



EMPLOYMENT TRIBUNALS

Claimant: Mr. M Bandura

Respondent: Mr. M Fernandez

Heard at: London South

On: 13 October 2021 and in chambers 6 December

Before: Employment Judge McLaren
Members Mr J Gautrey-Jones
Mrs. R Bailey

Representation
Claimant Mr. Philips, lay representative
Respondent: Mr. P Edmonds, Solicitor

JUDGMENT

The unanimous decision of the tribunal is

1. The claimant's complaint that there was an unlawful deduction from his wages throughout his employment as he was paid less than the minimum wage applicable is well founded. This claim is limited to the 2 years prior to the 4 October 2019.
2. The claimant's complaint that there was an unlawful deduction from his wages from 1 August- 4 October 2019 is well founded.
3. The complaint of unfair dismissal is well founded. This means the respondent unfairly dismissed the claimant.
4. The respondent contravened s 13 of the Equality Act as the reason for dismissal was age.
5. The claimant was not provided with a statement of terms in contravention of the Employment Rights Act.

REASONS

Background

1. The claimant was a butcher employed in a small village butchers shop owned by the respondent, which in part sells meat from the farm also owned by the respondent.
2. The claimant was employed from 2 January 2000 until some time in 2019. The date of termination is unclear. The respondent suggested it was 31 August, but it was agreed the claimant was not notified of his dismissal until 4 October 2019. We accept that the claimant could not issue proceedings prior to the date on which his termination was communicated to him and find therefore that his claims are brought within the appropriate time limits. In the alternative we consider it was not reasonably practicable to bring his claims earlier than he did and it would be just and equitable to extend any time limits.

Evidence before us

3. We heard evidence from the claimant on his own behalf and from his wife, as well as from the respondent, Mr. Fernandez. We were provided with a paginated bundle of some 66 pages.
4. In reaching our decision which is on liability only, we considered the evidence that we heard together with those pages of the bundle to which we were taken. We were also assisted by helpful submissions from both sides.
5. The parties had not agreed a formal issues list but agreed there were 3 parts to the claim, direct age discrimination, unfair dismissal and unlawful deduction from wages. There is no separate claim related to annual leave, nor is there a claim for breach of contract.
6. We have therefore set out the legal and factual issues we considered below.

Issues

Unlawful deduction from wages

7. How many hours a week did the claimant work? He says 50.5, the respondent says 24 hours a week.
8. What was the claimant's hourly rate of pay and was it below the national living wage?
9. If so, what were the dates of the underpayment?

Direct Age Discrimination (section 13 of the Equality Act 2010)

10. Was the claimant subjected to less favourable treatment by being dismissed.
11. If so, was the claimant treated less favourably than a hypothetical comparator.
12. If the Tribunal finds that the claimant has suffered unfavourable treatment, can the respondent show that treatment to be a proportionate means of achieving a legitimate aim. The respondent did not set out any legitimate aims, it denies that the dismissal was age related but was for capability.

Unfair Dismissal: Claim under Section 95(1)(a) of the Employment Rights Act 1996

13. Was the reason for the Claimant's dismissal a fair reason pursuant to section 98(2) of the Employment Rights Act 1996? The respondent contends that the claimant was dismissed for a fair reason, capability.

14. If so, did the respondent act reasonably in treating this as a sufficient reason for dismissing the claimant, applying section 98(4) of the Employment Rights Act 1996 and in particular applying the British Home Stores Ltd v Burchell [1978] test as follows:

- a. Did the respondent genuinely believe the claimant to be incapable?
- b. Did the respondent have reasonable grounds for that belief?
- c. In forming that belief, had the respondent conducted a reasonable investigation?

15. Was the claimant's dismissal within the range of reasonable responses of an employer?

Findings of Fact

Employment history, hours and pay

16. It was not disputed that the claimant had been working for the respondent since 2000. It was also agreed that the claimant never received an employment contract. Mr Fernandez explained that he was introduced to the claimant via another butcher and they had a conversation about the role. In that conversation he recollected that they discussed the claimant's pay but did not discuss hours. He was clear that he had never agreed an hourly rate with the claimant but had agreed a weekly pay. Mr Fernandez also recollected that this sum had been increased on one or two occasions but, given the length of time since these events, he could not recall by how much.
17. It was also agreed that the claimant was the sole individual running the shop. The claimant describes himself as full-time shop manager and butcher and gave evidence that his job included purchasing everything to run the shop, doing all the butchery and the sales, books, audits and sending all the weekly totals of takings and receipts and till rolls, later card machine receipts, to the accountant. Mr Fernandez did not dispute this. Indeed, he agreed the claimant was the only person running the shop and also gave evidence that it was the claimant who sent financial details to the accountant. We accept therefore, what amounts to undisputed evidence, that the claimant was the sole person in the shop and was wholly in charge of the shop and had extensive duties.
18. The amount of the claimant's pay was not disputed. We were directed to page 64 of the bundle which shows the profit and loss accounts for year ended 31 March 2019. They show a very small amount for wages and other staff costs, and we were told that the butcher's pay came out of the sales figure and was included in the cost of sales.

19. At page 67 of the bundle was a schedule which showed the monthly pay given to the claimant from February 2014 until 25 February 2019. This showed that he was paid £11,120.80 in 2015, £11,418 for what appears to be 2016 and £10,497 for 2017. There were no later figures. The claim form had set out that the claimant was paid £984 gross per month which is £11,008 pounds a year. In the Reply the respondent had accepted that the amount was accurate. While there is no figure given for 2018 the claimant's schedule of loss set out that he was paid the same in 2018 as 2019 and we make that finding.
20. We accept what was undisputed evidence that the information on which these documents were based came from the claimant directly. It was the claimant therefore who told the accountant what were the takings and his own wages. Mr Fernandez was not directly involved in this. We find, as was indeed conceded by the respondent's representative, that no information as to the hours worked were provided by the claimant to the accountant or by Mr Fernandez to the accountant. The documentary evidence in the bundle assists only with establishing the amount the claimant was paid per month and does not establish the number of hours that he worked in return for such pay.
21. There was a dispute between the parties as to the hours the claimant worked per week. We were shown information about the shop's opening hours. This included a photograph of the sign on the door currently, together with information taken from the Internet at page 33 and 34. These show that the shop is closed on Sundays and Mondays. On Tuesdays and Thursdays it is open from 7:30 AM until 5 PM and on Wednesday and Saturday from 7.30 in the morning until 3 PM. The bundle also contains at page 35 information from John Smith the relief butcher and at page 36 information from Stephen Denham who owned and ran the village shop and post office next to the butcher's shop until 2011. John Smith stated that when he is in the shop, he worked 40 hours a week Mondays to Saturdays and that the claimant worked in excess of those hours, around 50 hours per week over six days. Mr Denham confirmed that the opening hours that he witnessed were those set out above. He said that the shop's trading hours were 50.5 a week and that the claimant in effect worked these hours.
22. Mr Fernandez did not dispute that these were the opening hours shown, but did not agree that the shop was in fact open and occupied by the claimant for all of that time. He had calculated that the claimant worked only 24 hours a week. He was unable to recall exactly how he had calculated the number of hours the claimant worked. It was identified to him that taking the agreed monthly pay, if the claimant only worked 24 hours, he would have been paid exactly the appropriate hourly rate under the minimum wage legislation. Mr Fernandez's response was to tell us that he could not recall exactly how he had worked it out, but it was based on the sales. He told us that the opening hours of the shop were not relevant to the hour's calculation. It was his position that the higher the sales figure the more hours there were. Some days the shop did well, on some it did not do so well. He did not explain how this led him to identify the actual hours worked by the claimant.

23. He disputed the claimant was there at 7.30 in the morning but also gave evidence that he himself attended the shop usually only for a few minutes and largely on a Saturday. The claimant said that in fact the respondent popped into shop for some minutes every day. If we accept the respondent's own evidence, on his account he was hardly ever in the shop, and we find therefore that he would have no first-hand knowledge of when the claimant was and was not in the shop.
24. Throughout his evidence Mr Fernandez gave a confused account which on occasions contradicted his written statement and contradicted answers he had given to questions only minutes previously. The claimant's evidence as to the opening hours is supported by documentary evidence and by two other individuals who provided letters to which we have referred. The claimant was asked why he would work for so many years for so little pay, if he was indeed working during the hours he said. He explained that he was part of a double income household which was not therefore dependent on his wage alone.
25. On the balance of probabilities, we prefer the claimant's evidence as to the hours he worked. We accept that he was the sole employee who was in the shop, as a minimum for all of the hours that it was open, and have no reason to doubt that those opening hours are those displayed on the Internet and on its door. We find therefore that he worked 50.5 hours a week.

The events leading up to the dismissal

26. Mr Fernandez was very clear that his understanding of the events that led to the ending of the claimant's employment were based entirely on information he received from text messages from the claimant's wife. He did not on any occasion directly ask the claimant about his medical condition or what had happened to him. Those text messages were not retained by either party.
27. As Mr Fernandez's account is based on his recollection of what he was told by the claimant's wife, and as set out above, his evidence was contradictory on a number of points. We prefer the claimant's account of what occurred. The claimant is likely to have a clear recollection of events directly impacted him. His evidence throughout was consistent.
28. We find that on the evening of the 9 July 2019 the claimant became unwell while he was at home in the evening and passed out. His wife called an ambulance but by the time it arrived the claimant felt much better. He went into the ambulance for tests to be carried out and nothing was found to be wrong.
29. As he felt well, the claimant therefore went to work as normal the next day which was 10 July. At around 8.30 in the morning, he went to the toilet and found a small amount of blood. He immediately telephoned the respondent telling him what had just happened and that he needed to go to accident and emergency to have it checked out. The claimant also arranged for Mr Smith, the cover butcher, to come in and run the shop. Once Mr Smith had arrived, some 30 minutes after the phone call, the claimant was picked up by his wife and went to accident and emergency.

30. He was kept in hospital for three nights. During this time, he was on a general ward on a drip but was not being treated as an emergency. He was diagnosed with an episode of ulcerative colitis, advised to drink more water and was discharged with a clean bill of health without even a recommendation to see his GP. The claimant had no other medical problems and has not consulted his GP about this because there is no need.
31. On 15 July, that was the Monday morning, the claimant then contacted the respondent to tell him he was fully fit and ready to return to work as normal. He was told instead that he should not come back to work but should remain at home to help him recover. The claimant accepted this at the time and took the week, but after that when the respondent failed to contact him the claimant told us that he contacted Mr Fernandez frequently asking to be permitted to return to work. On each occasion Mr Fernandez was evasive and told him he had to be patient and he would let him know when he could return as he was trying to sort something out.
32. Despite the fact he had no fit note, on 1 August Mr Fernandez put the claimant on statutory sick pay. At the same time, on 1 August 2019 it is agreed that another person was employed as a full-time butcher in the shop. This new full-time butcher was much younger than the claimant. While Mr Fernandez had indicated the shop could not afford even one full-time butcher, he agreed that he had engaged his individual on a full-time position.
33. Mr Fernandez could not remember exactly when he had taken the decision that he was going to end the claimant's employment, but he believed it was sometime in August. He certainly instructed his accountants to prepare a P45 which showed the last date of employment as 31 August 2019. It was agreed that this document was not given to the claimant directly but was posted to him and arrived on 4 October.
34. The August pay slip shows that the claimant was paid £349.15 net for this month which reflects payment of statutory sick pay when he was not sick but prevented from working by the respondent. He was not paid anything from then and , as we have found the date of termination to be 4 October, is entitled to be paid wages until that date.
35. The claimant immediately telephoned Mr Fernandez on receipt of this document and his wife also overheard the conversation. The claimant's account was that in this conversation he was told that he had been retired. Mr Fernandez agreed that he did use that phrase and did tell the claimant that he was being retired.
36. The claimant told us Mr Fernandez had said he would call the next day but there was no further contact between the parties. We find that at no time was the claimant told that there was a potential issue that could lead to the end of his employment. The reason he was given for his employment ending was retirement. There were no disciplinary or investigative meetings, the claimant was never provided with any documents or any other matters to which he could respond. There was no process of any sort.

Reason for the dismissal/age discrimination

37. Mr Fernandez in his witness statement, and in some of the answers given before the tribunal, stated that he had told the claimant that he needed to provide some medical evidence that he was fit to return and suggested that this would be from the GP in the form of a fit note. His witness statement says that he repeated this request several times and gave the claimant until the end of August to comply with the request, but the claimant refused.
38. He also tells us that his concerns were because the claimant had collapsed three times and had been on the emergency ward in hospital. He described the claimant's illness as a haemorrhage and said that blood was for him the line which could not be crossed. He stated that there were health and safety issues because of the claimant's condition. He referred to the food handling guidelines which were included at page 37 of the bundle and said that he believed that rectal bleeding/haemorrhaging was the same as diarrhoea and therefore the claimant could not come back to work while he had this condition because that infection can be transmitted through food.
39. Mr Fernandez also suggested that he did not want the claimant to continue working for him because he was not safe on its own in the shop because he could collapse at any time and had previously refused to have cameras in the shop. He therefore could not continue to employ the claimant without somebody else being engaged as well.
40. In his evidence Mr Fernandez also made reference to things that he had discovered once the claimant had become ill, for example what he says were large collections of tobacco, betting slips and lottery tickets belonging to the claimant and discovering that the claimant had failed to inform him that the hygiene rating of the shop had dropped to 3 in June.
41. Mr Fernandez told us variously that the reasons for dismissal were the claimant's medical condition and it was a health and safety issue, that the claimant had failed to provide information that he was well, and that there were some conduct issues. He reiterated several times that the main issue was the blood, that had it not been for that the claimant would still be employed.
42. We did not find Mr Fernandez to be a credible witness because of the contradictions in his evidence both between his written witness statement in which for example he stated that he required a doctor's letter and his oral evidence in which he said he did not. He also originally stated that there was no failure to pay the minimum wage then accepted on his evidence that there was. He was vague and inconsistent about the number of meetings that had occurred and what had been said in them.
43. We prefer the claimant's account and therefore have found that there was no haemorrhage. There was an incident which resulted in the claimant being in hospital for three days, but he was well from the date of the discharge from hospital. He was fit and able to return to work on 15 July and there was no reason for him not to do so.

44. Even if we accepted Mr Fernandez account, there is no reason to link rectal bleeding with diarrhoea, and we therefore find that there are no food handling guidelines that impacted on the claimant's ability to work. We find that Mr Fernandez took no steps whatsoever to establish what the claimant's medical condition was, we find that he neither asked for information from the GP via the claimant nor did he ask the claimant directly.
45. As for the change in hygiene rating ,the claimant explained that this was to do with damp in the shop and a failure to address flaking paint work. We accept his evidence.
46. We find that Mr Fernandez did not therefore dismiss the claimant for capability. He accepts that he told the claimant at the time it was retirement, and we find that this was the reason.

Age discrimination

47. As noted above we have found that the reason for dismissal was retirement and so linked inextricably to the claimant's age. The claimant had been replaced by full-time much younger employee.

Relevant Law

Unfair Dismissal

48. There are five potentially fair reasons for dismissal under section 98 of ERA 1996: capability or qualifications, conduct, redundancy, breach of a statutory duty or restriction and "some other substantial reason" (SOSR). In this case the parties agree that the reason was conduct.

49. Once the employer has established a potentially fair reason for the dismissal under section 98(1) of ERA 1996 the tribunal must then decide if the employer acted reasonably in dismissing the employee for that reason.

50. Section 98(4) of ERA 1996 provides that, where an employer can show a potentially fair reason for dismissal:

"... the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) -(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and(b) shall be determined in accordance with equity and the substantial merits of the case.

51. By the case of Sainsbury's Supermarkets Ltd v Hitt 2003 IRLR 23 tribunals were reminded that throughout their consideration in relation to the procedure adopted and the substantive fairness of the dismissal, the test is whether the respondent's actions were within the band of reasonable responses of a reasonable employer. In this case the Court of Appeal decided that the subjective standards of a reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed. The tribunal is not required to carry out any further investigations and must be careful not to substitute its own standards of what was an adequate investigation to the standard that could be objectively expected of a reasonable employer.

Age Discrimination

52. S13 of the Equality Act defines direct discrimination as

(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.

(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

Burden of proof

53. Igen v Wong Ltd [2005] EWCA Civ 142, [2005] ICR 931, CA. remains the leading case in this area. There, the Court of Appeal established that the correct approach for an employment tribunal to take to the burden of proof entails a two-stage analysis. At the first stage the claimant has to prove facts from which the tribunal could infer that discrimination has taken place. Only if such facts have been made out to the tribunal's satisfaction (i.e., on the balance of probabilities) is the second stage engaged, whereby the burden then 'shifts' to the respondent to prove — again on the balance of probabilities — that the treatment in question was 'in no sense whatsoever' on the protected ground.

54. We reminded ourselves that the Court of Appeal confirmed in Madarassy v Nomura International plc [2007] EWCA Civ 33, [2007] ICR 867, [2007] IRLR 246, that a claimant must establish more than a difference in status and a difference in treatment before a tribunal will be in a position where it 'could conclude' that an act of discrimination had been committed.

Minimum Wage

55. The basic effect of the legislation implementing the national minimum wage (NMW) is to amend workers' contracts of employment to provide a minimum rate per hour below which they should not be paid. The legislation provides for a different hourly rate of pay for different categories of worker.

56. Regulation 4B NMW Regulations deals with the situation where the NMW rate is uplifted, or the worker becomes entitled to a different rate, during a pay reference period. It provides that the hourly rate at which the worker is entitled to be paid in respect of work done in any pay reference period is the rate in force on the first day of that period.

57. The rates for someone over age 25 were £8.21 from April 2019 to March 2020, £7.83 from April 2018 to March 2019, £7.50 for April 2017 to March 2018 and £7.20 for October 2016 to March 2017.

58. A worker who is not paid the NMW will be deemed to be entitled under the contract of employment to the higher of either the difference between what the worker is paid and the NMW.

59. The worker may bring a claim alleging an unauthorised deduction from wages before an employment tribunal under the protection of wages provisions contained in Part II of the Employment Rights Act 1996 (ERA) to recover the difference. For the purposes of the complaint, it will be presumed that the worker qualified for the NMW and that the worker was paid less than the NMW, unless the contrary is shown — S.28(1)–(2) NMWA.

60. Claims for unlawful deductions from wages must be brought within three months of the last deduction or series of deductions. unlawful deductions claims involving a series of deductions that are brought on or after 1 July 2015, S.23(4A) ERA operates to limit the deductions that can be recovered to those that took place in the two years preceding the date of the claim.

Conclusion

61. We have considered the relevant law and applied this to our findings of fact, taking the issues list as our guide.

Unlawful deduction from wages

62. How many hours a week did the claimant work? He says 50.5, the respondent says 24 hours a week. We have found he worked 50.5.

63. What was the claimant's hourly rate of pay and was it below the national living wage? We have found that he earned £11,418 in 2016 or £219.57 a week. This is an hourly rate of £4.34 an hour. In 2017 he was paid £ 10,497 or £201.86 a week being £4.17 an hour. In 2018 and 2019 he was paid £11,008 or £211.69 a week, £4.19 an hour. These figures fall short of the relevant NMW for each period.

64. We conclude the claimant's wages were subject to series of unlawful deductions from wages which amount to an ongoing breach. The underpayment was for each year of his employment although a claim can only be brought for 2 years prior to the date of the claim. The claim succeeds.

65. We also found that the claimant was paid less than he should have been in August 2019 as he was paid SSP when he was well and that he was not paid from 1 September to 4 October and he is entitled to this.

Direct Age Discrimination (section 13 of the Equality Act 2010)

66. Was the claimant subjected to less favourable treatment by being dismissed? If so, was the claimant treated less favourably than a hypothetical comparator.

67. We have found that the reason for the dismissal was retirement based on the claimant's age. He was treated less favourably than a younger man. As the respondent had 2 full time butchers employed by August 2019, it chose to keep the newly appointed younger man. The claimant has proved facts from which an inference of discrimination could arise and the respondent has not proved that that the dismissal was 'in no sense whatsoever' on the protected ground

68. The respondent did not seek to rely on a legitimate aim, and we find there was none. The claim succeeds.

Unfair Dismissal: Claim under Section 95(1)(a) of the Employment Rights Act 1996

69. Was the reason for the claimant's dismissal a fair reason pursuant to section 98(2) of the Employment Rights Act 1996? The respondent contends that the claimant was dismissed for a fair reason, capability. We have found it was for an unfair reason, retirement, a wholly unfair procedure was implemented, and we

conclude the dismissal was unfair in all aspects. The ACAS code was wholly ignored. The claim succeeds.

70. It was agreed that no terms of employment had ever been provided. The claim for failure to provide such terms also succeeds. The respondent did not provide any reason for this failure and while it is a small employer we consider that the respondent could have found the resources to comply with legislation.

71. As the hearing was not allocated a Judge and did not start until 12, we had only half a day for the hearing instead of the 2 days for which it was listed. The hearing dealt with the issue of liability only. A separate remedy hearing will be listed.

Employment Judge McLaren
Date: 6 December 2021