



EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT

RESPONDENTS

MRS C MORGAN
(AS PERSONAL REPRESENTATIVE
OF MRS M ELLIOT)

V

MISS Z FREYE (1)
MR T FREYE T/A FREYE DRY
CLEANERS (2)

HELD AT CARDIFF ON: 3, 4 & 5 MAY 2022

BEFORE: EMPLOYMENT JUDGE S POVEY
MR M PEARSON
MR A FRYER

REPRESENTATION:

FOR THE CLAIMANT: MS HOPKINS (LAY REPRESENTATIVE)
FOR THE RESPONDENTS: MR LEWIS - BALE (COUNSEL)

JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. The claim for unfair dismissal is not made out and is dismissed.
2. The claim for wrongful dismissal (notice pay) is not made out and is dismissed
3. The claim of indirect discrimination is not made out and is dismissed.
4. The claim of harassment is not made out and is dismissed
5. The claims of unlawful deduction from wages and unpaid holiday pay were struck out for want of jurisdiction.

REASONS

Background

1. At the culmination of the hearing of these claims, and following deliberations, the Tribunal provided its judgment and reasons on liability orally to the parties on 5 May 2022.
2. On 9 May 2022, Ms Hopkins, on behalf of Mrs Morgan (personal representative for the Claimant) made a request for a transcript of the Tribunal's reasons. This is that transcript.

Introduction

3. These are claims brought by Caron Morgan, as personal representative of her mother, Patricia Elliot (hereinafter referred to as the Claimant) against Zoey and Trevor Freye (hereinafter referred to as the First and Second Respondents, respectively). The Second Respondent was the owner of Freye Dry Cleaning. The First Respondent was, at the relevant time, employed as the general manager of Freye Dry Cleaning. The Claimant was employed by Freye Dry Cleaning at the Wellfield Road laundrette (the laundrette) in Cardiff, a position she had held since 1973.
4. Unfortunately, the Claimant passed away on 24 September 2020. She was 75 years of age. Mrs Morgan brought claims on behalf of the Claimant's estate of unfair dismissal, wrongful dismissal (unpaid notice pay), indirect age discrimination, harassment related to age, unlawful deduction from wages and breach of the employer's duty to provide written particulars of her employment.
5. By way of background, in March 2020 when the UK went into lockdown, the Second Respondent placed all his staff, including the Claimant, on furlough (under the initial furlough scheme, introduced by the UK government, whereby 80% of average salary was met by the state). With the advent of the flexible furlough scheme in summer 2020, the Second Respondent called all his staff back to work, including the Claimant. However, staff were afforded the opportunity to request to remain off work on full furlough if they so wished.
6. The return to work was subject to a number of changes, both in hours worked, number of staff per shift, the layout of the laundrettes and measures regarding contact with customers and other staff. Those changes had been implemented by the Respondents to ensure compliance with the Covid regulations in force at the time.
7. It is alleged that the Second Respondent dismissed the Claimant and that the dismissal was unfair. It is also alleged that the First Respondent, in her role as general manager, discriminated against the Claimant because of her age, both in the arrangements for and manner of the return to work in

summer 2020 and the way in which the First Respondent proceeded to specifically treat the Claimant (again, by reason of her age).

8. Following a period of ACAS Early Conciliation, Mrs Morgan presented the claims to the Employment Tribunal on 8 December 2020. Both Respondents resist the claims in full.

The Hearing

9. The Tribunal heard from Mrs Morgan, her sister, Ceri Elliot and from a customer of the laundrette, Sean White. We also heard evidence from the First and Second Respondents. Each witness confirmed and adopted their respective witness statements as their evidence in chief. In addition, we received submissions from Ms Hopkins (a family friend of the Claimant and her daughters) and from Mr Lewis-Bale for the Respondents.
10. We also had sight of an agreed bundle of documents ('the Bundle') and a small, supplementary bundle. The Bundle included the pleadings, text and email communications between the parties, text messages and diary entries private to the Claimant and her family (i.e. not previously disclosed to the Respondents) and various documents relating to the Claimant's employment.
11. The Tribunal were particularly grateful to Ms Hopkins for the professional manner in which she presented the Claimant's case, despite having no legal experience or training. We do not underestimate how challenging that must have been and, in our view, she presented the family's case in a compelling and cogent manner. As we explained at the end of the hearing, the ultimate failure of the claims pursued was in no way attributable to her conduct of the case.
12. Save for the non-legal members (who joined the hearing via video link), the hearing was conducted in person in Cardiff.

The Issues

13. The issues for determination (so far as liability was concerned) were initially set out by Judge Ward at the case management hearing on 26 February 2022, as follows (at [76] – [79] of the Bundle):

1. Unfair dismissal

- 1.1 Was the Claimant dismissed? Or did the death of the employee automatically terminate the contract of employment?

- 1.2 If the Claimant was dismissed, what was the reason or principal reason for dismissal?

- 1.3 Was it a potentially fair reason?

- 1.4 Did the Respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the Claimant?

...

3. Notice pay

3.1 Was the claimant's employment terminated in circumstances where notice is required to be given?

3.2 If so, what was the Claimant's notice period?

3.3 Was the Claimant paid for that notice period?

4. Indirect Age discrimination (Equality Act 2010 section 19)

4.1 A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCP:

4.1.1 that Mrs Elliott must return to her workplace from full furlough and

4.1.2 undertake her duties in the working conditions dictated by the Respondent.

4.2 Did the Respondent apply the PCP to the Claimant?

4.3 Did the Respondent apply the PCP or would it have done so?

4.4 Did the PCP put at a particular disadvantage when compared with persons with whom the Claimant does not share the characteristic, e.g. younger workers, in that her senior age caused her to be more vulnerable and gave rise to a greater risk of harm due to each and any of COVID 19, lone-working and manual handling tasks.

4.5 Did the PCP put the Claimant at that disadvantage?

4.6 Was the PCP a proportionate means of achieving a legitimate aim?

4.7 The Tribunal will decide in particular:

4.7.1 was the PCP an appropriate and reasonably necessary way to achieve those aims;

4.7.2 could something less discriminatory have been done instead;

4.7.3 how should the needs of the Claimant and the Respondent be balanced?

5. Harassment related to [] (Equality Act 2010 section 26)

5.1 Did the Respondent do the following things:

5.1.1 requiring her to work under unacceptable conditions and refusing to engage in any reasonable discussion to address Mrs Elliott's concerns and

5.1.2 subjecting her to a formal written warning.

5.1.3 disregarding Mrs Elliott's age related vulnerability and instead antagonised Mrs Elliott.

5.2 If so, was that unwanted conduct?

5.3 Did it relate to age?

6. Holiday Pay (Working Time Regulations 1998)

6.1 Did the Respondent fail to pay the Claimant for annual leave Mrs Elliott had accrued but not taken when their employment ended?

7. Unauthorised deductions

7.1 Were the wages paid to the Claimant on from 6 July 2020 less than the wages she should have been paid?

7.2 Was any deduction required or authorised by statute?

7.3 Was any deduction required or authorised by a written term of the contract?

7.4 Did the Claimant have a copy of the contract or written notice of the contract term before the deduction was made?

7.5 Did the Claimant agree in writing to the deduction before it was made?

7.6 How much is the Claimant owed?

14. Further details of the conduct which it was alleged constituted harassment were set out in a schedule of additional information (at [53] – [60] of the Bundle).

15. In addition, the claim was further amended to add a claim for a failure by the Second Respondent to provide the Claimant with a statement of the written particulars of her employment

The Relevant Law

Unfair Dismissal

16. In order for a claim of unfair dismissal to succeed, the employer must have dismissed the employee. A dismissal is defined by section 95 of the Employment Rights Act 1996 ('ERA 1996'). In summary, a dismissal occurs where the employer terminates the employee's contract of employment, a fixed-term contract comes to an end and is not renewed or extended or an employee terminates the contract in circumstances where she is entitled by law to do so because of the employer's conduct (also known as constructive dismissal).

17. The death of an employee automatically terminates the contract of employment (Farrow v Wilson [1869] LR 4 CP 744, Court of Common Pleas).

18. Age is a protected characteristic by virtue of section 4 of the Equality Act 2010 ('EqA 2010')

19. Section 39(2) of the EqA 2010 states:

An employer (A) must not discriminate against an employee of A's (B)—

- (a) as to B's terms of employment;
- (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
- (c) by dismissing B;
- (d) by subjecting B to any other detriment.

20. Section 19 of the EqA 2010 defines indirect discrimination as follows:

- (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
- (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
 - (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
 - (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
 - (c) it puts, or would put, B at that disadvantage, and
 - (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

21. Section 40(1) of the EqA 2010 states:

An employer (A) must not, in relation to employment by A, harass a person (B) –

- (a) who is an employee of A's;
- ...

22. Harassment is defined in section 26 of the EqA 2010 as follows (so far as relevant to these claims):

- (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.

...

23. The right of a personal representative to institute or continue Tribunal proceedings on behalf of a deceased employee's estate under section 206 of the ERA 1996 does not apply to claims for written particulars of employment under section 1 of the ERA 1996 or unlawful deductions from wages under Part II of the ERA 1996 (by virtue of section 206(2)).
24. Although the EqA 2010 does not contain any equivalent provision for the institution or continuance of discrimination claims, a claim for compensation for racial discrimination can be pursued by the applicant's personal representative (Lewisham and Guys Mental Health NHS Trust v Andrews (deceased) [2000] ICR 707, CA). On that reasoning, the same would apply to outstanding claims for compensation for discrimination on any of the other protected characteristics covered by the EqA 2010.

Decision & Reasons

The Written Particulars Claim & Wages Claim

25. As was considered and explained during the course of the hearing, by virtue of section 206 of the ERA 1996, Mrs Morgan, as the Claimant's personal representative, cannot bring claims in this Tribunal regarding any alleged failure to provide written particulars of employment or unlawful deductions from wages (whether unpaid wages or holiday pay).
26. It may be possible to pursue any unlawful deductions from wages in the civil courts. In order not to prejudice any future claims, it was agreed that the Tribunal would make no findings regarding either claim.
27. The claims were struck out because the Tribunal did not have the power (or jurisdiction) to deal with them. As explained, striking the claims out means that no decision was made by this Tribunal on the merits of either claim.

The Unfair Dismissal Claim

28. There was no dismissal. The Claimant's death on 24 September 2020 acted to bring to an end her contract of employment with the Second Respondent. What happened after that, in particular, the email sent by the Respondents to the Claimant on 29 September 2020 (at [140] of the Bundle and set out below) could not, in law, extend the employment relationship. The employment was already at an end, even if unbeknown to the Respondents or the Claimant's family.
29. We are required to apply the law and, applying the law in this case, we are compelled to find that there was no dismissal (as defined by section 95 of the ERA 1996, referred to above). Without a dismissal, there can be no unfair dismissal.

30. However, we wish to make a point about the contents of the email of 29 September 2020, the full text of which was as follows:

Subject: RE Termination of employment

Hello Pat,

Due to your unauthorized absence at 1PM on the 29th September 2020, following your written warning, we take this absence as you terminating your employment with us.

We will be sorry to see you leave, and wish you the best in the future. You will be paid any outstanding holiday pay and be removed from the furlough scheme effect of immediately.

Please return your key to the premises when you are able to.

Kind regards,

Miss Zoey Freye & Mr Trevor Freye.
Freye Drycleaning.

31. It was suggested that, by reason of its title, that email was an attempt by the Respondents to terminate Claimant's employment. It was not. On a proper reading of the contents of the email, the intention is clear. The Respondents had concluded that the Claimant had resigned or retired. Even if the unfortunate events of 24 September 2020 had not occurred, the Claimant would have been in difficulties in showing that the email of 29 September 2020 was the Respondents ending her employment. It was, at most, a misunderstanding of the situation. It was not in dispute that at the time the email was sent, the Respondents did not know of Claimant's passing.

The Notice Pay Claim

32. For the same reasons, the notice pay claim must also fail. There is only a requirement for an employer to give an employee notice of the termination of their employment when the employer is the one ending the employment. That did not happen in this case.
33. Similarly, even if the events of 24 September 2020 had not occurred, the email of 29 September 2020 was not evidence of the Respondents dismissing the Claimant and would not have given rise to an entitlement to notice or payment in lieu of notice.

The Indirect Discrimination Claim

34. Reliance was placed on two PCPs (as recorded by Judge Ward and detailed above):

- 34.1. Requiring the Claimant to return to work from full furlough ('PCP 1'); and
 - 34.2. Requiring her to undertake her duties in the working conditions dictated by the Respondents ('PCP 2').
35. The Respondents accept that they applied PCP 1 to the Claimant but they also applied it to all their staff. It was the clear evidence of the Second Respondent that this was considered to be the fairest approach. We did not find that requiring the Claimant to return to work placed her at any disadvantage compared to staff who were younger than her, for the following reasons:
- 35.1. The Respondents made a number of Covid-related adjustments to the shop premises to ensure that Covid safeguards were implemented and applied.
 - 35.2. The Claimant was not shielding nor was it ever suggested that she was eligible for shielding (under the guidance in force at the time). Her age did require her to be more aware of the risks of catching Covid (as per the Welsh Government guidance in force at the time) but those risks were, in our judgment, clearly addressed and managed by the measures put in place by the Respondents prior to staff returning in July 2020.
 - 35.3. Whatever the Claimant's subjective fears and concerns may have been, she did not take up the opportunity provided by the Respondents prior to July 2020 to request that she remain on full furlough
36. As the 1st PCP did not place the Claimant at any particular disadvantage compared to younger staff, it could not be discriminatory (as defined by section 19 of the EqA 2010).
37. The 2nd PCP was also applied by the Respondents to all staff, including the Claimant. Specifically, provisions were introduced to reduce the risk of Covid infection. This included lone working arrangements and moving the interior layout of the shop around. Again, these provisions were applied to all staff at all sites. They were also changes which, to a large degree, were forced upon the Respondents by the Covid restrictions, guidelines and regulations.
38. Reference was made to falls at work which the Claimant endured whilst working alone (and to which Mr White's evidence was addressed, having come upon the Claimant at the laundrette following one such fall). However, these falls were never reported to the Respondents by the Claimant (or anyone else at the time). On this issue, we preferred the evidence of the First Respondent, who was clear, measured and reliable in her recollections of both the events during this period and the motivations behind them.

39. We accept that both Respondents were actively considering their staffs' safety and well-being. That was borne out by the measures they took in the shop itself but was also abundantly clear from the emails sent to staff. We do not deny that the Claimant subjectively held a different view about the Respondents and their motivations (as disclosed by her diary entries and her texts to family and friends). She was entitled to hold such views but they did not, in our judgment, reflect the reality of what was motivating the Respondents, particularly in those uncertain, confusing and difficult early months of the pandemic.
40. The measures put in by the Respondents were prudent, sensible, lawful and, it would appear, ultimately effective in combatting the risk of infection to their staff generally and the Claimant specifically (it was not suggested that the Claimant contracted Covid following her return to work in July 2020). As with the 1st PCP, the Claimant was not put at any particular disadvantage by those measures compared to other staff, including those who were younger than her. She was not treated less favourable in any way relating to her age.
41. For all those reasons, the indirect discrimination claim is not made out and is dismissed.

The Harassment Claim

42. The conduct relied upon in support of the harassment claim was set out in the list of issues by Judge Ward (above) and developed further in the additional information (at [53] – [60] of the Bundle).
43. The legal test of harassment in discrimination claims is set out above (per section 26 of the EqA 2010). It is confined to conduct of the most serious nature.
44. We considered each of the three categories of alleged harassment identified by Judge Ward in turn.

Requiring the Claimant to work under unacceptable conditions and refusing to engage in any reasonable discussion to address the Claimant's concerns

45. In our judgment, those conditions on returning to work in July 2020 were not unacceptable for the reasons explained earlier (namely that they were mandated by the Covid regulations and guidance in force at the time and were a reasonable, proportionate and effective response by the Respondents). Nor did we find that the Respondents refused to engage in any reasonable discussion with the Claimant to address her concerns. In reality, some of her concerns were never communicated to the Respondents (they only appeared in her diaries or in private text exchanges with friends and family). There can, self-evidently, be no criticism for failing to address concerns which were never raised with the Respondents.

46. Those concerns which were raised with the Respondents were reasonably engaged with and reasonably addressed. We accept that the Claimant may not have agreed with how they were resolved but that is not the test of reasonableness, which is, by definition, an objective standard.
47. For those reasons, the conduct complained of as being harassment either did not occur or fell a long way short of meeting the legal requirements for such an allegation.

Subjecting the Claimant to a formal written warning

48. The Claimant was subjected to a written warning (toward the end of September 2020 and at [138] – [139] of the Bundle) and it was unwanted conduct. However, there was no plausible way that the Respondents' decision to issue that warning was in any way related to the Claimant's age. Rather, it was related to allegations regarding her conduct which, on the evidence presented, was itself not related to the Claimant's age (rather, it related to the Claimant's attitude towards colleagues, towards the Respondents and towards customers).

Disregarding the Claimant's age-related vulnerability and instead antagonising the Claimant.

49. It cannot be said that the Respondents ignored any age-related vulnerabilities. The wholesale changes to the shop, the working practices and the option to remain on furlough were all instigated to protect the Claimant (along with all the other members of staff) and were available to her. There was again, in our judgment, gaps between what the Claimant thought and what she told the Respondents and also between the actions taken by the Respondents and whether the Claimant agreed with them. There were, at most, disagreements but there was certainly no evidence of conduct by the Respondents that came close to meeting the definition of harassment.
50. That final point was perhaps best exemplified by the final limb of the harassment claim – the allegation that the Respondents sought to antagonise the Claimant. There was simply no evidence that the Respondents deliberately went out to antagonise the Claimant. That is not to deny that the Claimant felt antagonised by some of the Respondents' decisions. She clearly did, as evidenced in her communications with her family and as recorded in her diary. But again, believing or feeling something does not necessarily make it so. On the evidence we saw and heard, the Respondents were doing what they could to manage three shops with numerous staff at a time of uncertainty, both from a public health and an economic viewpoint. They did not seek to antagonise the Claimant, still less engage in conduct which met the threshold of harassment.
51. In all aspects, beyond the assertions of the Claimant and her family, there was nothing to show that any of the actions, decisions and endeavours undertaken by the Respondents that impacted upon the Claimant were

related in any way by the fact that she was one of the older, if not the oldest, member of staff.

52. For those reasons, the harassment claim is not made out and is dismissed.

EMPLOYMENT JUDGE S POVEY

Dated: 25 May 2022

Order posted to the parties on 27 May 2022

For Secretary of the Tribunals Mr N Roche