



THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH

BEFORE: EMPLOYMENT JUDGE K ANDREWS
MEMBERS: Dr S Chacko
Mr N Shanks

BETWEEN:

Ms M Machado Claimant

and

HCL Chauffeurs UK Ltd Respondent

ON: 22 & 23 March 2023

Appearances:
For the Claimant: In person
For the Respondent: Mr S Harvey, owner

REASONS FOR THE JUDGMENT SENT TO THE PARTIES ON 11 APRIL 2023 REQUESTED BY THE RESPONDENT

1. In this matter the claimant complains that she was unfairly and wrongly dismissed as well as discriminated against because of her marital status and race (she is Brazilian). She also says that she is owed unpaid wages and notice pay. The issues arising from those claims were identified by Judge Ferguson in a case management order dated 28 June 2022 although the claimant confirmed at today's hearing that she is not pursuing any claim that her dismissal was because of her race.
2. In the course of this hearing the claimant referred on occasion to alleged discriminatory comments made about her at the workplace. These did not form part of her claims however and are therefore outside the terms of this Judgment.

Evidence & Documents

3. For the respondent we heard from Mr Harvey, it's owner. We also read a written statement from Mr A Dubery, the respondent's sole director, but he was not present to attest to its truth or be cross examined and therefore we accorded it appropriate weight. We also heard from the claimant. The evidence of both Mr Harvey and the claimant was, from time to time, inconsistent.

4. Although theoretically we had an agreed bundle of documents before us, this proved to be incomplete and both parties sought permission to add various documents on the second day which was granted in the interests of justice.
5. Both parties made oral submissions on the conclusion of the evidence.

Relevant Law

6. Unfair dismissal: By sections 94 and 108 of the Employment Rights Act 1996 (“the 1996 Act”) an employee has the right not to be unfairly dismissed by his or her employer but only if at the time of that dismissal they have been continuously employed for a period of not less than two years ending with the effective date of termination.
7. Wrongful dismissal: Any summary dismissal of an employee will be in breach of the right to notice of termination (either through the contract of employment or the statutory minimum provided at section 86 of the 1996 Act) and therefore a wrongful dismissal unless there has been repudiatory conduct by the employee justifying that summary dismissal. It is a question of fact for the Tribunal to decide on the balance of probabilities if the contract has been so breached rather than considering whether the employer was reasonable in its conclusions. In reaching that decision the Tribunal is entitled to consider all relevant evidence whether it pre or post dates the dismissal.
8. Unpaid wages: If a worker suffers an unauthorised deduction from his or her wages he or she may make a complaint to the Tribunal (section 23 of the 1996 Act). Where the total amount of wages paid is less than the total amount properly payable, the amount of that deficiency is a deduction (section 13).
9. The meaning of wages for this purpose is broad: ‘any sums payable to the worker in connection with his employment’ (section 27).
10. Holiday pay: Workers and employees are entitled by statute to a minimum of 5.6 weeks paid holiday per year (with a cap of 28 days) (regulations 13 and 13A of the Working Time Regulations 1998). They may also be entitled to additional contractual paid holiday.
11. Direct discrimination: Section 13 of the Equality Act 2010 (the 2010 Act) provides that a person discriminates against another if, because of a protected characteristic, he treats that person less favourably than he treats or would treat others. Marriage and race (which includes nationality) are both protected characteristics.
12. To answer whether treatment was “because of” the protected characteristic requires the Tribunal to consider the reason why the claimant was treated as he/she was. The Equality and Human Rights Commission Code of Practice states that whilst the protected characteristic needs to be a cause of the less favourable treatment it does not need to be the only or even the main cause.
13. Section 23 of the 2010 Act refers to comparators and that there must be no material difference between the circumstances relating to each case. The relevant circumstances are those factors which the employer has taken into account when

treating the claimant as it did with the exception of the protected characteristic (Shamoon v Chief Constable RUC 2003 IRLR 285).

Findings of Fact

14. A particular difficulty in assessing the facts relevant to this matter is not only that the respondent is a small employer (approximately 10 employees and a larger number of self employed drivers) but that it is not particularly careful about keeping proper HR records and is one of several companies owned by Mr Harvey. Also, the claimant and Mr Harvey were in a close personal relationship between 2015 and October 2020. That relationship ended acrimoniously involving reports to the police and a County Court claim by the claimant against Mr Harvey as well as these proceedings. Having assessed all the evidence, however, both oral and written, and the submissions made by the parties, we find on the balance of probabilities the following to be the relevant facts and areas of dispute.
15. The respondent company, as its name suggests, provides chauffeur services and in particular supplies drivers as well as passenger assistance to Surrey County Council. In order for an individual to perform this work it is necessary to have a Surrey CC red badge (renewed annually).
16. There is very little agreement between the parties as to whether and when the claimant was employed by the respondent and how much she was paid. They agree that she was never issued with a written contract of employment. Further, Mr Harvey confirmed that none of his employees have written contracts though he says they are issued with payslips as was the claimant.
17. The claimant says that her employment with the respondent commenced on 3 December 2015 and was continuous until her dismissal at the end of October 2020. Her account is that until November 2016 she was paid £1,000 per month gross, in cash, as a self-employed person. She says that she raised her concerns with the respondent about being treated as self-employed and it was then that she was 'put on the books'.
18. For the period March to December 2019 the claimant says that she continued to be employed but the money that would have been paid to her as wages was used, with her agreement, by her and Mr Harvey to pay for the refurbishment of a flat that they had bought together. Further, that from December 2019 onwards she was due to be paid £2,000 per month but half of that money was used, again with her agreement, to pay for domestic bills in the shared flat.
19. As for duties, the claimant says that she worked as a general personal assistant in the office. She did not have her own email address at the respondent as others working in the office did and says that when she was in the office she would use the general bookings email address. She says that she also worked as a Surrey CC passenger assistant from time to time and when she did so she received an additional cash sum of circa £50. She said she was not always paid for those extra duties which she was fine with as she understood that she was helping out occasionally on an unpaid basis but there were also occasions when she was not paid because Mr Harvey told her she had an income from her ex-husband and she was not fine with that.

20. In addition to her employment with the respondent, the claimant worked 20 hours per week for Sofitel between 2013 and 2017.
21. As for the respondent's position on these matters, in their Response to this claim it was stated that the claimant was only employed for one year in 2015/16 and a two-month period in 2018. In a defence filed by Mr Harvey in the County Court claim, he stated that the claimant worked for the respondent from May to October 2020 and was paid via PAYE.
22. In his evidence before this Tribunal Mr Harvey agreed that the claimant had been paid £1,000 per month gross through the respondent's books from May 2020 and was issued with a fuel card for her own use but this was just to help her with her financial situation. He said that she did not do any regular work - only helping out if someone called in sick - and that most of the duties that she had told the Tribunal she performed were in fact carried out by his mother (the company secretary) or Mr Dubery. Mr Harvey also said that the claimant was never paid any additional cash sums and that any payment for acting as a passenger assistant, which he agreed she did occasionally do to help out, formed part of the duties for which she was on PAYE. He says he never said anything about her being financially supported by her ex-husband.
23. One might expect documentary evidence to shed light on which of these conflicting accounts is accurate. There were few relevant documents before us however and they were not comprehensive. What we did have was:
 - a. A bank statement from November 2016 shows the claimant receiving £760.64 as 'HCL Chauff UK Ltd Wages' – this could be the net equivalent of £1,000 gross but that is not certain.
 - b. Documentation with regard to an application by the claimant for a Surrey CC red badge in October 2018 which led to the badge being issued on 10 December 2018. The corresponding letter refers to the claimant being an employee of the respondent. Mr Harvey says that this was the first time that the claimant was issued with the badge and it was only renewed once which would have expired at the end of 2020 (this was supported by documentation showing she had a badge that would expire in November 2020). Accordingly she could not have worked as a passenger assistant before 31 December 2018.
 - c. An email exchange on 26 February 2019 in which Mr Harvey asked the claimant to answer a query relevant to the work of the respondent. He said he was just asking her as his partner.
24. The claimant and Mr Harvey's personal relationship ended in or around October 2020. She says that he told her that she would then be put on furlough but this did not happen.
25. On 26 October 2020 a what's app message sent from Mr Harvey to the claimant referred to her having an income from him (and from her husband) but that he would continue to pay her through the respondent 'for the time being'.

26. Mr Harvey says he then discovered that the claimant had been misusing the fuel card and he wrote to her inviting her to a disciplinary hearing. He says that hearing took place at their home when he returned from work one evening but that the claimant 'got stropky' and therefore the meeting did not complete and he wrote to her on the following day dismissing her for gross misconduct. The claimant says no such meeting took place and she never received the letter. Mr Harvey says it was posted to an address in Hampton which the claimant accepts was a correct address for her but any correspondence sent there was redirected to her at another address.
27. In the alleged dismissal letter Mr Harvey gave the reason for dismissal as the claimant's use of the company fuel card to put fuel in vehicles owned by her friends and family. She was advised of her right to appeal against dismissal and that if she wished to do so she should inform the HR Department. Mr Harvey confirmed in his evidence that the respondent does not have an HR Department. There were records from the fuel card company before us which post date the dismissal letter. Mr Harvey said that this was because those records were 'just firming up' what he had been told by the company and he received them later.
28. The claimant attended the office on 1 November 2020 and spoke to Mr Dubery. By this stage Mr Harvey had been arrested as a result of a complaint made by the claimant to the police. Her evidence is that Mr Dubery told her she should not be there and that she should go and work for her ex-husband.
29. On 30 November 2020 the claimant wrote to the respondent, marked for the attention of the company secretary and Mr Harvey, stating that she had not been paid for the month of October and was owed £1,000. She also asked for payslips for August, September and October and confirmation as to whether she remained employed, that she had had no work and had been told that she was going to be put on furlough. The respondent did not reply to this letter. Mr Harvey's evidence was that the claimant had only sent it to make it look like she had not received the dismissal letter but in fact she had.
30. The claimant says, and we accept, that her wages were always paid into her bank account ending 0378. She produced bank statements for that account that show she was paid £975.04 on 1 October 2020, presumably in respect of September (which corresponds with a payslip provided by the respondent), but no further payments being received in October and November. The respondent has produced a payslip which suggests she was paid for October but no other evidence to show that payment being made e.g. their own bank statements.
31. As far as holiday pay is concerned the claimant says that she only took four days holiday in 2020 whereas Mr Harvey says that she was off for three weeks in August 2020 as they were away on holiday together. He did not have any official holiday records for the claimant but did produce several dated photographs that did seem to show them on holiday in various locations on various dates in 2020. The claimant does not accept that the date and time stamp on the photos are necessarily genuine although we find there is no reason to believe that they are not. She also says that she just did what she was told by Mr Harvey and that she would have done some work while she was away with him.

32. The claimant commenced the ACAS early conciliation process on 25 December 2020. This completed on 26 January 2021 and she submitted her claim form on 24 February 2021.

Conclusions

33. Turning first to the claim of unfair dismissal. A critical period in assessing the qualifying continuous employment or otherwise of the claimant is March to December 2019. Even on the claimant's case she says that during this period although she continued to do work for the respondent she agreed that she would not be, and was not, paid for that work. That being the case, we find that the claimant was not an employee of the respondent during that period regardless of what her employment status was or was not before that. An absolutely fundamental part of an employment relationship existing is that an individual is paid for the work that they do. On the claimant's own case this was not the position in that period. Therefore she was not then an employee and when her employment terminated at the end of October 2020, she did not have sufficient service to claim unfair dismissal.

34. What we do want to make clear is that if she had had the right not to be unfairly dismissed, the process followed by Mr Harvey at the end of October would undoubtedly have been an unfair dismissal. He did not follow anything approaching a fair process (not least because as her personal partner he should not have conducted or had any involvement in it), he did not investigate the allegation properly and he did not document the allegations and conclusions properly. In those circumstances the respondent did not have reasonable grounds for its belief that the claimant had committed gross misconduct and the dismissal would have been unfair.

35. As to the claim that the dismissal was an act of direct marital status discrimination, there was no evidence before us to support this argument. At most the claimant gave us a few anecdotes about what she says was Mr Harvey's attitude towards the fact that her former husband was still supporting her financially. This is insufficient to establish the necessary link between her marital status and her dismissal.

36. The remaining direct discrimination claims relate to the fact that the claimant was not put on furlough and, she says, was not allocated work after 18 October. As far as the latter is concerned there was no evidence to suggest there was any specific change on or around 18 October. As far as furlough is concerned it is clear that there were discussions about furlough and some employees of the respondent were put on furlough in April 2020 but the claimant was not. Her position remained as it had been i.e. she was paid £1,000 a month to do a certain amount of work for the respondent, although the extent and nature of that work is disputed. Not being put on furlough is not less favourable treatment and in any event was not linked to her race or marital status. As far as race is concerned the claimant relies upon the October 2020 WhatsApp message. The message does not support her allegation in express terms but does say she will continue to be paid in the meantime. She says this was a reference to furlough. Even if that is true, there is nothing in that message to link that to her race.

37. The claims of discrimination therefore fail and are dismissed.

38. Turning to the notice pay claim, the claimant says that she was due four weeks notice under her contract of employment. There was no written contract and no evidence of any specific terms having been agreed orally. Certainly there was no evidence of a four week notice period. Therefore, in the absence of any gross misconduct, the claimant is entitled only to rely on the statutory minimum notice period which, for someone with under two years continuous employment at the time of termination, was one week's notice.
39. Because of our findings about the inadequacy of Mr Harvey's disciplinary process for the claimant, we cannot find that she had in fact committed an act of gross misconduct and therefore we do find that summarily dismissing her was in breach of the contract and she was entitled to one week's notice pay of £250 gross.
40. Turning to the claim for holiday pay her relevant period of continuous employment is, at most, January to October 2020 and as an employee the claimant was entitled to paid holiday. She says she only took four days in that period. The respondent says she took much more than that but cannot be specific as no holiday records were kept. He does however rely on the photos and says that these show she took 25 working days of holiday. We accept that the photographs provided by Mr Harvey do show that the claimant was out of the country principally on holiday for a total of 25 working days. In the absence of reliable evidence from her regarding the number of hours she was working each week it is impossible to precisely calculate her holiday due. Even if we accept that the claimant on these periods of holiday did do some unspecified work, we find that the holiday she received and was paid for was at least equal to or more than the holiday she would have been due. Therefore we are not making any award for unpaid holiday.
41. The final claim is for unpaid wages in October 2020. On balance, considering the documents referred to above we conclude that the claimant was not paid what she was due for October 2020 and she is due the sum of £975.04 net.
42. In summary therefore the claims of unfair dismissal, discrimination and unpaid holiday pay fail but the claimant is entitled forthwith to be paid one week's notice pay and her outstanding wages for October 2020.

Employment Judge K Andrews
Date: 4 May 2023