The order of 20 February 2019 set out the issues about disability. These are solely about reasonable adjustments. The Order states that no other issues will be considered at the hearing. The subsequent orders of 03 January 2020 and 01 February 2021 have adopted those issues.
23. They are fully set out in the case management order, but not repeated verbatim here. It is common ground that the Respondent imposed a change in the type of work (cashier to cleaning), and in shift pattern (from 10pm to 6am on 3 consecutive nights to 6 days a week, 6am to 10am cleaning, varied at Mr Walton's request to 3 days of his choice).
24. Mr Walton says that this work was difficult for him to manage and made his condition worse.
25. Mr Sivakumar says that while he knew of the haemorrhoids, he did not know much about the effect of them, that the reason for the changes was that he did not want the Claimant as a cashier (because of the commission payment) and that in any event the Claimant did not work the new role other than 3 days, but was off ill from 10 July 2018 (after the 1st day, nevertheless working 01 and 03 August 2018), pending a pre-arranged operation (which took place on 24 September 2018), and that it transpired that his condition had worsened at the time he went off ill, but by reason of hard work in the garden of his parents' home, where he lived, not by reason of any work he did for the Respondent.

The Hearing

26. Mr Walton appeared without representation. Mr Sivakumar was represented by Counsel. There were no other witnesses. There was a bundle of papers prepared by the solicitor for Mr Sivakumar. There had been very little co-operation between the parties about its preparation. The Tribunal did not apportion blame for that, but at least the Respondent's solicitors had, at the last minute, prepared a bundle with the Tribunal papers, and sections from the Claimant as well as from the Respondent. The Claimant had prepared a very lengthy submission with evidence interspersed through it in the form of screen shots of text messages and other documents. Mr O'Brien did not have it. The Tribunal adjourned for 40 minutes for him to peruse it. He was content to continue, saying that there was little in it which was not in the bundle prepared by Mr Sivakumar's solicitors.
27. Mr Walton made clear the extent of his mental health difficulties, and the Tribunal requested that the cross examination was conducted appropriately for a vulnerable witness, Mr O'Brien meeting that obligation in an exemplary way.
28. Mr Walton had not received the Respondent's bundle. His evidence concluded at 2:45, and so the Tribunal adjourned until the second day so that he might have time to look at it, it being sent to him again at about 10:40 am. It had been sent previously on 29 March 2018 but not received by him.
29. In any event the Tribunal wished to adjourn for the day at that point, as it was plain that Mr Walton found the hearing very stressful and emotional, and it

would have been unfair to expect him to commence cross examination of Mr Sivakumar the same day, even after a break.

30. The Tribunal did not consider that Mr Walton was adversely affected by not having seen Mr Sivakumar's bundle, because the contents were much as that of his own documents. The cross examination of Mr Walton had identified all the documents in it which Mr Sivakumar's Counsel thought relevant.
31. Mr Walton objected to Mr Sivakumar's witness statement being admitted at all. He said that it should have been provided in April 2020 if previous orders had been complied with. It had, he said, been written by the solicitors after reading what he had written.
32. The Tribunal did not accept this submission. Whatever orders had been made in the past, the provision of the witness statement was in compliance with the order made on 01 February 2021. Mr Walton's own submission/witness statement was not received by Mr Sivakumar's solicitor (it was via a DropBox or OneDrive link, and not disputed that Mr Walton had sent the link before) until the first day of the hearing and so Mr Sivakumar's witness statement could not have been prepared to deal with what Mr Walton had put in his own document. It was not unusual for a solicitor to attend a client to take instructions and from those instructions to prepare a witness statement for signature.
33. Mr Walton found it hard to question Mr Sivakumar, and the Tribunal asked questions of him fully to put Mr Walton's case to him. Mr O'Brien did not object to any of the questions put to him by the Tribunal.
34. Mr O'Brien provided a written submission and the Tribunal accorded Mr Walton as much time as he requested for him to read and consider it. Mr O'Brien spoke to his submission for about 15 minutes. The Tribunal then adjourned for half an hour to allow Mr Walton time to reflect on what he wished to say. At the commencement of the hearing, I had explained to Mr Walton about what was needed for evidence (fact), cross examination (questions, short, interrogatory and to put his case to Mr Sivakumar) and submissions (opinion, and to draw attention to key points of evidence and reasons why his claim should succeed, and not the defence). This guidance was repeated at each of these three stages.
35. It was clear that:
 - 35.1. The primary issue for Mr Walton is the removal of his cashier role for an accusation of attempting dishonestly in taking a commission Mr Sivakumar said was due to him, and which he said helped to make up the cost he said that he suffered through drive offs. Mr Walton's view is that he got stopped money for shortages caused by drive offs and this commission was a recompense. He said it was no part of his job to earn commission for Mr Sivakumar, and he was entitled to keep the commission he earned by helping customers who had got themselves into the situation. It was, he said the fuel replacement company which insisted on paying him. He strongly objects to being labelled dishonest.

35.2. The disability claim is about it being, in Mr Walton's case, a problem for him to do cleaning work in the day time instead of sales work at night, by reason of his disability (of haemorrhoids). He says the cleaning makes it worse. He also says that his mental health problems make it extremely hard for him to get up early, and that 6 days a week gave him only 1 day of rest. He wanted the 3 x 8 hour consecutive night shifts to give him 4 days rest, to enable him to get to work, and to be able to cope with the effects of his haemorrhoids before starting work. He says his mental health issues make his haemorrhoids worse.

Findings of fact

36. Mr Walton worked nights as a sales assistant at Mr Sivakumar's filling station. On 09 July 2018 he was told that he would no longer be allowed that role, but could be a cleaner instead. He was told it would be 4 hours a day for 6 days, instead of 3 night shifts of 8 hours. Mr Walton asked that this be reduced to 12 hours a week, so 3 days (180/197). He made this request on 12 July 2018, and Mr Sivakumar agreed, and Mr Walton chose the days he wanted. He did not ask for a later start time.

37. The reason for this change was that Mr Sivakumar objected to Mr Walton giving his personal bank details to a company which paid commission when contacted by (or on the recommendation of) Mr Walton to attend people who had put the wrong sort of fuel in their vehicles.

38. On 26 June 2018 (122/197) Mr Walton had helped a customer who had put the wrong fuel in his car by putting him in touch with a company which solves such problems. The company was the one Mr Sivakumar had an arrangement with, and their business cards were at the cash desk. They pay a commission every time. It may be £50 or even £100, depending on what they charge the customer. They pay it in cash if the customer pays in cash, or to a bank account if the customer pays with a card. Mr Sivakumar's bank account details were in a diary at the desk, with staff information and other useful details. Mr Walton says that he did not know that. However, Mr Walton knew that Mr Sivakumar expected to keep the commissions for himself. He so stated in his initial accounts of matters for this claim (23/197, and 98/197). He said that the people from the company insisted that it was his commission, and that after three times refusing, he gave them his bank details. After they did not send the money for some days, he told Mr Sivakumar, who was angry about it. This is clearly evidenced in a text message exchange at the time Mr Walton was removed from his cashier duties (113-119/197). It is also apparent from a text message sent by Mr Walton to the fuel company repeating his bank details, dated 30 June 2018. Mr Walton received the money on 02 July 2018 (99/197)

39. Mr Walton's evidence to the Tribunal was that he had told Mr Sivakumar the next morning, but both the text messages and the original statement of case make it clear that it was several days later. It is also clear that Mr Walton did not regard it as doing anything wrong, for if he had he would not have told Mr Sivakumar about it.

40. Mr Sivakumar recorded in the text messages on 15 August 2018 (121/197) that he had told Mr Walton on 09 July 2018 that he would not allow Mr Walton

to work on the tills as he did not trust him anymore. He felt that had the commission been in cash he would never have known about it. It was he who permitted the fuel company to work on his forecourt, and he had their cards at his cash desk. The money helped offset shortfalls from drive offs. Mr Walton's job was available if he wanted it, or he could feel free to find himself another.

41. Mr Walton worked 10 July 2018, but then went to his GP and was given a sick note effective from 09 July 2018. Although signed off he worked two shifts – 01 and 03 August 2018. Mr Walton says that this work caused him injury by worsening his haemorrhoids. However, on 11 July 2018 he texted Mr Sivakumar:

“Still in the loo sorry. it’s my own fault, i know I ain’t meant to be bending over too much or lifting heavy things but with the state of my back garden & my parents not getting on with it, I got the hump & started doing it my self & that’s probably why i am bleeding so much today. Sorry again.” [sic]

42. Mr Walton's evidence was that Mr Sivakumar had a way of making you think everything was your fault, and that was why he apologised, and that he had in fact done very little work in the garden, and that the worsening was down to his physical work at the filling station on 10 July 2018. The Tribunal did not find this a credible account. If Mr Walton was looking for a reason to try to set out problems caused by the cleaning duties he was now being asked to do, this was, if it was so, the opportunity to do so. The text was not in response to anything from Mr Sivakumar.
43. Mr Walton's evidence (borne out by the difficulties he had during the hearing) is that he has considerable mental health issues, with anxiety and depression. He says that it is a well known fact that this can, and his case does, exacerbate the long standing problems he has with his haemorrhoids. The stress of being removed from his role, and of being accused of dishonesty made his mental health much worse and that made his haemorrhoids much worse. The Tribunal accepts this as factually correct. That, together with the gardening, were the sole reasons his already bad condition worsened.
44. Mr Walton had a diagnostic procedure (colonoscopy) in April 2018, and an operation on his haemorrhoids on 24 September 2018 (66/197) (3 days after filing this claim). A letter from his GP to a consultant dated 16 July 2018 (104/197) stated that Mr Walton wanted an operation upon them, and this request the GP supported.
45. The dates are important, as it is clear that Mr Walton's haemorrhoids were causing him great problems from April 2018 onwards. It is very unlikely indeed that one shift of 4 hours on 10 July 2018 caused Mr Walton any additional issue at all.
46. Also relevant is that Mr Walton's objection to the cleaning work was mainly to its times. His mental health issues make it very hard for him to get out of bed in the morning. While it is apparent to the Tribunal that Mr Walton's mental health issues are very likely to be a disability within the Equality Act 2010, this has never been part of his pleaded case. There was no reasonable adjustment required to start time because of haemorrhoids, and although Mr Walton does find it difficult to attend to personal hygiene by reason of his

haemorrhoids this was not something he said to Mr Simakumar made early morning starts a problem. The start time was a problem for him primarily for mental health reasons. Mr Walton never told Mr Sivakumar that was the reason he could not work from that time. As to the work itself, he had complained to Mr Sivakumar that his body would not cope with the tasks, not that he had mental health problems that caused him difficulty. When working at the cash desk he had to stock shelves in the small shop and clean it. There was not sufficient difference in the physical component of the roles to make any real difference in Mr Walton's case.

47. Mr Walton asked for his hours to be reduced to 12 a week (179/197), because he did not want to work 6 days running. He said (above) that this was because his body could not take these new shifts. In oral evidence it was clear this was his main difficulty in getting up early and in working 6 days a week, for mental health reasons, and because he wanted to do the role he had before.

48. He also asked that this be the reduction in hours was until his operation had been done: it is plain that the haemorrhoids were having a severe effect upon him from April 2018 at the latest. The Tribunal finds this would have been the case whatever he was doing at work.

49. Mr Walton did not ask for the start time to be changed. Mr Sivakumar said that provided the cleaning was done in the morning, and when he is there (he starts very early) Mr Walton could have started later. As Mr Sivakumar agreed to vary the days there is no reason to doubt him about the start time being capable of being varied, had Mr Walton asked.

50. Mr Walton said that there was much more physical work in his cleaning job than in working in the office. He laid particular stress on the delivery of goods to the shop, and the need to unpack them. Mr Sivakumar said that the lorry driver takes the goods most of the way on an unloading trolley. This is credible, as this is commonplace. Mr Walton was not overly concerned about moving stock, per se, as he stocked the shop while working at the cash desk. He also asked by text message on 11 July 2018 if he might come in to sort out the stock room while signed off as unfit for work (182/197). There was nothing to suggest to Mr Sivakumar that the physical movement of stock was problematic for Mr Walton.

51. Mr Walton was off sick until 25 November 2018, by reason of this operation. On 24 November 2018 he texted Mr Sivakumar (124/197) to say he was able to return, and stated:

"I didn't agree to be your cleaner & I still don't, I would like my nightshift sales assistant job back. Are you going to give me 3 nights a week back or are you firing me for whatever reasons you took me off nights and banned me from the till?"

52. Mr Sivakumar did not reply until 03 January 2019 (125/197):

"I regret to note that though your sick note ended on 25th November 2018, you have failed to report for work or forward as sick note to cover your absence.

Your absence will be treated as unauthorised.

If you fail to either return to work or forward the sick note from your GP before 11th January 2019, I will be left with no option but to commence disciplinary proceedings.”

53. On or about 10 January 2019 Mr Walton write to Mr Sivakumar (186/197) stating that on 24 November 2018 he had told Mr Sivakumar that would not return to work on the expiry of a sick note (on 25 November 2018) until he was restored to his former shifts, hours and title. He said that even if he was fired now, it would not stop the Tribunal proceedings.
54. Mr Sivakumar did not respond and took no action. Nothing has changed since. Mr Sivakumar said in oral evidence that he was awaiting the result of this hearing.
55. Mr Walton has recently sought other jobs, but was out of action for about 9 months after his operation on 24 September 2018.

Conclusions

56. The Respondent accepts that no terms and conditions were provided to the Claimant⁴. The Tribunal finds this to have been a deliberate decision and not an oversight, and so awards 4 weeks' pay⁵. The Claimant's pay was for 12 hours a week at £7.63 an hour. That is £93.86 weekly, and so 4 weeks' pay is £375.44. The Respondent is ordered to pay that sum to the Claimant.
57. The Claimant has the disability he claims, and it has effects that are serious for him.
58. For the reasons given, nothing to do with that disability had any causative link with his being moved away from his night cash assistant role.
59. For the reasons given, his work had no causative link with his need for surgery to correct the haemorrhoids.
60. The adjustments he said should have been made were about start time, and about the number of days he wanted to work. They were connected with mental health problems, and unconnected with his physical disability. The reason he asked was because he was now down to work 6 days a week, which he did not feel he could do, for mental health reasons, and the reason he was no longer doing the cashier role, and was moved to cleaning was nothing to do with his disability. There is therefore no causative link between the reduction in hours and the physical disability.
61. There is no credible evidence that he would have to undertake heavy manual tasks that could impact on his disability.

⁴ Contrary to S1 of the Employment Rights Act 1996

⁵ S38 Employment Act 2002

62. For these various reasons Mr Walton's claim that Mr Sivakumar failed in his duty to make reasonable adjustments to Mr Walton's work in order to accommodate Mr Walton's disability of haemorrhoids fails and is dismissed.

Employment Judge Housego

Date 01 April 2021