EMPLOYMENT TRIBUNALS

Claimant: Mr B Ghanbari

Respondent: (1) Bassam Abdulkadir Razak
(2) New Age Laundry Limited
(3) Newage Environmental Technology Limited

Heard at: **London South Employment Tribunal**

On: **8-9 December 2022**

Before: **Employment Judge Curtis**

Representation
Claimant: In person
Respondents: R2: No attendance
R3: Mr Adamou (counsel)

JUDGMENT

The judgment of the ET is that:

1. The Claimant's claim of unfair dismissal is not well founded. It is dismissed.

2. The Third Respondent made unlawful deductions from the Claimant's wages in respect of his pay for the period 23 September 2019 to 24 October 2019 at the rate of £135 per day for 26 days. The Third Respondent is ordered to pay to the Claimant the gross sum of £3,510.

REASONS

Introduction

1. In these reasons I set out:
   1..1. The relevant procedural background to the case
   1..2. My decision on the Claimant's application for reconsideration of EJ Reed's order
   1..3. My decision on the Claimant's application to amend his case
   1..4. What the claims and issues are
   1..5. What happened ('findings of fact')
   1..6. A summary of the relevant law

1..7. My conclusions on whether the Claimant's claims succeed or fail (in other words, whether the Claimant wins or loses)

Procedural background to the case

2. In a claim form ('ET1') lodged on 10 December 2019 the Claimant brought claims of unfair dismissal, unpaid wages and notice pay against the First Respondent and Mr Bassam Razak.

3. The Claimant applied to amend his claim on 28 September 2021. EJ Reed made a decision on the amendment application in an order dated 1 July 2022. EJ Reed allowed the amendments to clarify and detail the claims for unlawful deductions from wages and unfair dismissal. He refused the applications to add claims for detriment relating to a protected disclosure, and harassment on the basis of religion.

4. EJ Reed also struck out the claim against the First Respondent, Mr Razak, as having no reasonable prospect of success, as the Claimant had no reasonable prospect of establishing that Mr Razak was his employer.

5. The Third Respondent (Newage Environmental Technology Limited) was added by EJ Reed, as the Second Respondent and Mr Razak said that the Third Respondent was the employer. EJ Reed believed that there was a real possibility a tribunal may agree and it would be unjust if the Claimant's case had to be dismissed purely on the basis that it was brought against the wrong party in error.

6. After the 1 July hearing the Claimant made a request for reconsideration of EJ Reed's decision to strike out the claim against Mr Razak. EJ Reed refused that request.

7. The first day of this two-day final hearing was taken up with two preliminary issues:
   7..1. an application to reconsider EJ Reed's decision to refuse to add claims of protected disclosure detriment and religious harassment; and
   7..2. an application by the Claimant to amend his claim.

Reconsideration application

8. The Claimant made a separate request for reconsideration of EJ Reed's decision to refuse to add claims of protected disclosure detriment and religious harassment. That application had not been looked at by a Judge before this hearing, as there was some delay in it arriving with the tribunal.

9. Rule 72(3) of the ET Rules says that the reconsideration shall be by the Employment Judge who made the original decision where practicable. It was not practicable for the application to be decided by EJ Reed, so under Rule 70 of the ET Rules of Procedure the Acting Regional Employment Judge gave me permission to decide the application.

10. I refused the application. Although I gave oral reasons at the time, I will repeat them here so that the Claimant has all of the decisions recorded in one document.

11. The Claimant made his application on three grounds:
    11..1. He emphasised that he did not know he had to put these matters in his ET1. He is not legally qualified and is learning as he goes. He has had difficulty in getting CAB appointments.
    11..2. Mr Razak is here today and so can be questioned on these matters. That would be preferable to the Tribunal saying that it is too difficult to deal with. Mr Razak should be held accountable for his slogans and the things he says
    11..3. In the original ET1 the Claimant said "shall submit later" in relation to: the amount of losses, the representative and additional information. This was his indication that he was not sure he had put in all he needed, in light of the difficulties he has as a litigant in person.

12. Rule 70 of the ET rules provides that a Tribunal may reconsider any judgment *"where it is necessary in the interests of justice to do so"*, and that on reconsideration the decision may be confirmed, varied or revoked.

13. Although it was not clear why the application had not reached the Tribunal within 14 days of the original decision (as required by rule 71), I treated the application as though it had been made within that time limit.

14. The tribunal has a broad discretion on a reconsideration application. The discretion must be exercised judicially, having regard to the interests of the party seeking reconsideration, the other party and the public interest of finality in litigation (*Outasight VB Ltd v Brown* [2015] ICR D11). There is no requirement for 'exceptional circumstances'. Reconsiderations are a limited exception to the general rule that tribunal decisions should not be reopened and relitigated; they are not a method by which a disappointed party to proceedings can get a second bite of the cherry.

15. When considering the application I kept in mind the overriding objective at rule 2 of the ET rules.

16. In my judgment, the grounds advanced by the Claimant are attempts to relitigate the decision made by EJ Reed. They are all points which could have been, and in some cases were, made to EJ Reed at the time. The only matter which could arguably not have been made to EJ Reed was the second point: that Mr Razak was here at the hearing and so could be questioned on the matters. I believe that it would not be just to grant the application on this ground. The Respondents have a right to know the case they are to meet, so that they may prepare the evidence in response; to say that someone should be questioned on new issues simply because they are present as a witness on other issues is not a good reason to reconsider the earlier decision of EJ Reed.

Amendment application

17. The Claimant applied to amend his claim to include a new claim that he undertook work on 23 to 26 September at two 'NOX' hotels and was entitled to be paid £1,500 for each piece of work (so £3,000 in total).

18. The basis of the claim was slightly confusing. The Claimant said that he undertook the work for the Respondent as a trial, without any expectation of payment. He also said that his day rate when he began working was £135 per day, but he claimed £1,500 per day for this work as no sum had been

agreed for the Nox work and he thought £1,500 was what the work was worth.

19. Based on what the Claimant said, I understood him to be claiming that:

    19..1. There was an agreement that he would be paid a reasonable sum for the work undertaken, and a reasonable sum was £1,500 for each piece of work. That was a contractual agreement, and the money owed was outstanding on termination of employment.

20. The Claimant told me that this was not part of his original claim when he lodged his ET1 as it wasn't part of his daily rate, but was used as a test of his capabilities. He said that when he had the case management hearing on 1 July he realised it could be included as part of his unfair dismissal claim because of the explanation that EJ Reed gave about the schedule of loss.

21. The Respondent opposed the application to amend the claim.

22. When considering the application, I had in mind the principles set out in the cases of *Selkent Bus Co Ltd v Moore* [1996] ICR 836, and *Vaughan v Modality Partnership* [2021] ICR 535. I also considered the overriding objective.

23. I refused the application to amend as:

    23..1. It was made very late in the proceedings: this is the final hearing of the claim
    23..2. The claims brought would be outside of the time limit imposed by the legislation
    23..3. The claims were not previously foreshadowed in the ET1 or in any earlier application to amend
    23..4. The Respondent was caused prejudice by the fact that it had not had an opportunity to collate any evidence on the point, such as what would amount to a reasonable payment for the work undertaken.
    23..5. Whilst not decisive, I also took into account the fact that the Claimant's case was inconsistent. At times he said there was no agreement to be paid and the work was done as an unpaid trial; at times he suggested that there was an agreement to be paid a reasonable sum for the work.

24. I explained to the Claimant that this would not preclude him from seeking payment for the Nox work as part of the compensatory award for his unfair dismissal claim, in the event that claim succeeded and to the extent that it had not already been paid.

The claims and issues

25. The issues for the tribunal to consider were discussed and agreed at the start of the hearing. There are as follows:

Unlawful deductions from wages

25..1. Who was the Claimant employed by? The Claimant says that he was employed by Mr Razak personally; the Respondents say that he was employed by Newage Technology Limited

25..2. Has the Respondent made a deduction?. That involves determining when the Claimant worked, in particular did he work:

25..2.1. 6 days per week in the weeks ending 5, 12, 19 October 2019, and 4 days in the week ending 24 October 2019?

25..2.2. How much was he entitled to be paid for each day of work? The Claimant says he was entitled to be paid £135 per day; the Respondent says £80 per day.

25..3. If the wages were not paid in full then the Respondent does not put forward any lawful basis for the deductions.

Automatic unfair dismissal – Health and safety concerns

25..4. On the following dates, did the Claimant report that the staircase was uneven and that he had slipped on it:

25..4.1. 24 October 2019 to Mr Cornea

25..4.2. 24 October 2019 to Mr Razak

25..4.3. 27 October 2019 to Mr Razak

25..5. If so, did that amount to circumstances connected with work which the Claimant believed were harmful or potentially harmful to health and safety?

25..6. Was that belief reasonable?

25..7. Were those matters brought to the Respondent's attention by reasonable means?

25..8. Was that the sole or principal reason for dismissal?

Automatic unfair dismissal – Protected disclosure (s.103A ERA 1996)

25..9. What did the Claimant say, when and to whom? The Claimant says he made disclosures on the following dates:

25..9.1. 24 October 2019 to Mr Cornea, saying that there was a problem with the available steps

25..9.2. 24 October 2019 to Mr Razak in a telephone call, in which the Claimant repeated his concerns regarding the steps

25..9.3. 27 October 2019 to Mr Razak in a telephone call, in which the Claimant again raised concerns regarding the steps

25..10. Were these disclosures of information?

25..11. Did the Claimant believe that the disclosure of the information was made in the public interest?

25..12. Was that belief reasonable?

25..13. Did the Claimant believe that the disclosure tended to show that the health and safety of any individual had been, was being or was likely to be endangered?

25..14. Was that belief reasonable?

25..15. Was the disclosure made to the Claimant's employer?

25..16. Was the disclosure the sole or principal reason for the Claimant's dismissal?

Documents and evidence heard

26. I had two witness statements from the Claimant, as well as his comments on Mr Razak's first statement. I had two witness statements from Mr Razak and a witness statement from Mr Cornel Cornea. I heard oral evidence from each of those witnesses.

27. The Claimant initially had some difficulties accessing the hearing bundle, but this was resolved before the evidence began.

28. The Claimant told me that he was on painkillers for his knee pain which caused a buzzing noise in his head. He also has a low heart beat and said that he might need to ask the same questions a few times. He said the only adjustment he needed was regular breaks, which I made sure we had. The Claimant was able to participate fully in the hearing.

29. I was provided with a bundle containing 172 pages.

Findings of fact

30. In this part of the judgment I say what happened. Where the witnesses did not agree I have made a finding on the balance of probabilities, which means I decided what probably happened.

31. There was a surprising lack of documentary evidence to help me understand the basics of the relationship between the Claimant and his employer. There was no contract of employment. There was nothing in writing which contained a record of any agreement between the Claimant and his employer. There was no record of what work the Claimant was to do, when, and how much he would be paid. There was no record of the days or times that the Claimant worked. These are basic documents which I would expect the Respondent to have.

32. Having heard the evidence of the witnesses, that this is not a case where I found that any one witnesses gave an entirely accurate account. As will be clear from my findings below, I accepted the Claimant's evidence on some, but not all, points. Likewise for Mr Razzak and Mr Cornea.

33. In September 2019 Mr Razzak was a director of both the Second and the Third Respondent. The Second Respondent is a laundry business; the Third Respondent undertakes work servicing air conditioning units. Mr Razzak is no longer a director of the Second Respondent; he has been removed as a director without his consent as the company has been 'hijacked'. The matter is currently being investigated by the police. It is in those circumstances that Mr Adamou represents only the Third Respondent and there is no attendance from the Second Respondent.

34. In September 2019 the Claimant was introduced to Mr Razzak by a mutual friend. The met at one of the sites of the Second Respondent to discuss potential employment. The Claimant was offered, and rejected, a role within the laundry business. A few days later Mr Razzak spoke with the Claimant again and offered him a role servicing air conditioning units.

35. I am satisfied that the Claimant understood that he would be employed by a limited company rather than Mr Razzak personally. The Claimant explained that he had has previously been employed by companies in the UK; from his evidence I was satisfied that the Claimant understood the distinction between an individual and a limited company. From the Claimant's evidence it was clear that he knew Mr Razzak operated via a limited company. The Claimant may not have known which the name of the company that was going to employ him, but I am satisfied that he knew that it would be a limited company rather than Mr Razzak personally.

36. Mr Razzak explained to me that the Second Respondent is the laundry company, and the Third Respondent is the air conditioning company. I conclude that the Claimant was employed by the Third Respondent.

37. For the rest of this judgment, where I refer to "the Respondent" I am referring to the Claimant's employer, the Third Respondent.

38. As to the Claimant's pay, Mr Razzak says that there was no discussion about the rate of pay in the September discussions, but that on 2 October 2019 (after the Claimant had been working for Mr Razzak for over a week) a rate of £80 per day was agreed. The Claimant said that before he started work there was an agreement that he would be paid £135 per day. To support his contention, the Claimant says that he had told Mr Razzak that he had been offered a role by another company as a site agent, for £120 per day with a company car.

39. The evidence before me amounts to the word of Mr Razzak against the word of the Claimant. There are factors which support both party's contention as to the agreed wage: Mr Razzak says that Mr Cornel was employed at a rate of £135 and that the Claimant was employed as his assistant; as such it makes sense that the Claimant would be paid less. Against that is the Claimant's case that he had another job offer which was going to pay £120 per day, so he negotiated a rate of £135.

40. I believe it is unlikely that Mr Razzak and the Claimant would have waited until almost two weeks after the Claimant started before discussing pay. It is much more likely that pay was discussed before or around the time that the Claimant started working. I reject Mr Razzak's evidence as to the timing of the conversation and I accept what the Claimant says. The Respondent has produced no documentary evidence to confirm what the Claimant was paid, nor what Mr Cornea was paid. I prefer the Claimant's account on this issue, and find that it was agreed that the Claimant would be paid £135 per day.

41. The Respondent's case is that the agreement regarding pay applied to all work undertaken by the Claimant, including the work at the Nox hotels on 23-26 September 2019. The Claimant says that the Nox Hotels work was not part of the agreed daily rate, as it was a trial. I find that the agreement

as to the Claimant's daily rate of pay applied to the work the Claimant undertook at the 'Nox' hotels. There may have been a discussion about the Nox work being part of a 'trial' or 'probationary period', but I am satisfied that the parties agreed that the Claimant would be paid for this period at the same rate as the remainder of the work, i.e. £135 per day.

42. There is also a dispute as to how many days the Claimant worked. The Respondents' case is that the Claimant worked on a total of ten days, being 23-26 September 2019 at the Nox hotels, 27 September 2019 at a site in Lower Marsh and 5 days in the week commencing 30 September 2019 at a site in Lower Marsh (with a visit to another site on one of those five days).

43. The Claimant says he worked a total of 26 days, being:

    43..1. 23-26 September 2019 at the Nox hotels
    43..2. 6 days per week for the weeks commencing 30 September, 7 and 14 October 2019
    43..3. A further four days on 21-24 October 2019.

44. The Respondent was not able to provide any record of when and where the Claimant worked. There were no job sheets, rotas, signing in sheets produced by the Respondent. I found this surprising.

45. The Claimant provided a record of his Oyster Card journeys for the relevant dates. In his cross-examination the recorded journeys were examined in some detail and the Claimant was able to clearly and eloquently explain which job each of the journeys related to.

46. Having heard the evidence of the witnesses, I prefer the Claimant's account as to the days that he worked. I found him to be clear and credible when describing the journeys he took for work and the sites visited on the various days. I was surprised by the complete lack of documentation from the Respondent, and found its case unconvincing on this point.

47. The Respondent also sought to persuade me that the Claimant's employment ended because of a dispute about his identification documents, in particular that he had provided a false name and hadn't given the Respondents his National Insurance number despite repeated requests. I found this unconvincing. There is no documentary record of any requests for a NI number from the Claimant (whether by letter, text, WhatsApp message, email etc). The assertion is significantly undermined by the Site Induction Checklist and Site Rules which the Claimant completed on 27 September 2019 in his own name. These documents were attached to Mr Razzak's first witness statement; for Mr Razzak to say in his second witness statement that *"he never gave us his real name"* lacks credibility in light of the contemporaneous documents.

48. I find that the Claimant worked for a total of 26 days, and that there was an agreement that he would be paid £135 per day. He has not yet been paid for any work undertaken.

49. I turn now to whether the Claimant made disclosures of information to the Respondent. To determine this, it is useful for me to first decide whether the Claimant suffered an accident at work. The Claimant says that he fell,

twisting his knee and hip on 24 October 2019 and that he reported this to Mr Cornea and Mr Razzak the same day.

50. I have some difficulty with the Claimant's evidence about injuring himself at work. Within the bundle there is a "Claim Notification Form" ('CNF') which was completed by a solicitor instructed by the Claimant for a potential personal injury claim. This contains some inconsistencies with the Claimant's account to me, such as the accident date which is recorded as 22 October 2019 on the form, but was said to be 24 October 2019 in the Claimant's evidence to me.

51. The CNF also suggests that the Claimant did not seek medical attention until mid-November 2019, which is some time after the purported accident. The Claimant told me that he was too unfit to attend work at all following the accident; I found it unusual that the Claimant was not able to provide evidence to support this, such as medical records or a fit note.

52. The Claimant asserts that he reported this accident, and two previous accidents, to the site manager and Mr Cornea. The site manager is employed by a third party.

53. Mr Cornea denied that the accidents were reported to him. It appears to be agreed that there was no record made at the time, for example in an accident book at the site. The Claimant said that Mr Cornea and the site manager laughed at him when he reported the accident and concerns regarding the steps. The Claimant also says he continued to work after they laughed at his concerns, but he did not escalate matters to Mr Rezzak as Mr Rezzak was a "busy man" and the Claimant "could not go to 'my daddy' every time something happened".

54. This account from the Claimant does not sit well with his assertion to me that he had significant concerns about the steps and that he raised them as health and safety concerns and protected disclosures. The Claimant had Mr Rezzak's mobile telephone number; it is very difficult to believe the Claimant when he says people were laughing about serious health and safety concerns, yet he continued to work at the site and did not escalate matters to Mr Rezzak.

55. Considering all of these points and having heard the oral evidence of the Claimant and Mr Cornea, I come to the conclusion that the Claimant did not have an accident at work. I do not believe the Claimant on this point.

56. That feeds into the question of whether the Claimant complained to the Respondent about the staircase at the Lower Marsh site. Given that I do not accept the Claimant's evidence as to whether there was an accident, I am less likely to accept his account that he reported concerns about the steps.

57. I have weighed up the evidence of Mr Cornea against the evidence of the Claimant. I have considered the lack of any documents to support the Claimant's account. I also considered the fact that the Claimant continued to work at the site. The Claimant was not able to provide supporting evidence (such as records of telephone calls etc); he did not raise concerns in writing during his employment or when his employment ended.

58. I find that the Claimant did not raise concerns regarding the staircases with Mr Cornea or Mr Rezzak. I accept the evidence of Mr Rezzak and Mr Cornea on this point. I find it more likely that after the termination of his employment the Claimant has looked back at photographs he has of the site, after looking at those photographs he has put together a theory that the steps were not even.

59. The relationship between the Claimant and Mr Rezzak broke down after 24 October 2019. There is little agreement as to what the cause was: the Claimant says it was the fact that he reported concerns about the steps but I reject that as I find that he did not raise any concerns. The Respondent says that the relationship broke down as the Claimant had provided a false name at the start of employment and refused to provide necessary identification documents (his national insurance number) on request. I find that unlikely: I have already referred to the evidence showing that the Claimant provided his real name on the site induction checklists. I am not satisfied that either party is giving me an accurate story about why the employment relationship came to an end.

60. Regardless, it did come to an end at around the end of October 2019. The parties agree that the Claimant attended the site and was refused entry shortly after 24 October 2019, and that the police asked the Claimant not to return to the site.

61. I am satisfied that the employment ended at the end of October 2019.

The Law

62. Section 13(1) of the Employment Rights Act 1996 provides that an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract or the worker has previously signified in writing his agreement or consent to the making of the deduction. An employee has a right to complain to an Employment Tribunal of an unlawful deduction from wages pursuant to Section 23 of the Employment Rights Act 1996.

63. A claim about an unauthorised deduction from wages must be presented to an employment tribunal within 3 months beginning with the date of payment of the wages from which the deduction was made, with an extension for early conciliation if notification was made to ACAS within the primary time limit.

64. The relevant parts of s.100 ERA 1996 provide:
"100 Health and safety cases.
(1)An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that—
…
(c)being an employee at a place where—
(i)there was no such representative or safety committee,

…he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,

65. The relevant parts of section 43B ERA 1996 say:

(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

…(d) that the health or safety of any individual has been, is being or is likely to be endangered,

66. Section 103A ERA 1996 provides:

"An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."

67. The burden is on the Claimant to prove that he raised the health and safety concern and/or made a protected disclosure. He also has to prove that the raising of the concern/protected disclosure was the sole or principle reason for his dismissal.

Analysis and Conclusion

Identity of the Claimant's employer

68. For the reasons set out above, I find that the Claimant's employer was the Third Respondent.

Unlawful deductions from wages

69. I have found that the Claimant worked a total of 26 days, and was entitled to be paid £135 per day. He has not been paid any of these sums. The Third Respondent has not put forward any basis on which any deductions from wages could have been lawfully made.

70. I therefore find that the Claimant has suffered deductions from wages totalling £3,510 (being 26 days at £135 per day). The Claimant's claim of unlawful deductions from wages succeed.

Automatic unfair dismissal

71. For either of the Claimant's unfair dismissal claims to succeed he must first prove that he reported concerns regarding the staircase at the Lower Marsh site to Mr Cornea or Mr Razak on 24 or 27 October 2019.

72. The Claimant has not proved to me that he raised concerns regarding the staircase on 24 or 27 October 2019. I did not accept his evidence on this point. I have set out my reasons for not accepting the Claimant's evidence at paragraphs 49-58 above. I therefore find that he did not make a protected disclosure.

73. As I have found that the Claimant did not raise health and safety concerns or make a protected disclosure, I cannot find that his dismissal was because of those matters. Although I believe I have not been given the true story about the Claimant's dismissal, I am satisfied that the dismissal was not

because the Claimant raised concerns about the safety of the staircase on site.

74. I therefore find that the unfair dismissal claims fail.

_____

Employment Judge **Curtis**

_____16 January 2023_____
Date