EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 2300352/2019

Held in Glasgow on 7, 8, 9 & 10 October 2019

Employment Judge M Sangster
Tribunal Member P McColl
Tribunal Member W Muir

Mr S Belvue	**Claimant** **Represented by** **Mr G Singh - Solicitor**
Retail & Asset Solutions Limited	**Respondent** **Represented by** **Mr N McDougall - Advocate**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that:

- the claims of direct discrimination and harassment on the grounds of race are not well founded and are dismissed; and
- the claim for unauthorised deductions from wages is well founded. The respondent is ordered to pay the sum of £7.77 to the claimant as a result.

REASONS

Introduction

1. The claimant presented claims of discrimination on the grounds of race and unlawful deductions from wages. Case management preliminary hearings were held on 13 June 2019 and 5 August 2019. Following the first preliminary hearing, it was agreed that the claimant would provide further particulars of

his claim. This was done by letter dated 25 July 2019. That letter provided particular dates in respect of which the claimant claimed he had been underpaid and the number of hours he claimed he was underpaid on each occasion. It also provided further particulars of the claim of race discrimination and confirmed that the claimant's claims were of direct discrimination, indirect discrimination and harassment. At the preliminary hearing on 5 August 2019, the claimant's representative confirmed that the claimant did not seek to amend his claim to bring any additional claims. The indirect discrimination claim was subsequently withdrawn. As a result, that particular claim was dismissed by judgment dated 5 September 2019.

2. The respondent accepted that some additional sums were due to the claimant, but disputed the amount claimed by the claimant. They denied that their actions amounted to direct discrimination or harassment on the grounds of race.

3. The claimant gave evidence on his own behalf. The claimant also intended to call a number of individuals who were also witnesses for the respondent. Following discussion at the outset of the hearing, it was agreed that these witnesses would simply be called by the respondent, with the claimant having the opportunity to cross examine them. The respondent led evidence from Scott Dalziel (SD), Large Account Manager, Gordon McFarlane (GM), Area Manager, Shelly Mowbray (SM), Regional Deployment Coordinator, and Gronya Hayes (GH), Regional Business Manager. A joint set of productions was lodged.

Issues

4. At the outset of the hearing, it was agreed that the issues were as follows:

Direct discrimination because of race - s13 Equality Act 2010 (Eq A)

a. Did the respondent subject the claimant to the following treatment?

i. Terminating his engagement with the respondent; and/or

ii.'Cold shouldering' him for further work.

b. If so, was that treatment Vess *favourable treatment,* i.e. did the respondent treat the claimant as alleged less favourably than it would have treated others ("comparators") in not materially different circumstances? The claimant relied on hypothetical comparators.

c. If so, was this because of the claimant's race?

Harassment related to race - s26 EqA

d. Did GM state to the claimant that he was 'always smelling of cannabis'?

e. If so, was that conduct unwanted?

f. If so, did it relate to the protected characteristic of race?

g. Did the conduct have the purpose or (taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

Unauthorised deductions - s13 Employment Rights Act 1996 (ERA)

h. Was the claimant paid less in wages than he was entitled to be paid and if so, when and how much less?

Matters arising during the hearing

5. During the course of the hearing, the following issues arose:

a. During re-examination of the claimant, questions were put to the claimant which did not arise from cross examination. The Tribunal determined however that it was in the interests of justice for these issues to be explored, provided Mr McDougall had the opportunity to ask further questions in relation to the additional points raised. This was done.

b. At the commencement of proceedings on the third day of the hearing, by which point the Tribunal had heard evidence from the claimant, SD and GM, Mr Singh, for the claimant, indicated that he required the respondent to produce their drug and alcohol policy. He requested that there be an adjournment of the hearing to allow this to be done and that witnesses then be recalled to allow questioning on this policy. Having considered submissions on this application, the Tribunal declined the request and provided reasons for doing to. The reasons included that the Tribunal did not believe that the policy was relevant to the matters to be determined, that no request for an order was made in advance of the hearing and the absence of the policy was not raised as a preliminary matter at the outset of the hearing, despite parties being asked if there were any preliminary issues to be addressed.

c. Around 11.50am on the third day of the hearing, Mr McDougall raised with the Tribunal that, during the course of SM's evidence he had cause to glance at the claimant who had said to him *'don't try me',* which he took as a threat towards him. The claimant denied doing so. Neither the Employment Judge nor the Tribunal Members heard or saw the claimant doing so. Mr McDougall requested an adjournment of the hearing to enable him to consider the Rules of Procedure and what, if any, application he would like to make as a result. This was granted. On resuming Mr McDougall indicated that he had considered making an application for a security guard to be present for the remainder of the hearing, but did not feel this would be necessary as we were close to the end of proceedings. He confirmed that, having reflected, he did not wish to make any particular application and was content to proceed. The Tribunal highlighted that no findings were made in relation to whether the comment was made or not, but stressed that any behaviour of that nature would be entirely inappropriate and unacceptable.

Findings in fact

6. Having heard all the evidence presented, the Tribunal made the following findings in fact, relevant to the issues to be determined.

7. The respondent is a UK wide audit and stocktaking business. There are different business units within the respondent's business, covering merchandising, warehousing and stocktaking. The respondent has approximately 500 employees and a workforce of around 2,500 casual workers.

8. The stocktaking part of the business provides services to clients such as Home Bargains, B&Q and Marks & Spencer. The biggest client of the respondent's stocktaking business unit is Tesco. Work is undertaken at client sites throughout the UK. Casual workers either make their own way to the client site to undertake stocktaking, or they are collected and driven to the client site in one of the respondent's minibuses. The respondent owns 5 minibuses, and leases up to 7 further minibuses, depending on work levels, for the purpose of transporting casual workers to client sites.

9. The claimant is of Black Afro-Caribbean ethnicity, originally from Haiti. He obtained asylum in the UK and is now a British citizen.

10. The claimant was engaged by the respondent as a casual worker within the stocktaking business unit from May to July 2017. During this period he worked as a counter, assisting with stock takes. He left of his own volition, to take up work elsewhere.

11. In/around August 2018, the claimant contacted GM on his mobile telephone to enquire about the possibility of further work. GM suggested that the claimant attend the next organised recruitment session and provided details of this to him.

12. The claimant, along with a number of other individuals, attended the recruitment session in Alloa on 27 September 2018, run by the respondent. At that recruitment session, he signed a Casual Worker Agreement with the respondent. The Casual Worker Agreement set out the basis upon which the

respondent may provide work to the claimant from time to time. It expressly stated that it was not an employment contract nor was it intended to provide employment rights. It confirmed that there was no obligation on the respondent to offer work, or on the claimant to accept this. It confirmed that where work was offered and accepted, it would be paid at a rate of £7.90 per hour.

13. On/around 8 October 2018, the claimant contacted GM again to ask when he would be offered work, as he had not yet been offered any assignments. GM indicated that they had a lot of counters at that time, so there was no guarantee of any work. He asked the claimant however if, in addition to work as a counter, he would be interested in undertaking driving duties to drive other counters (as well as himself) to and from client premises. This was due to the fact that a driver who was based in the Dunfermline area had just given one week's notice that he was leaving. A replacement was therefore urgently required. The claimant was based in Falkirk, rather than Dunfermline, so the claimant was not ideally placed to undertake the role, as Falkirk was approximately 30 minutes' drive away from Dunfermline, increasing the costs the respondent would incur for the claimant's time and fuel for the minibus. It was agreed however that, pending successful completion of the relevant tests, the claimant would be offered driving duties, as and when this was required by the respondent. This was a temporary arrangement until another driver, based in the Dunfermline area, could be found.

14. The claimant attended for a driver assessment with GM on 11 October 2019. He passed the assessment and, following completion of the relevant paperwork, the minibus was handed over to the claimant by the previous driver on 13 October 2019. The claimant remained a casual worker when undertaking his driving duties: there was no guarantee of work and no obligation on the claimant to accept any work offered.

15. When a client instructs a stock take to be done by the respondent, the respondent allocates minibuses to the particular job. If the claimant's minibus was one of those allocated to that job, and he accepted the work, it would be his responsibility to try to secure other casual workers, who had expressed an

interest in the job on the respondent's online portal, to attend the stock take. A bonus of £10 was paid to him if he secured sufficient casual workers to fill the bus. Where additional casual workers were required, in addition to those on the minibus, independent casual workers, who had their own means of transport, would be utilised. This however increased costs for the respondent, as they then required to pay additional travel costs.

16. Drivers are allocated to a particular job by the respondent on the basis that they agree to drive casual workers to the premises where the stock take will be conducted and also work as a counter on the stock take. Stock takes would generally take around 8 hours. Whilst the driver would also participate in the stock take, they would take a longer break than the other casual workers, towards the end of the stock taking shift, to ensure that they were sufficiently rested to drive the workers home at the end of their shift. Drivers would however always do at least 5 hours of counting before taking a break. Breaks were unpaid.

17. On 12 November 2018 the claimant drove the minibus to a stocktake at Tesco Bruntsfield in Edinburgh. The Tesco Store manager asked for the claimant to be removed by the respondent, as he stated that the claimant smelt of cannabis, so it would not be appropriate for the claimant to remain in this store once it opened to the public. The respondent believed they had no option but to comply with the request of their largest client. The claimant was asked to leave the store and he waited in the minibus until the stock take was complete and he could drive the other casual workers home.

18. 13 November 2018 the claimant drove the minibus to a stock take at Tesco St Rollox. The store manager refused to allow access to the store, following a discussion he had had with the store manager at Bruntsfield. Again, the respondent believed they had no option but to comply with the request of their largest client. The claimant accordingly waited in the minibus until the stock take was complete and he could drive the other casual workers home.

19. On 20 November 2018 the claimant was due to collect nine stepladders from HSS. Following his visit to the HSS site, the respondent received a complaint

from HSS that the claimant had been rude and abusive towards HSS staff when collecting the ladders, as he felt he could not fit them in the minibus. He left the HSS site with only 2 ladders, rather than 9. GH called the claimant to ask him to return for the ladders and the claimant was aggressive and argumentative towards her on the phone.

20. On 21 November 2018 the claimant drove the minibus to a stock take at Tesco, Galston. The store manager refused to allow the claimant access to the store following a discussion he had had with the store manager at Bruntsfield. Again, the respondent felt they had no option but to comply with their client's request. The claimant accordingly waited in the minibus until stock take was complete and he could drive the other casual workers home.

21. On 22 November 2018 the claimant drove the minibus to a stock take at Tesco, Castle Douglas. During the course of the stock take the team leader, SD, raised concerns with the claimant due to higher levels of error in his stocktaking and the claimant not following agreed stocktaking protocols. The claimant became aggressive and confrontational towards SD, shouting at him. He was asked to leave the store as a result. The claimant then waited in the minibus until stock take was complete and he could drive the other casual workers home. He was paid for driving duties and the time worked on-site only.

22. On 30 November 2018, the respondent received complaints from two casual workers that they were not picked up by the claimant, at the agreed time and place, to attend a stock take at Home Bargains in Straiton. GH telephone the claimant to ask him to return to pick up the two casual workers. The claimant became aggressive towards GH on the telephone. Whilst he did return to pick up the casual workers, he then refused to undertake any counting duties at the client site. Instead he remained in the minibus for the entire shift. When the stock take was complete, he drove the other casual workers home.

23. Later that day the claimant was advised by the team leader, Veronica Bryceland, that he would only be paid for driver hours for that day. He responded in a rude and aggressive manner.

24. On 4 December 2018, the claimant drove the minibus to a stock take at B&Q, Falkirk. The claimant signed himself off the count shortly after it started, starting that it was too cold to work in the outside part of the store. No other casual workers, including other drivers who were present, did so. He asked to participate again once the count had moved inside the store and was informed by the team leader, SD, that he could not do so.

25. On 6 December 2018, GM informed the claimant that the respondent would no longer offer driving duties to him and he required to return the minibus. This was due to a combination of factors as follows:

    a. The claimant's conduct, in particular being rude to HSS staff, GH and Veronica Bryceland and his aggressive behaviour towards SD, in a client's premises;

    b. It was felt that the claimant was unreliable, due to the fact that he was signing himself off shifts after agreeing to work on them. This was done on the dates indicated above, as well as on 14, 15, 22 and 30 November 2018. In addition, the claimant had been refused entry to client sites. Having one less counter than anticipated on each of these occasions placed additional pressure upon the other casual workers assigned to that particular stock take to try to complete the stock take within the allocated time, and could cause the count to run over the allocated time.

    c. The fact that December is a particularly quiet month for the respondent's stocktaking business unit, with the leased minibuses being returned to the rental company, which meant there was no requirement for the claimant to drive the van for the remainder of the month; and

    d. A driver, who lived in the Dunfermline area, had been identified and would be allocated to the Dunfermline team from January 2019 onwards.

26. The Tribunal did not accept, as asserted by the claimant, that GM stated to him during this discussion that would no longer be offered driving duties as he *'always smelt of cannabis'.*

27. The claimant however remained a casual worker for the respondent and was able to apply to undertake stocktaking assignments as a counter. On 10 December 2018, the claimant expressed an interest, through the respondent's online system, in undertaking work on a number of jobs. These were not offered to him as they were either fully allocated already (in which case he was placed on a 'reserve list'), or he did not have the requisite expertise to undertake the roles. The claimant did not apply for any further roles following this.

28. On 12 December 2018, the claimant sent an email to GM, asking why he had not been offered any work as a counter and stating that he understood he would still be offered shifts as a counter, notwithstanding the fact that he was no longer a driver. The claimant also, in his email, raised that he felt discriminated against and highlighted that he had contacted ACAS, who would be in touch with the respondent shortly. GM did not respond to email.

29. Later in December 2018, the claimant tried to log onto the respondent's systems to apply for further work, but was unable to do so. He did not contact anyone from the respondent in relation to this, or to seek to rectify the issue.

30. In further and better particulars of the claimant's claim dated 25 July 2019, the claimant provided dates in respect of which he asserted he had been underpaid, together with the number of hours in respect of which he remained entitled to payment. In total, he claimed he had been underpaid by least 47 hours and 32 minutes.

31. This was investigated by GH, who reviewed the timesheets submitted for each job, as well as the actual count times inserted onto the respondent's online system by the team leader allocated to each shift. In relation to the driving time claimed, this was checked against the journey time calculated for the route suggested in the respondent's online system (which took into account the pick-up points for each casual worker allocated to the job) and also against

google maps. The time of day the journey was undertaken was also taken into account, but they were generally at night so traffic would not impact journey times. Where google maps indicated a longer journey time than that identified by the respondent's online system, that time was used to calculate the driving time.

32. GH then prepared a table of what was worked, setting out the time spent on each occasion driving (as shown by the respondent's online system/google maps, depending on which was most favourable to the claimant) and the time spent counting (as shown by the respondent's internal system and the timesheets completed for each job), versus what was paid. This table showed that the claimant had been underpaid by 59 minutes. The respondent's calculations were provided to the claimant, as a response to the further and better particulars provided, on 2 August 2019. The claimant did not however accept these calculations.

Claimants submissions

33. The claimant provided a written submission, extending to 8 typewritten pages. These summarised the evidence from the claimant's perspective and submitted that the claims should be upheld as a result.

34. In relation to the claim of direct discrimination, it was submitted that GM's motivation for the removal of driving duties from the claimant, on 6 December 2018, was racist stereotyping and assumptions about drug use in certain ethnic minority communities. The comments made by GM, that the claimant was 'always smelling of cannabis' support this position, and also amount to harassment on the grounds of race. GM's evidence that he did not mention cannabis on 6 December 2018 was not credible. Applying a hypothetical comparator, a white member of staff would not have been treated in the same way as the claimant.

35. The claimant was not offered further work by the respondent as a result of the email of 12 December 2018 which he sent to GM, which GM was offended by. In that email the claimant stated that GM had been 'sucked into a cult'.

This was due to the fact that English is not the claimant's first language, so his choice of words, it was submitted, is not always the best.

36. The claimant gave a clear and frank evidence as to the wages he is owed, which was highly credible. GH's evidence however showed that the respondent had an overreliance on auto-generated information from their work portal and there was little scope for human input. The claimant's evidence should accordingly be preferred.

Respondent's submissions

37. The respondent provided a written submission, extending to 11 typewritten pages. The respondent referred to the relevant provisions of the EqA and made submissions in relation to the relevant tests to be applied by the Tribunal as a result.

38. It was submitted that the claimant's evidence was not credible, and a rationale provided for why that was the case, based on the evidence he had given to the Tribunal.

39. In relation to the direct discrimination claim, the respondent submitted that the claimant had failed to demonstrate any less favourable treatment and, if there was, that this was on the grounds of race. Any less favourable treatment of the claimant was not on the grounds of race, it was due to his behavior and actions.

40. The Tribunal was invited to accept the evidence of the respondent, rather than that of the claimant in relation to the claims of harassment on the grounds of race and unlawful deductions from wages.

Relevant law

41. Section 4 EqA provides that race is a protected characteristic.

Direct discrimination

42. Section 13(1) EqA provides that:

'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. '

43. The basic question in a direct discrimination case is: what are the grounds or reasons for treatment complained of? In ***Amnesty International v Ahmed*** [2009] IRLR 884 the EAT recognised two different approaches from two House of Lords authorities - (i) in ***James v Eastleigh Borough Council*** [1990] IRLR 288 and (ii) in ***Nagaragan v London Regional Transport*** [1999] IRLR 572. In some cases, such as ***James,*** the grounds or reason for the treatment complained of is inherent in the act itself. In other cases, such as ***Nagaragan,*** the act complained of is not discriminatory but is rendered so by discriminatory motivation, being the mental processes (whether conscious or unconscious) which led the alleged discriminator to act in the way that he or she did. The intention is irrelevant once unlawful discrimination is made out. That approach was endorsed in ***R (on the application of E) v Governing Body of the Jewish Free School and another*** [2009] UKSC 15.

44. The Tribunal should draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances (with the assistance, where necessary, of the burden of proof provisions) - as explained in the Court of Appeal case of ***Anya v University of Oxford*** [2001] IRLR 377.

45. In ***Shamoon v Chief Constable of the RUC*** [2003] IRLR 285, a House of Lords authority, Lord Nichols said that it was not always necessary to adopt a sequential approach to the questions of whether the claimant had been treated less favourably than the comparator and, if so, why. Instead, they may wish to concentrate initially on why the claimant was treated as they were, leaving the less favourable treatment issue until after they have decided on the reason why the claimant was treated as they were. What was the employer's conscious or subconscious reason for the treatment? Was it because of a protected characteristic, or was it for some other reason?

Harassment

46. Section 26(1) EqA provides as follows:

**(1) A person (A) harasses another (B) if—*

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

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

(i) violating B's dignity, or

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

47. Section 26(4) Eq A provides that:

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

(a) the perception of B;

(b) the other circumstances of the case;

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

48. There are 3 essential elements of harassment claim under section 26(1), namely (i) unwanted conduct, (ii) that has the prescribed purpose or effect and (iii) which relates to a relevant protected characteristic.

Burden of proof

49. Section 136 EqA provides:

[1]If there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned the tribunal must hold that the contravention occurred. But this provision does not apply if A shows that A did not contravene the provision. '

50. There is accordingly a two-stage process in applying the burden of proof provisions in discrimination cases, explained in the authorities of /gen ***v Wong*** [2005] IRLR 258, and ***Madarassy v Nomura International Pic*** [2007] IRLR 246, both from the Court of Appeal. The claimant must first establish a first

base or prima facie case of direct discrimination or harassment by reference to the facts made out. If the claimant does so, the burden of proof shifts to the respondent at the second stage to prove that they did not commit those unlawful acts. If the second stage is reached and the respondent's explanation is inadequate, it is necessary for the tribunal to conclude that the complaint should be upheld. If the explanation is adequate, that conclusion is not reached.

51. In ***Madarassy,*** it was held that the burden of proof does not shift to the employer simply by a claimant establishing that they have a protected characteristic and that there was a difference in treatment. Those facts only indicate the possibility of discrimination. They are not of themselves sufficient material on which the tribunal "could conclude" that on a balance of probabilities the respondent had committed an unlawful act of discrimination. The tribunal has, at the first stage, no regard to evidence as to the respondent's explanation for its conduct, but the tribunal must have regard to all other evidence relevant to the question of whether the alleged unlawful act occurred, it being immaterial whether the evidence is adduced by the claimant or the respondent, or whether it supports or contradicts the claimant's case, as explained in ***Laing v Manchester City Council*** [2006] IRLR 748, an EAT authority approved by the Court of Appeal in ***Madarassy.***

Unlawful deductions from wages

52. Section 13 of the Employment Rights Act 1996 provides that an employer shall not make a deduction from a worker's wages unless:

    a. The deduction is required or authorised by statute or a provision in the worker's contract; or

    b. The worker has given their prior written consent to the deduction.

53. Section 13(3) ERA provides that *'Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated …*

as a deduction made by the employer from the worker's wages on that occasion'.

54. Wages are properly payable where a worker has a contractual or legal entitlement to them ***(New Century Cleaning Co Limited v Church*** [2000] IRLR 27).

Decision

Direct discrimination because of race

55. The Tribunal commenced by considering whether the claimant had been subjected to the treatment complained of, namely

a. Terminating his engagement with the respondent; and/or

b. 'Cold shouldering' him for further work.

56. The Tribunal accepted that the claimant had been removed from driving duties. Therefore, to that extent, part of his engagement with the respondent had been terminated. The Tribunal found however that the claimant's engagement with the respondent was not terminated entirely: he was able to continue working as a counter. This was clear from the evidence of both the claimant and the respondent and was evident from the fact that on 10 December 2018, the claimant applied for a number of roles with the respondent, through their online system. Whilst he later experienced difficulties logging onto the respondent's system, he did not follow up on this, by contacting the respondent's IT helpline. He simply assumed that his access to the respondent's system had been revoked. The Tribunal did not accept that this was the case and accepted the evidence of the respondent that the claimant remained engaged as a casual worker, with the ability to express an interest in work as a counter. Accordingly, the Tribunal found that the only treatment complained of which was established by the claimant was the termination of his driving duties with the respondent.

57. The Tribunal then considered, in accordance with Shamoon, what the reason for that treatment was. The claimant asserted that it was because of his race.

The Tribunal found that this was not the case. The Tribunal found that the claimant's race played no part whatsoever in the reason why the claimant's driving duties were removed. The respondent gave cogent evidence as to why the claimant's driving duties were removed from him, namely that they had secured another driver for the area the claimant was covering on a temporary basis and the claimant's conduct. The claimant's race did not play any part in the respondent's decision.

58. Whilst it was not necessary to do so, given the finding above, the Tribunal also considered whether the claimant had been treated less favourably than a hypothetical comparator. The Tribunal found that he had not been. Rather, anyone engaged by the respondent as a temporary driver for an area around 30 minutes' drive away from their home would have been informed that they would no longer be offered driving duties when a driver in that area was identified. Similarly, anyone who acted as the claimant had, would have been informed by the respondent that they would no longer be offered driving duties.

Harassment related to race

59. The Tribunal noted that the allegation of harassment related to an alleged statement by GM to the claimant, namely that the claimant *'always smelt of cannabis'* when confirming that he would no longer be offered driving duties. GM denied that he had done so, providing a full and detailed explanation for why he had determined that it was no longer appropriate for the claimant to be offered driving duties, none of which involved a belief on GM's part that the claimant ever smelt of cannabis. Indeed, GM's evidence when questioned was that he had never smelt cannabis on the claimant. The Tribunal considered GM was an inherently reasonable, measured and truthful witness. The Tribunal noted that GM had supported the claimant throughout the time that he worked with the respondent: they had met when the claimant first worked with the respondent and no issues were identified; the claimant contacted GM on his mobile when he wanted to be re-engaged by the respondent and GM encouraged him to apply; and when the claimant was not getting shifts as a counter, GM suggested and arranged for him to do driving

work instead. His evidence was that he liked the claimant. Against this backdrop, the Tribunal preferred the evidence of GM to that of the claimant and found, as a matter of fact, that GM did not state that the claimant '*always smelt of cannabis'.*

60. Given that the Tribunal found that the conduct complained of did not occur, the claim of harassment does not succeed.

Unauthorised Deductions from Wages

61. The Tribunal noted that limited evidence was placed before the Tribunal in relation to this claim and that, in particular, there was no evidence as to the time the claimant started and finished work on each day in question, whether by oral evidence, documentary evidence in the form of timesheets or other written records. Instead the claimant merely asserted in evidence that he had worked a particular number of hours on the day in question, without reference to start/finish times, and without confirming the basis for that assertion.

62. In relation to the oral evidence led by the claimant, regarding to the hours he stated he had worked but had not been paid for, the Tribunal noted that

a. The claimant initially gave evidence by reference to the further and better particulars of claim he submitted, dated 25 July 2019, stating that the amounts claimed were correct;

b. He then gave further evidence, still in examination in chief, in relation to each date and, on almost all occasions, his oral evidence did not align with the number of hours he stated he was due in the further and better particulars of claim he submitted, dated 25 July 2019;

c. In evidence in chief he stated that he always spent at least 5 hours counting in each shift worked, before signing himself off, as this was the minimum requirement. In cross examination he stated that driving made him tired, as he was new to it. He was therefore not able to do counts, in addition to driving. Instead, he was happy to do driving only and be paid solely for that (this latter position being aligned with the position stated by the respondent).

63. The Tribunal accepted that the respondent reviewed their records following receipt of the further and better particulars of claim submitted and, from those records they compiled a table showing the number of hours driving and counting undertaken on each day. The driving times were calculated by reference to the respondent's online system and google maps. Whichever was most favourable to the claimant was taken as the journey time and driving time recalculated based on that. The respondent then assessed whether the claimant had been overpaid or underpaid as a result, in respect of each day referred to by the claimant. That information was provided to the claimant by letter dated 2 August 2019 and remained respondent's the position at the Tribunal hearing.

64. The claimant did not dispute the number of hours which the respondent asserted were paid in respect of each date identified by the claimant, other than in relation to 25 November 2018, which the claimant stated was not paid.

65. The following table summarises the position adopted by the parties

Date (all November 2018)	**Claimant's position - further particulars of 'Hours owed'**	**Claimant's position - evidence re hours worked & owed**	**Respondent's position**
07	***Due - 5 hours, 28 mins***	Counting - 5h Driving - 7h, 10m Total - 12h, 10m ***Due - 6 hours, 10mins***	Counting - none Driving - 7h, 10m Total - 7h, 10m Paid - 6h ***Due - 1 hour, 10 mins***
13	***Due - 2 hours, 28 mins***	Counting - 3h Driving - 3h, 20m Total - 6h, 20m ***Due - 2 hours, 43mins***	Counting - none Driving - 3h, 20m Total- 7h, 10m Paid-3h, 37m ***Overpaid - 17 mins***
14		Counting - 5h Driving - 3h, 45m Total - 8h, 45m	Counting - 1h, 30m Driving - 2h, 16m

	Due - 2 *hours, 33 mins*	***Due - 4 hours, 7 mins***	Total - 3h, 46m Paid - 4h, 38m ***Overpaid - 52 mins***
15	***Due - 2 hours, 20 mins***	Counting - 5h Driving - 2h, 40m Total - 7h, 40m ***Due - 4 hours, 5 mins***	Counting - none Driving - 2h, 40m Total - 2h, 40m Paid - 3h, 35m ***Overpaid - 55mins***
20	***Due - 3 hours***	Counting - none Driving - 6h Total - 6h ***Due - 6 hours***	Counting - none Driving - none ***Due - none***
21	***Due - 3 hours, 53 mins***	Counting - 3h Driving - 5h Total - 8 h ***Due - 2 hours, 7 mins***	Counting - 1h Driving - 5h, 42m Total - 6h, 42m Paid - 5h, 53m ***Due - 49 mins***
23	***Due - 3 hours***	Counting - 5h, 40m Driving - 6h Total - 11h, 40m ***Due - 1hour, 55 mins***	Counting - 5h, 40m Driving - 4h, 4m Total - 9h, 44m Paid - 9h, 45m ***Due - none***
25	***Due - 6 hours***	Counting - none Driving - 6h Total - 6 h ***Due - 6 hours***	Counting - none Driving - 6h Total - 6 h Paid - 6h ***Due - none***
26	***Due - 5 hours, 40 mins***	Counting - none Driving - 6h Total - 6h ***Due - 6 hours***	Counting - none Driving - none ***Due • none***

28	***Due - 4 hours, 10 mins***	Counting - 5h Driving - 6h Total - 11h ***Due - 1 hour, 38 mins***	Counting - 6h Driving - 3h, 32m Total - 9h, 32m Paid - 9h, 22m ***Due - 10 mins***
30	***Due - 3 hours***	Counting - 5h Driving - 6h Total - 11h ***Due - 8 hours***	Counting - none Driving - 3h, 54m Total - 3h, 54m Paid-3h ***Due - 54 mins***
Misc (dates not specified)	***Due - 6-9 hours***	***Due - 6 hours***	***None***
Total	**Due - 47 hours, 32 minutes**	**Due - 54 hours, 45 minutes**	**Due - 59 minutes**

66. The Tribunal preferred the evidence of the respondent in relation to the hours worked by the claimant. In reaching this conclusion, the Tribunal took into account the following:

a. The fact that there were discrepancies in the evidence presented by the claimant in relation to hours worked and that he could not point to any evidence to substantiate his position.

b. The significant contradiction between the claimant's evidence in chief (that he always worked a minimum of 5 hours per shift counting) and cross examination (that he didn't want to do counts as well as driving, as he found driving tiring).

c. The fact that the respondent's evidence in relation to the number of hours worked counting on each day was based on their records and driving hours were calculated by reference to route planners on the respondent's online system and google maps.

67. The evidence accepted by the Tribunal showed that the claimant was not paid for 59 minutes worked in November 2018. His hourly rate was £7.90, so he was underpaid by £7.77.

68. The sum paid to the claimant by the respondent in respect of November 2018 was accordingly £7.77 less than the amount of the wages properly payable on that occasion. The respondent had no contractual or legal right to make that deduction. The deduction from the claimant's wages was accordingly unauthorised.

Employment Judge: M Sangster
Date of Judgment: 5 November 2019
Entered in register: 6 November 2019
and copied to parties

I confirm that this is my judgment in the case of Belvue v Retail Asset Solutions Ltd 2300352/2019 and that I have signed the judgment by electronic signature.