



EMPLOYMENT TRIBUNALS

Claimant

Mr Andrei Tocu

Respondent

Nemaste Village Limited

v

Heard at: Norwich

On: 14, 15, 16 November 2022

Before: Employment Judge Postle

Members: Mrs L Gaywood and Mr C Davie

Appearances

For the Claimant: In person

For the Respondent: Mr Jetani, Managing Director

Interpreter: Miss L Onica, Romanian speaking

JUDGMENT

1. The Claimant was not the subject of race discrimination under the Equality Act 2010.
2. The Claimant's dismissal for some other substantial reason was fair.
3. The Claimant did not suffer an unlawful deduction of wages.
4. The Claimant is entitled to accrued holiday pay in the sum of £743.04 being 16 days. The Respondent is entitled to credit the redundancy pay paid of £525.00. Which means the Respondents are Ordered to pay a balance to the Claimant of **£218.04**.
5. The Respondent's counter claim is dismissed.

REASONS

1. The Claimant brings claims to the Tribunal of:
 - a. Direct race discrimination, the Claimant being of Romanian nationality and relies only on the dismissal itself as the alleged less favourable treatment;

- b. A claim under the Employment Rights Act 1996 for ordinary unfair dismissal (the Respondent asserts the potentially fair reason to dismiss was redundancy);
 - c. There is a dispute over the amount of redundancy pay due. The Claimant received £525.00 and asserts he would be entitled to £712.00;
 - d. There are claims of unpaid wages. The Claimant asserting in September, October and November 2020 he was underpaid by £1.82 per hour, amounting to £455.00; and
 - e. There is a claim for holiday pay for the period April 2020 to 15 January 2021.
2. In this Tribunal we have heard evidence from the Claimant through a prepared Witness Statement and from the Respondents we heard evidence from Mr Jetani, the Managing Director of the Respondent, and Ms Patel the Administrative Officer of the Respondents.
 3. The Tribunal also has the benefit of a Bundle of documents consisting of 109 pages.
 4. Finally, the Tribunal also had the benefit of a Romanian Interpreter, Ms Onica who performed a very professional job assisting the Tribunal greatly in administering justice.

The Facts

5. The Claimant was originally employed in one of the Respondent's businesses at a café in the University of East Anglia, from March 2018. When that was closed around September / October 2018 the Claimant came to work at the Respondent's Indian restaurant in Norwich until his dismissal on 15 January 2021.
6. The Claimant was employed as a Kitchen Porter, his contract is at page 74a and he was originally contracted for 40 hours per week at £8.15 per hour, which was the appropriate sum for the National Minimum Wage at the relevant time.
7. It is common ground the Claimant got on well with the owner, Mr Jetani and other staff and worked well and was a valued employee.
8. Unfortunately, the world pandemic arrived in March 2020 which caused the shut down of most businesses in the UK and indeed worldwide, including the restaurant trade. The Government operated a Furlough Scheme to ensure employees were paid whilst businesses were closed.

9. As the restaurant trade was allowed to slowly open up, in accordance with Government Guidelines, the Claimant was, as with other employees, required to work in September / October 2020. However, the Claimant was reluctant to attend work due to Covid and concern for his family. It is clear, during this period, the Claimant was paid for part time work together with furlough pay. The payment for the part time work being made in cash seemingly to avoid tax and National Insurance at the Claimant's request.
10. What is clear, is on 9 December 2020 the Claimant was asked to attend a meeting, as were other staff to discuss return to work. Businesses were now slowly being allowed to return to some normality in accordance with Government Guidelines, particularly take away business and along with other staff he was asked to work part time possibly 10 – 20 hours per week, which was to be topped up with the Government Furlough Scheme, which meant the Claimant would not have been out of pocket. The Claimant wished to return full time and made that clear to Mr Jetani which under the relevant Government Guidelines at the time and the restrictions with restaurants, was not possible. This was confirmed to the Claimant by letter of 22 December 2020, erroneously marked April, about the Claimant's return to work part time and confirmed the remaining hours would be paid under the Government Furlough Scheme. The letter went on to say,

"You cannot decide that you will not return to work while the work is available and would rather keep receiving furlough pay. We cannot fulfil your wish of paying you just furlough although we have work.

...

From last meeting we had in person we came across the fact that you do not want to return to work while the furlough scheme is in place. We would like to inform you once again that you will need to return to work, the furlough scheme will not run for lifetime.

So if you do not propose to come to work in line with your terms and conditions of employment you will not have any option than termination of the employment."

11. Following this meeting and letter, the Claimant did not return to work. A second meeting was arranged for 15 January 2021 to discuss the return to work. The Claimant was not willing to return unless he was engaged fully 40 hours, despite the offer of part time and top up under the Furlough Scheme.
12. The Claimant would not return as requested by the Respondent. The Claimant was therefore dismissed by reason of redundancy by Mr Jetani. This was confirmed in writing by letter of 21 January 2021, the effective date of dismissal being 15 January 2021.

The Law – Equality Act 2010 (“EqA”)

13. Section 13, Equality Act 2010 provides,

13 Direct Discrimination

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

14. The Tribunal is therefore looking for some prima facie evidence of less favourable treatment and if there is any evidence of less favourable treatment, then we look to the Respondents for an explanation.

15. In dealing with direct discrimination, one also has to consider the comparator. It appears the comparator in this case is hypothetical. Under s.23 EqA 2010,

23 Comparison by reference to circumstances

(1) On a comparison of cases for the purposes of section 13, there must be no material difference between the circumstances relating to each case.

Conclusion on race discrimination

16. On the claim of direct race discrimination, it is clear that the only reason for the Claimant’s dismissal was the Claimant’s refusal to return to work part time with his pay being topped up under the Furlough Scheme.

17. The Tribunal are entirely satisfied that, that had absolutely nothing to do, or bearing, on the Claimant’s race or national origin of being Romanian. Had another employee refused on the same facts, whether British, Indian or Sri Lankan, the Respondent would have acted in exactly the same way by dismissing that employee for the refusal to return to work albeit part time, with their income being topped up under the Government Furlough Scheme. The claim therefore is not well founded.

The Law – Employment Rights Act 1996 (“ERA”)

18. Section 98, Employment Rights Act 1996 provides,

98 General

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

- (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
- 19. In this case, the Respondents had advanced the reason for dismissal was redundancy which is a potentially fair reason. Whatever the reason for the dismissal, the Tribunal would then have to go on to consider the fairness under s.98(4), namely,
 - (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-
 - (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
 - (b) shall be determined in accordance with equity and the substantial merits of the case.
- 20. It is clear that in this case the requirement for the employers to carry out work for which the employee carried out work continued, was not diminished and there was a requirement for that work to be done, albeit on a part basis. Therefore, it was not a redundancy situation.
- 21. However, on the facts of this case, the Claimant was offered the return to work part time hours with pay being topped up under the Furlough Scheme. The Respondents held two meetings with the Claimant and those options were put to the Claimant and the Claimant declined. The Claimant was wishing to return only on a full time basis. The Claimant had been warned after the first meeting in a letter dated 22 December 2020 of the consequences of not returning to work was he would be dismissed. The second meeting took place on 15 January 2021 and the Claimant was still not returning to work, or willing to return to work, therefore the Respondent had no option but to terminate his employment and that to the Tribunal's mind, was a potentially fair reason to dismiss, namely some other substantial reason.
- 22. The Tribunal are further satisfied under s.98(4) ERA 1996 the Respondent acted fairly and reasonably and that the decision to dismiss fell within the range of a reasonable response that a reasonable Respondent would adopt.
- 23. As to the claim for unlawful deduction of wages said to have occurred in September, October and November 2020, the Claimant admitted in evidence he was being paid cash during this period which was of benefit to him and the Respondent. Therefore, the Tribunal are not satisfied, in those circumstances, it would be appropriate to consider a claim for unlawful deduction of wages.

24. As to the claim for holiday pay, the Respondent through Mr Jetani was candid in his acceptance it had not been paid in the period April 2020 to January 2021; a period of 10 months which equates to 16 days. Taking the Claimant's annual salary based on 40 hours per week, that amounts to £16,952 and given that the calculation is done on the rule of apportionment and divided by 365 days, that amounts to £46.44 per day. This in turn equates to £743.04. But of course the Respondents have paid erroneously a redundancy payment which was not due to the Claimant and must be credit for that sum of £525.00. Therefore, the amount Ordered to be paid to the Claimant for the outstanding holiday pay is £218.04.

25. In respect of the counter claim, the Tribunal makes no Order in that respect.

Employment Judge Postle

Date:17/1/2023

Sent to the parties on: 26/1/2023

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For the Tribunal Office.