EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Mickel Foster-Burke	**v**	**Operators R US Ltd**

Heard at: Watford **on**: 18 October 2022

Before: Employment Judge Bedeau

Members: Mr P Miller
Mr A Hayes

Representation
For the Claimant: In person
For the Respondent: Mr F Hussain, Solicitor

JUDGMENT having been sent to the parties on 11 November 2022 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claimant presented his claim form on 7 December 2021 in which he claims unfair dismissal and race discrimination, notice pay and other unspecified payments. He worked for the respondent as a Delivery Driver.

2. In the response, presented on 27 January 2022, the respondent avers that the claimant was self-employed. In accordance with the terms of his contract, he was required to reimburse the respondent for any damage caused to its vehicle. He was involved in three vehicular accidents and, as a consequence, upon leaving the respondent, monies were retained to cover the repair costs.

3. On 28 March 2022, Employment Judge Laidler, dismissed the unfair dismissal claim as the claimant had not been in continuous employment with the respondent for at least two years.

4. At the preliminary hearing held on 22 July 2022, before EJ S Moore, it was agreed that the claims before the tribunal are unauthorised deduction from wages, and direct race discrimination. The Judge also clarified the issues which are set out below.

The issues

Status

(1) Was the Claimant an employee or worker for the purposes of falling within the scope of section 13 Employment Rights Act 1996 and section 13 Equality Act 2010?

Unauthorised deduction from wages

(2) If so, was the Respondent required or authorised to make a deduction from the Claimant's wages (to pay for damage caused to its vehicles) by virtue of a relevant provision of the Claimant's contract pursuant to sections 13(1) & (2) of the Employment Rights Act 1996?

(3) If so, has the Respondent shown that the deduction made related to repair costs that had been genuinely and properly incurred?

(4) Did the Respondent withhold the Claimant's wages for the week before the Claimant handed in his notice? If so, was the Respondent required or authorised to do so within the meaning of section 13 Employment Rights Act 1996?

(5) Did the Claimant terminate his contract with immediate effect (during his notice period) by leaving the premises and going home after having an altercation with an employee of DX Freight?

(6) If not, was the Respondent entitled to terminate the Claimant's contract with immediate effect (during the Claimant's notice period) following the Claimant's altercation with the employee of DX Freight and his decision to go home?

(7) In the light of the above, what, if any, wages does the Respondent owe the Claimant?

Direct race discrimination

(8) Did the Respondent treat the Claimant less favourably because of his race than he treated "Pete" (or would treat a hypothetical white employee) contrary to section 13 of the Equality Act 2010:

(a) By requiring the Claimant to work harder than Pete for the same pay; and

(b) By Mr Bird speaking to the Claimant in more derogatory and disrespectful way than he spoke to Pete.

The evidence

5. Evidence was given by the claimant. On behalf of the respondent, evidence was given by Mr Geoff Bird, Director. After considering the oral evidence, and the documentary evidence in two separate bundles prepared by each party, the tribunal made the following findings of fact.

Findings of fact

6. The respondent provides delivery drivers to another company, DX Freight, and operates from its main premises in Milton Keynes, Bedfordshire.

7. The claimant commenced employment on 4 May 2021, as a Delivery Driver

and was based at Humphreys Road, Houghton Regis, Dunstable, in Bedfordshire.

8. One of the issues in this case is whether the claimant was self-employed, a worker or in employment? Mr Hussain, solicitor on behalf of the respondent, conceded that the claimant was either an employee or a worker. We find upon the evidence that he was an employee. He was bound by a contract entitled, "Employment Contract". Curiously, it refers to the arrangement being on a self-employed basis. This was produced by the claimant as evidencing an employment relationship, though the copy before us is not signed. The parties considered themselves bound by its terms and conditions. It is an all-embracing agreement, covering the claimant's start date; job title; place of work; holiday leave; disciplinary procedure; grievance procedure; confidential information; termination of employment, amongst others. How he carried out his work was in accordance with the terms of this contract. He worked variable hours; was paid for his work; was subject to the respondent's disciplinary procedure; and he followed the instructions given to him by his managers.

9. In the contract there is a provision in relation to reimbursing the respondent for damage caused to its vehicles. Paragraphs 12 to 14 states the following:

> "12. The employee will be responsible for paying back any claims made against them, upon full investigation by the employer. This will be deducted straightaway from the employee's wage. Any claims resolved and signed off will not result in a deduction by the employer.
>
> 13. The employee will be charged for any damages caused to their vehicle or any other third party property, 21 days will be offered to resolve the issue before the employer intervenes. VOR will result in the vehicle and driver being stood down until resolved, a prolonged period will result in a vehicle charge to the employee, this will be deducted straightaway from the employee's wage.
>
> 14. Upon leaving the company the employer will withhold the last wage from the employee for four weeks for any outstanding damages or claims to be paid."

10. He worked, he told the tribunal, between 8 to 12 hours a day, 6 days a week, and was paid, on average, £450 gross. We accepted his evidence.

<u>The claimant's three vehicle accidents</u>

11. About two weeks after the commencement of his employment, he was involved in the first of three vehicle accidents whilst driving the respondent's van. He caused damage to the offside side door. Some two to three months later, he was involved in another accident when he reversed into a bollard and damaged his vehicle. The third was a further two months after the second when he reversed into a lamppost. In relation to all of these accidents, he reported them to the respondent's manager. There is no dispute that he is responsible for the damage. In his evidence, and as part of his case, he acknowledged that he is liable for the cost of repairing the damage to the vehicles.

12. He said that Mr Geoff Bird, Director, spoke to him in a very disrespectful manner when the accidents were reported. We find that, having had three accidents in seven months, this was of particular concern to Mr Bird. We further find that the manner in which Mr Bird spoke to him in relation to the three accidents, though firm, was not disrespectful. Had it been a white Delivery Driver, in either the same or similar circumstances, Mr Bird would have spoken to that person in a similar way.

13. The claimant told us, and we accepted his evidence, that he received his last wage of £450 on 20 November 2021.

14. We find that at the commencement of an employee's employment, they are not paid for their first week's work. In the second week they are paid at the end of that week for their work in that second week, and so on in the third and following weeks. The respondent, therefore, retains the employee's first week's pay.

15. Sometime in late November 2021, the claimant secured employment with another company and handed in his notice. The precise date is unclear, however, he commenced his new employment on 8 December 2021.

The claimant's verbal altercation with a manager

16. On Wednesday 24 November 2021, during his notice period, the claimant had a verbal altercation with a manager of the respondent's contractors, whereupon the manager repeatedly invited him "to go outside" to physically resolve their differences. The claimant took up the challenge and went outside together with the manager, but they were prevented from engaging in fisticuffs by those present. When the matter was referred to the respondent's managers, the issue of the altercation and possible fighting, was raised with the claimant, and we find that on 24 November, he left his employment after having been told not to return.

17. In accordance with the contract terms, Mr Bird kept hold of £780, made up of the week's pay of £450, which was kept from the first week of the claimant's employment, plus the three days he worked up to 24 November 2021, £330.

Cost of repairs

18. In the claimant's bundle of documents, there are two sets of three invoices, totalling £3,292.80, sent to him by the respondent covering the alleged repair costs to the damage vehicles. We find that they are not dated and give different addresses of the company that allegedly carried out the repairs. Mr Bird told the tribunal that he had paid the mechanic who carried out the repairs, in cash, however, there is no record of those payments produced to the tribunal. He acknowledged that there should be records held by the respondent. If the work was carried out at Luton initially, the subsequent invoices states that Bedford was the place where the repairs were carried out. This seems to be inconsistent because the repairs were allegedly carried out at Luton and not Bedford.

19. Having regard to the above, we have formed the view that these invoices cannot be relied on by the tribunal as evidence probative of repairs carried

out on the respondent's vehicles, and we do not accept, on the face of these invoices, that the claimant owed the respondent the sum of £3,292.80.

20. The claimant told the tribunal that from the information given to him by the respondent and by the mechanic, that on each occasion the cost of repair was £350. Whilst we accept that the damage to the vehicles was not the same on the three occasions, it seems unlikely that the repair costs would have been the same. However, as this is the best evidence the tribunal had, we decided to accept it.

21. The claimant puts his race as a black person. His comparator is Mr Peter Humphrey, Delivery Driver, but Mr Humphrey's circumstances are distinct from those of the claimant's. Mr Humphrey is 57 years old and presumably he was 56 at the material time in November 2021. The claimant was 35 years of age at that time. Mr Humphrey has a back condition and suffers from gout. The unchallenged evidence is that he had a much smaller delivery round compared with the claimant's round. The claimant did not know Mr Humphrey's hours of work. Much of his evidence about Mr Humphrey is based on his observation. We find that from the documentary evidence given to the tribunal, that it is clear that Mr Humphrey was paid less than the claimant because his round was smaller having regard to his particular health conditions. He is white, and we are satisfied that he is not an appropriate comparator.

22. The claimant also made reference in his evidence, to the other drivers who worked the same hours he did, and the same rounds in terms of geographical area, distance, and number of parcels. He asserts that he had been discriminated as they are white and were paid the same as he was paid.

23. We find that Mr Bird did say to the claimant, "If you don't like what you are doing you could go elsewhere. I am tired of dealing with your shit". We further find that those words were said with reference to the claimant's three accidents within a period of seven months of his employment with the respondent.

Submissions

24. We have taken into account the submissions by the claimant and by Mr Hussain. We do not propose to repeat their submissions having regard to rule 62(5) Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, as amended. The evidence was short, and their submissions are fresh in our minds.

The Law

23. Under section 13, equality Act 2010, "EqA", direct discrimination is defined:

> "(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."

24. Section 23, provides for a comparison by reference to circumstances in a direct discrimination complaint:

> "There must be no material difference between the circumstances relating to each case."

25. Section 136 EqA is the burden of proof provision. It provides:

> "(1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provisions concerned, the court must hold that the contravention occurred."
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

26. In the Supreme Court case of Hewage v Grampian Health Board [2012] ICR 1054, it was held that the tribunal is entitled, under the shifting burden of proof, to draw an inference of prima facie race and sex discrimination and then go on to uphold the claims on the basis that the employer had failed to provide a non-discriminatory explanation. When considering whether a prima facie case of discrimination has been established, a tribunal must assume there is no adequate explanation for the treatment in question. While the statutory burden of proof provisions has an important role to play where there is room for doubt as to the facts, they do not apply where the tribunal is able to make positive findings on the evidence one way or the other.

27. In Madarassy v Nomura International plc [2007IRLR 246, CA, the Court of Appeal approved the dicta in Igen Ltd v Wong [2005] IRLR 258. In Madarassy, the claimant alleged sex discrimination, victimisation, and unfair dismissal. She was employed as a senior banker. Two months after passing her probationary period she informed the respondent that she was pregnant. During the redundancy exercise in the following year, she did not score highly in the selection process and was dismissed. She made 33 separate allegations. The employment tribunal dismissed all except one on the failure to carry out a pregnancy risk assessment. The EAT allowed her appeal but only in relation to two grounds. The issue before the Court of Appeal was the burden of proof applied by the employment tribunal.

28. The Court held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status, for example, sex and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

29. The Court then went on to give a helpful guide, "could conclude" or "could decide", must mean that any reasonable tribunal could properly conclude from all the evidence before it. This will include evidence adduced by the claimant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent in testing the complaint subject only to the statutory absence of an adequate explanation at this stage. The tribunal would need to consider all the evidence relevant to the discrimination complaint, such as evidence as to whether the acts complained of occurred at all; evidence as to the actual comparators relied on by the claimant to prove less favourable treatment; evidence as to whether the comparisons being made by the

claimant is like with like, and available evidence of the reasons for the differential treatment.

30. The Court went on to hold that although the burden of proof involved a two-stage analysis of the evidence, it does not expressly or impliedly prevent the tribunal at the first stage from the hearing, accepting, or drawing inferences from evidence adduced by the respondent disputing and rebutting the claimant's evidence of discrimination. The respondent may adduce in evidence at the first stage to show that the acts which are alleged to be discriminatory never happened; or that, if they did, they were not less favourable treatment of the claimant; or that the comparators chosen by the claimant or the situations with which comparisons are made are not truly like the claimant or the situation of the claimant; or that, even if there has been less favourable treatment of the claimant, it was not because of a protected characteristic, such as, age, race, disability, sex, religion or belief, sexual orientation or pregnancy. Such evidence from the respondent could, if accepted by the tribunal, be relevant as showing that, contrary to the claimant's allegations of discrimination, there is nothing in the evidence from which the tribunal could properly infer a prima facie case of discrimination.

31. Once the claimant establishes a prima facie case of discrimination, the burden shifts to the respondent to show, on the balance of probabilities, that its treatment of the claimant was not because of the protected characteristic, for example, either race, sex, religion or belief, sexual orientation, pregnancy, or gender reassignment.

32. The employer's reason for the treatment of the claimant does not need to be laudable or reasonable to be non-discriminatory. In the case of B-v-A [2007] IRLR 576, the EAT held that a solicitor who dismissed his assistant with whom he was having a relationship upon discovering her apparent infidelity, did not discriminate on the ground of sex. The tribunal's finding that the reason for dismissal was his jealous reaction to the claimant's apparent infidelity could not lead to the legal conclusion that the dismissal occurred because she was a woman.

33. The tribunal could skip the first stage in the burden of proof and go straight to the reason for the treatment. If, from the evidence, it is patently clear that the reason for the treatment is non-discriminatory, it may not be necessary to consider whether the claimant has established a prima facie case, particularly where he or she relies on a hypothetical comparator. This approach may apply in a case where the employer had repeatedly warned the claimant about drinking and dismissed him for doing so. It would be difficult for the claimant to assert that his dismissal was because of his protected characteristic, such as race, age, or sex.

34. A similar approach was given by Lord Nicholls in Shamoon-v-Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, judgment of the House of Lords.

35. Under section 136(2) EqA, the burden is still on the claimant to establish less favourable treatment, Royal Mail Group Ltd v Efobi [2021] UKSC 33, Lord Legatt.

36. In relation to unauthorised deductions from wages, section 13 Employment Rights Act 1996, proscribes any deductions from a worker's wages unless it is,

> "…required or authorised by virtue of a statutory provision or a relevant provision in the worker's contract or the worker has previously signified in writing his [or her] agreement or consent to the making of the deduction."

37. In relation to penalty clauses, in the Giraud UK Ltd v Smith case, it was held by the Employment Tribunal and approved by the Employment Appeal Tribunal, that a term in the employee's contract allowing his employer to deduct a sum from his final salary in the event that he failed to give the requisite 4 weeks' notice, was held to be a penalty clause as it was not a genuine pre-estimate of the loss that the employer could suffer in the event of the employee's breach. The EAT held in paragraphs 10 and 11, the following:

> "10. It is of significance that the clause in this case did not seek to place any limitation on the right of the employer to recover damages for his actual loss in the event of its being greater than that specified in the clause and the calculation which it laid down. Thus, in the present case, the employee is in a position where if the actual loss turned out to be nil the employee is liable for the calculable sum, but if the actual loss is greater than the calculable sum he may face an unlimited claim for the balance. This is a mater which weighed heavily on the employment tribunal. It also weighs heavily on us.
>
> 11. In our judgment it is difficult to see how in these circumstances the clause can represent a genuine pre-estimate of loss. Moreover, we agree with the implicit finding of the employment tribunal that the clause, by reason of this aspect of its application, is an oppressive clause because it takes a form which can be described colloquially a 'heads I win, tails you lose'.

Conclusion

Unauthorised deduction from wages

38. The three sums of £350 being the cost of each repair, comes to £1,050. The respondent kept back £780 in accordance with paragraphs 12-14 of the claimant's contract of employment, and if that is deducted from £1,050, there is the balance the claimant owes the respondent of £270.

39. There is no employer contract claim nor a counter-claim by the respondent.

40. The claimant is not entitled to two weeks' notice pay based on his conduct on 24 November, as he was involved in a verbal altercation with a manager which was likely to result in violence but for the intervention of his work colleagues present. We have come to the conclusion that his behaviour constituted a fundamental breach of his contract with the respondent entitling the respondent not to either allow him to continue to work his notice, nor pay him in lieu of notice.

41. The conclusion we have come to, therefore, is that the respondent did not unlawfully make a deduction from the claimant's wages as the deduction

was authorised, and on the figures, the claimant owes the respondent the sum of £270. His unauthorised deductions from wages claim is, therefore, not well-founded. The sum retained was not a penalty.

42. Further and alternatively, he is not entitled to notice pay.

Direct race discrimination

43. In relation to the direct race discrimination claim, Mr Humphrey is not an appropriate comparator as he has a back condition and suffers from gout which explains why he was given a smaller, less demanding delivery round. The respondent had a duty to make reasonable adjustments in his case. There is no evidence upon which we could decide that the claimant was treated less favourably because of either his race or race, Madarassy.

44. Reliance upon the other drivers' circumstances do not assist the claimant as they were working the same hours, the same geographical areas, and were paid the same as he was paid. It follows this that there was no difference in treatment because of race or because of the claimant's race. The claimant cannot, therefore, establish less favourable treatment. The onus is upon him to do so, Royal Mail. Group Ltd v Efobi.

45. Further, the claimant asserts that Mr Bird spoke to him in a disrespectful way, in that, Mr Bird said, "If you don't like what you are doing you could go elsewhere. I am tired of dealing with your shit". Those words were said but with reference to the claimant's three accidents within the comparatively short seven months employment with the respondent. They were unrelated to the claimant's race, or to race. We further conclude that, had it been a white Delivery Driver with such an accident history with the same length of service, Mr Bird would have behaved in a similar way as the frequency, the costs to the respondent, as well as the inconvenience to its business, would have been a serious concern to him as Director.

46. It follows from our findings and our conclusions above that the unauthorised deduction from wages and direct race discrimination claims, are not well-founded and are dismissed.

_____
Employment Judge Bedeau
7 February 2023
Date: ……

Judgment sent to the parties on

10th February 2023
For the Tribunal office: GDJ