EMPLOYMENT TRIBUNALS

Claimant: **Mr G S Kharood**

Respondent: **Pura Facades Ltd**

JUDGMENT

1. By consent, the respondent is ordered to pay to the claimant the sum of £192.70, which the respondent admits was unlawfully deducted from the claimant's wages.

2. The claim for £355 for P11D is dismissed upon withdrawal by the claimant, pursuant to rule 52 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

3. The claimant's application to amend the claim to add a claim of race discrimination (sections 13 and 26 Equality Act 2010) and detriment for making a protected disclosure (section 47B Employment Rights Act 1996) is refused.

4. All other claims are struck out pursuant to rule 37(1)(a) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

REASONS

1. Reasons were given orally at the hearing on 4 May 2022. At the conclusion of that hearing, the claimant made a request for written reasons pursuant to rule 62(3) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

2. At a preliminary hearing on 22 March 2022, I spoke to the claimant about my concern that (with the exception of the claim for wages of £192.70) the claims mentioned in his claim form were outside the jurisdiction of the Employment Tribunal. That discussion was summarised at paragraph 40 of my case management order. I ordered the claimant to provide an explanation as to why his other claims should not be struck out (paragraph 11 of the case management order).

3. The claimant produced a written document in compliance with paragraph 11 of the case management order. That document was discussed at the hearing of 4 May 2022. The claimant stated that the claim for "harassment & stress & mental health, health & safety" was within the jurisdiction of the Tribunal as it was a claim of direct race discrimination, harassment related to race, and detriment for making a protected disclosure. The claimant stated that these were new claims that he had not pleaded before because he had not realised, until he took legal advice, that these were claims within the jurisdiction of the Employment Tribunal. He stated that, whilst he had seen the box on the claim form for race discrimination, he thought that he could only claim this if he had been dismissed, which he had not been. The claimant stated that he withdrew his claim for P11D as he was resolving this directly with HMRC. He stated that the claim for "chiropractor fees", "defamation / loss of earnings", and "damages for unfair treatment, harassment, stress health & safety breaches" were caused by the alleged race discrimination, and he sought damages for them in this regard. The claimant stated that the claim for "legal letter "related to legal fees that he incurred in defending a claim which was intimated by the respondent against him for breach of restrictive covenants.

4. At the 4 May 2022 hearing, the claimant provided oral particulars of his proposed amended claims. He alleged that the respondent treated him less favourably (than Mr C Forbes) and subjected him to unwanted conduct and detrimental treatment in the period from 13 to 27 September 2021. The details of such treatment were set out in his claim form. The claimant alleged that he made protected disclosures to the respondent in September 2021 about furlough fraud (which he said he thought was a crime) and breaches of health and safety. He said he also made protected disclosures to HMRC, HSE and Brent Council, about the same facts. These alleged disclosures were not stated within the claim form. The claimant said that he believed the respondent's treatment of him was because of his race (his Indian ethnic origins), related to his race, or because he made protected disclosures. The claimant did not allege this causal link in his claim form. The claimant did not mention race discrimination in his claim form, or when I explicitly asked him about this at the 22 March 2022 hearing (as recorded at paragraph 40(a) of my case management order). The claimant also alleged that he was subjected to detriment because of making protected disclosures after his employment had ceased. He said that the respondent made derogatory comments to his new employer in or around December 2021. This was not contained in the claim form as the claimant did not become aware of this until after submitting his claim form. Details of these alleged facts were included in a written application from the claimant to the Tribunal to amend the claim dated 13 January 2022. The claimant stated therein that the respondent had "slandered" him by (amongst other things) stating that he had reported the respondent to "Health & safety", the claimant then stated in the 13 January 2022 application to amend that "none of this is true".

5. At the 4 May 2022 hearing the respondent admitted that it made an unlawful deduction of wages from the claimant's 31 October 2021 payslip in the sum of £192.70. The respondent said that this amount was deducted ostensibly pursuant to clause 3.2(b) of the employment contract (which stated that the respondent had the right to deduct the cost of the notice period from the

employee's final salary if the employee refused to work their notice period). The respondent admitted that the deduction was in fact unlawful as it was a deduction from SSP at a time when the claimant was on sick leave.

6. At the 4 May 2022 hearing the claimant initially stated that he had suffered financial loss because of the unlawful deduction. He was called to give sworn evidence on this point. Under oath, he stated that whilst the deduction had caused inconvenience, particularly as he had a young child, which was expensive, he did not in fact suffer any financial loss attributable to the deduction.

Application to amend the claim

7. In ***Vaughan v Modality Partnership*** UKEAT/0147/20 the EAT gave guidance to Employment Tribunals on the correct approach to adopt when considering an application to amend. The paramount consideration is the balancing of the relative injustice or hardship between the parties of allowing or refusing the amendment. In doing so, the Tribunal should consider the real practical consequences of allowing or refusing the amendment. The factors cited in ***Selkent Bus Co Ltd v Moore*** [1996] ICR 836 are not a checklist, but simply a discussion of the kinds of factors that are likely to be relevant when conducting that exercise. Factors such as the prospects of success of the claim, and the extent to which the new pleading is likely to involve substantially different areas of inquiry from the old (also on this point: ***Abercrombie and ors v Aga Rangemaster Ltd*** [2014] ICR 209), are potentially relevant practical considerations when balancing the relative hardship.

8. In ***Galilee v Commissioner of Police of the Metropolis*** [2018] ICR 634, the EAT gave guidance to Employment Tribunals on determining out of time applications to amend. Whilst time limits are relevant to the decision-making process, it may not always be possible to determine that issue until the evidence is heard. There is no mandatory rule that all out of time issues must be decided before permission to amend can be considered. Where amendments introduce new causes of actions, they will take effect for the purposes of limitation at the time permission is given to amend.

9. The application to amend the claim was refused. I decided that the balance of hardship fell in the favour of the respondent. I reached that decision for the reasons set out below.

10. The prejudice that would be suffered by the claimant is that the refusal of the application would preclude him from bringing a claim of race discrimination and protected disclosure detriment. However, even if I allowed the amendment, the claimant would not necessarily be able to pursue these claims, as he would have to persuade the Tribunal to exercise its discretion to extend time, and he may have difficulty in doing so. Specifically:

    a. The proposed amended claims are new claims, as accepted by the claimant. Although the claimant referred to (most of) the alleged less favourable treatment, unwanted conduct, and detrimental treatment in his claim form, he did not refer to (1) race discrimination or

whistleblowing; (2) the alleged protected disclosures; (3) his race; or (4) the alleged causal link. Therefore, if I allowed the amendment, the claim would be treated as if it was presented to the Tribunal today. The claims would therefore be out of time;

b. The time limits for the whistleblowing claim are stricter than for the race discrimination claim. But, in all cases, the burden of proof is on the claimant. I had some scepticism about the claimant's explanation for failure to include the race discrimination claim in his claim form, or mention this sooner. The claimant stated that he did not do this as he did not realise it was a claim within the power of the Tribunal, as his claim did not relate to dismissal. However, when I expressly asked him about this on 22 March 2022, he stated that he did not allege any discrimination or harassment on grounds of, or related to, a protected characteristic.

11. The prejudice to the respondent is in having to defend three entirely new claims arising from new facts, concerning several individuals. If I refused the amendment, the only outstanding claim could be resolved today, as it had been listed for determination today. If I allowed the amendment, there would be a further hearing over multiple days, requiring an amended response, disclosure, witness statements, and attendance at a full merits hearing. This would mean increased time and expense for the respondent at all stages of the litigation process.

<u>Strike out pursuant to rule 37(1)(a) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013</u>

12. The claim for "legal letter" was struck out pursuant to rule 37(1)(a) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 as it had no reasonable prospect of success. A standalone claim for legal fees from separate litigation in a different jurisdiction is not a claim within the jurisdiction of the Employment Tribunal.

13. The claims for "chiropractor fees", "defamation / loss of earnings", and "damages for unfair treatment, harassment, stress health & safety breaches" were struck out pursuant to rule 37(1)(a) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 as they had no reasonable prospect of success. The claimant stated that these were damages caused by the alleged race discrimination. Given the application to amend to add a claim of race discrimination was refused, it follows that there was no reasonable prospect of the claimant recovering damages for these heads of loss.

<u>P11D claim</u>

14. The claimant withdrew his claim for P11D, and this was therefore dismissed upon withdrawal pursuant to rule 52 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

<u>Unlawful deduction from wages claim</u>

15. The respondent admitted that it had unlawfully deducted £192.70 from the

claimant's wages. Judgment was given by consent.

16. The claimant admitted that he had suffered no financial loss attributable to the unlawful deduction. Therefore, no further payment was ordered pursuant to section 24(2) of the Employment Rights Act 1996.

Employment Judge Gordon Walker

4 May 2022

JUDGMENT SENT TO THE PARTIES ON

04/05/2022.

FOR THE TRIBUNAL OFFICE