



EMPLOYMENT TRIBUNALS

Claimant: Mr. A Parodi

Respondent: Gloster MEP Limited

Heard at: London South, by video **On:** 20 September 2023

Before: Employment Judge G Cawthray

Representation

Claimant: Ms C Harris, Human Resources Manager for Respondent, not legally qualified

Respondent: In person, not legally qualified

RESERVED JUDGMENT

1. The Claimant's complaint of automatically unfair dismissal pursuant to section 104 of the Employment Rights Act 1996 fails and is dismissed.
2. The complaints of unlawful deduction from wages, notice pay/breach of contract/wrongful dismissal, failure to provide a written statement or employment particulars and statutory redundancy pay are dismissed following withdrawal by the Claimant.

REASONS

Introduction, Evidence and Procedure

3. At the start of the hearing, I discussed in detail with the parties the basis of the complaints pursued. The Claimant clarified that he was now only pursuing an automatically unfair dismissal claim.
4. The Claimant confirmed that he was no longer pursuing any other complaints, namely unlawful deduction from wages, notice pay, failure to

provide a written statement or employment particulars or a claim for statutory redundancy pay. I explained that these complaints would be dismissed upon withdrawal.

5. No reasonable adjustments were required for any attendee or witness.
6. As neither party was legally represented, I carefully explained the process of giving and challenging evidence and the difference between evidence and submissions. I explained the burden of proof and I reminded the parties at several times that the key issue for determination was whether the reason, or principal reason, for the Claimant's dismissal was that he asserted a statutory right, namely, to be paid the National Minimum Wage.
7. The Claimant had provided a written witness statement, affirmed and was asked questions by Ms. Harris on behalf of the Respondent and myself.
8. Mr. Cox, Operations Director, provided a written witness statement, affirmed and was asked questions by the Claimant and myself.
9. Ms. Harris provided a written witness statement and affirmed. The Claimant decided not to ask Ms. Harris any questions as she was not employed at the point of his dismissal. I did not ask Ms. Harris any questions.
10. An agreed bundle of 492 pages was provided.
11. Both parties gave oral submissions.

Issues

Automatically Unfair Dismissal section 104 Employment Rights Act 1996

12. Was the reason or principal reason for dismissal that the claimant asserted a statutory right, namely, to be paid National Minimum Wage?

Facts

13. The Claimant started employment on 1 September 2021 as Trainee Project Manager. This was an apprenticeship arrangement and the Claimant attended university, approximately one day a week.
14. The Respondent has a training programme, and there were and are a number of Trainee Project Managers. Trainee Project Managers work in different departments across the Respondent for one month at a time,
15. The Claimant felt uncomfortable from the beginning of his employment at the Respondent.
16. The Claimant was issued with a contract of employment dated 5 August 2021, which he signed on 14 September 2021. The contract was a general form contract.

17. The Claimant was 21 years old when he started employment and in the first year of employment, he was paid £17,000 per annum. The Claimant had no concerns about his rate of pay in this period. The Claimant also received a phone allowance and travel expenses.
18. The Respondent has an Employee Handbook which contains a Disciplinary Policy & Procedure that reserves the right to discipline or dismiss employees without following the Disciplinary Procedure if an employee has less than 24 months' continuous service.
19. The Employee Handbook also contains an Expenses Policy which states that employees "must use the most cost-effective transport methods and routes in conducting business".
20. In or around November 2021 the Respondent gave the Claimant an Agreement to Repay Training Costs. The Claimant signed the agreement on 17 February 2022. The Claimant was unhappy with the terms of the agreement and sought to have some terms amended. There were numerous conversations about the agreement.
21. The Claimant passed his probation and had a performance development review six months after starting his role at which stage he was given feedback. Subsequently, in a meeting with Ms. Harris, the Claimant said the feedback from managers was "not great but not terrible" and that timekeeping regarding lunch breaks was raised with him.
22. On 15 August 2022 the Claimant requested a meeting. A short discussion took place after the email and an arranged meeting took place on 22 August 2022 between the Claimant, Mr. Cox and Katerina Metaj, Human Resources Director. Mr. Cox had received feedback from Heads of Department on the Claimant's attitude and performance.
23. During oral evidence Mr. Cox said managers completed feedback forms, usually once a month, that are then used as the basis of discussions at performance development review meetings. Mr. Cox said there was approximately 14 to 16 forms relating to the Claimant and he had seen most of them. However, save for one form dated 10 January 2023, there were no forms in the Bundle. It was not clear what time frame the forms Mr. Cox was talking about related to. I am unable to make a precise finding of fact on the content of such form, noting that they should have been disclosed as part of these proceedings. However, I do find that in August 2022 Mr. Cox had some concerns about the Claimant's attitude and performance.
24. During the meeting Mr. Cox and Ms. Metaj discussed with the Claimant some concerns about some of the Claimant's and attitude towards work including taking extended breaks and not properly engaging with the tasks given to him. The Claimant also made comments about the training programme and the allocation of trainers.
25. At the end meeting Mr. Cox requested that the Claimant take a week away from work to decide whether or not he wished to remain working for the Respondent. This was because Mr. Cox had formed the view that the Claimant was not engaged and happy in his role. This was confirmed in

subsequent email correspondence and the Claimant was advised in an email from Ms. Metaj on 26 August 2022 to focus on his training. The Claimant replied setting out concerns about his training programme and agreement.

26. The Claimant returned to working on site the following week. On 5 September 2022 he emailed Ms. Metaj and Mr. Cox asking about plans for him for the next few weeks and an answer to his questions about his training agreement. Ms. Metaj was on leave and replied to his email on 20 September 2022. The Claimant had sent an email setting out his concern regarding delay to Mr. Cox on 5 September 2022 when he received Ms. Metaj's out of office response.
27. Ms. Metaj scheduled a meeting for 27 September 2022 with herself, Mr. Cox and the Claimant.
28. In or around early December 2022 the Claimant felt that he was not being paid the correct National Minimum Wage and raised concerns with Ms. Metaj.
29. The Claimant spoke with Ms. Metaj on 7 and 8 December 2022.
30. On 8 December 2022, following a discussion with her earlier that day, the Claimant emailed Ms. Metaj setting out concerns about his training and that he wished to discuss with Mr. Cox, in particular his weekly plan and communications. The Claimant had produced a lengthy document setting out matters about which he was unhappy which included his weekly plan, future plan, communications, PDR/Annual Review and salary. The general tone is that the Claimant was unhappy with his role and requested Wayne Budge be assigned as his development leader.
31. On 12 December 2022 the Claimant emailed Ms. Metaj querying when he would hear about his salary and weekly plan.
32. A salary review document was produced by Ms. Metaj around 14 December 2022. A further salary review document was created on 19 December 2022. Between 15 and 23 December 2022 the Claimant and Ms. Metaj exchanged several emails regarding salary rate, with Ms. Metaj seeking to rectify the matter. The emails referenced calculations and the Claimant suggest a rate higher than National Minimum Wage. The tone of the Claimant's emails were direct and evidenced his unhappiness more widely than pay.
33. The Claimant spoke with Ms. Metaj on 16 December 2022, and attended the office on 23 December 2022 with the desire to speak further as he had not received an email response.
34. On 22 December 2022 the Claimant was paid a back payment of £821.97.
35. The Respondent accepts that due to human error that from the second year of his training the correct pay rate was not paid to the Claimant. This was rectified in December 2022, the Claimant received back pay and his pay was increased.

36. On 3 January 2023 Ms. Metaj emailed the Claimant setting out reference to the HMRC calculator tool and the Claimant's entitlement and that she considered the matter closed. The Claimant replied on 4 January 2023, and within that email referenced disagreements in the past. The Claimant did not accept the content of Ms. Metaj's email and challenged various aspects and makes reference to reporting the matter to HMRC and demanded a response by a deadline on 5 January 2023. The figure in dispute was low, less than £30.
37. Ms. Metaj emailed the Claimant noting his unhappiness and explaining that a meeting would be called. The Claimant replied on 5 January 2023 stating he would be lodging a formal grievance. The Claimant sent a further email on 6 January 2023 setting out the basis of his grievance, that he wished to discuss after pay was rectified, getting training back on track, incorporating goals, reviews and targets, addressing negative bias and being assured of fair treatment going forward.
38. In early January 2023 the Claimant was liaising with the Respondent's accounts team regarding expenses and deductions.
39. On 3 January 2023 the Claimant emailed Mr. Cox asking for a quick meeting or coffee as there were a couple of things he wished to talk about. The Claimant sent a chaser email at 16:05 on 5 January 2023.
40. Paragraph 12 of Mr. Cox's witness statement made reference to a meeting that discussed his training. It states the Claimant was sent home for the rest of the week to think about his future. In response to questioning, Mr. Cox said this meeting took place on 5 January 2023. I do not find this to be the case. There is no corroborative evidence to support a meeting taking place on 5 January 2023 and there is no evidence to suggest the Claimant was required to stay away from work for a week in January 2023. I cannot make any precise findings on whether or not an informal discussion took place.
41. In January 2023 Mr. Cox and Ms. Metaj discussed the Claimant and made the decision to dismiss the Claimant on 9 January 2023. They notified the Managing Director, Mark Aldridge, who agreed with the plan.
42. On 9 January 2023 Ms. Metaj sent an email inviting the Claimant to attend a meeting the following day, 10 January 2023. The Claimant replied asking to reschedule due to having an exam and made reference to stipulating he wished to discuss matters after the salary issue had been resolved and wished to be accompanied. Further email correspondence continued between them regarding meeting arrangements and exam schedules on 9 and 10 January 2023. Ms. Metaj stated: *"I do not intend to email back and forth again regardless of your appetite to constantly argue."*
43. On 10 January 2023 the Wayne Budge completed a feedback report. Mr. Cox had not seen this at the time he made the decision to dismiss the Claimant.

44. The Claimant attended a meeting on 12 January 2023. Mr. Cox and Ms. Metaj were present at the meeting. Notes of the meeting were included in the Bundle, and the content was not challenged. Various matters were discussed at the meeting, summarised in brief by headline only below.
- (1) The Claimant's approach to the Agreement to Repay Training Costs;
 - (2) The Claimant's low performance across departments;
 - (3) Time keeping;
 - (4) The Claimant's wish for training sessions with James Coulahan;
 - (5) Changes made to site rotation upon the Claimant's request;
 - (6) The Claimant's request to be paired with Wayne Budge;
 - (7) Salary review and approach;
 - (8) That the Respondent felt there was nothing further it could do to accommodate further opportunities in the business;
 - (9) That the Claimant asked Business Unit Leaders to sign a non-disclosure agreement;
 - (10) The tone of emails from the Claimant;
 - (11) Approach not in line with business needs;
 - (12) Travel expenses.
45. The notes made reference to performance reports attached, but such documents have not been identified in the Bundle.
46. The notes indicate Ms. Metaj's frustration with the Claimant, that he was seen as nagging and focused only on his own wishes or needs. Mr. Cox's oral evidence demonstrates that he felt the Respondent had tried to support the Claimant but that he considered the Claimant made repeated demands for changes to the Training Programme.
47. At the conclusion of the meeting the Claimant was told that his employment was being terminated, but was offered an option to resign, and if he does not resign he would be dismissed and be asked to repay training fees of £24,000. There is no reference to this offer being made on a confidential or without prejudice basis.
48. The Claimant was given 24 hours to consider how he wished to move forward.
49. The Claimant did not resign.
50. The Claimant was dismissed and provided with a dismissal letter on 13 January 2023. The reasons for dismissal were summarised in the letter, namely lack of honesty regarding travel expenses, time keeping and continued argumentative, abrasive and unethical behaviour with senior management and peers. The letter stated the Claimant was summarily dismissed without notice.
51. The Claimant appealed the decision to dismiss him on 16 January 2023. An appeal meeting took place on 7 February 2023 and was conducted by John Regan, Finance Director, and the issues discussed at the meeting on 12 January 2023 were considered. John Regan also commented on the poor feedback received by managers across the Respondent. Towards

the end of the appeal meeting John Regan stated, with reference to the rate of pay:

“As I said at the start I see it as a side issue. The business is not going to make a decision on anybody over £5-£10 a month – I know this 100% - its an immaterial amount of money...”

The argument about it (between HR and you) is why Paul Cox called a meeting to put an end to constant emails back and forth about it....

The argument led to Paul calling a meeting to close it out, and was therefore an opportunity, to cover off other points...”

52. During the appeal meeting the Claimant stated he did not wish to be reinstated. He did not withdraw his appeal, and the appeal process was concluded.
53. On 17 February 2023 the Claimant was sent a letter dated 16 February 2023 informing him that his appeal had been upheld and that he had been reinstated, meaning his employment had been continuous but that a formal performance procedure would be commenced to address concerns about behavior and attitude.
54. On 20 February 2023 the Claimant emailed Ms. Harris stating he no longer wished to work for the Respondent, as he had stated in the appeal meeting, and referenced seeking compensation.
55. Discussions continued between the Claimant and Ms. Harris, and the Claimant largely maintained he did not wish to return, although Ms. Harris sought to put solutions in place for resolving the dispute. The Respondent asked the Claimant to return to work. The Claimant attended the Respondent’s main office for a few days around 10 March 2023. The Claimant is unsure on what the status of those days was and is not clear whether or not he was paid for the period. The Respondent treated the Claimant as having resigned.

Law

Section 104 Employment Rights Act 1996 - Assertion of statutory right

(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 the employee—

(a) brought proceedings against the employer to enforce a right of his which is a relevant statutory right, or

(b) alleged that the employer had infringed a right of his which is a relevant statutory right.

(2) It is immaterial for the purposes of subsection (1)—

(a) whether or not the employee has the right, or

(b) whether or not the right has been infringed;

but, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith.

(3) It is sufficient for subsection (1) to apply that the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.

(4) The following are relevant statutory rights for the purposes of this section—

(a) any right conferred by this Act for which the remedy for its infringement is by way of a complaint or reference to an employment tribunal,

(b) the right conferred by section 86 of this Act,

(c) the rights conferred by sections 68, 86, 145A, 145B, 146, 168, 168A, 169 and 170 of the Trade Union and Labour Relations (Consolidation) Act 1992 (deductions from pay, union activities and time off),

(d) the rights conferred by the Working Time Regulations 1998, the Merchant Shipping (Maritime Labour Convention) (Hours of Work) Regulations 2018 (S.I. 2018/58), the Merchant Shipping (Working Time: Inland Waterway) Regulations 2003, the Fishing Vessels (Working Time: Sea-fisherman) Regulations 2004 or the Cross-border Railway Services (Working Time) Regulations 2008].

and

(e) the rights conferred by the Transfer of Undertakings (Protection of Employment) Regulations 2006.

(5) In this section any reference to an employer includes, where the right in question is conferred by section 63A, the principal (within the meaning of section 63A(3)).

56. The first requirement to succeed in a claim under section 104 of the Employment Rights Act 1996 (ERA) is that the employee must have asserted a relevant statutory right, either by bringing proceedings against the employer to enforce such a right or by alleging that the employer has infringed such a right — section 104(1).

57. Section 104 does not apply to all statutory rights but only to the ‘relevant’ statutory rights referred to in section 104(4). These include ‘any right conferred by this Act i.e. the Employment Rights Act 1996 for which the remedy for its infringement is by way of a complaint or reference to an employment tribunal’ — S.104(4)(a).

58. In cases where a claimant has been employed for less than two years, the burden is on them, on the balance of probabilities, to show that they were dismissed for an automatically unfair reason. This principle was established by the Court of Appeal in *Smith v Hayle Town Council 1978 ICR 996, CA* (a trade union related case).
59. In considering what the principal reason for dismissal was, a Tribunal must consider what was in the employer's mind at time. If the assertion of a statutory right is a subsidiary or indirect reason, the claim will fail.
60. A 'reason for dismissal' has been described as '*a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee*', see *Abernethy v Mott, Hay and Anderson 1974 ICR 323, CA*.
61. Consideration of the reasonableness of the decision to dismiss is entirely irrelevant when it comes to claims based on any of the statutory provisions, in this case assertion of a statutory right, that render a dismissal automatically unfair. The Tribunal's focus must be on establishing, on the evidence, whether the prohibited reason was the reason or principal reason for dismissal. If it was, then there is no option but for the tribunal to find the dismissal unfair.
62. It may be appropriate for a Tribunal in some circumstances to draw inferences as to the real reason for the employer's action on the basis of its principal findings of fact.
63. Where an internal appeal against dismissal is successful and the employee is reinstated, then the relationship is treated as if there was no dismissal. Even if the employee does not wish to continue in employment, the effect of a successful appeal is to treat the employee as if he or she had never been dismissed.
64. The EAT applied *Patel v Folkestone Nursing Home Ltd 2019 ICR 273, CA*, in *Marangakis v Iceland Foods Ltd 2022 EAT 161*, and determined that Marangakis was reinstated following her successful appeal against her dismissal for gross misconduct, even though she did not wish to return to work. In that case, when Marangakis instituted her appeal she indicated that she wished to be reinstated but changed her mind during the appeal process, citing a breakdown in mutual trust. However, the appeal continued, it was not withdrawn, and Iceland Food Ltd eventually informed her that her appeal had been allowed and that she was to be reinstated with continuity of service and backpay. When Marangakis later sought to bring an unfair dismissal claim, the employment tribunal found that the original dismissal had 'vanished', meaning that it could not form the basis for a claim, and the EAT dismissed Marangakis' appeal against that decision. The EAT noted that, applying *Patel*, if an appeal is lodged, pursued to its conclusion – i.e. not withdrawn – and is successful, the employer and employee are bound to treat the dismissal as not having occurred irrespective of the employee's subjective wishes.

Conclusions

65. I have reached my conclusions by applying the law to the findings of fact set out above, which are based on the evidence provided.
66. I have first considered whether the Claimant informing his employer that he has not been paid the correct rate of National Minimum Wage is an assertion of a statutory right within the meaning of section 104 Employment Rights Act 1996.
67. The protection of wages rights are set out at sections 13 – 27 of the Employment Rights Act 1996. If an employee believes they have not been properly paid what is due to them, they can bring a claim for unlawful deduction from wages in the Employment Tribunal.
68. The Claimant clearly asserted, told the Respondent, that he did not consider he was being paid the correct rate of pay under the National Minimum Wage.
69. I have now turned to considering the reason for the dismissal on 13 January 2023, I will deal with the impact of reinstatement below.
70. I have concluded that on the balance of probabilities that the Claimant has not demonstrated that the reason, or principal reason for the dismissal, was the fact he asserted he was not being paid National Minimum Wage. He believes this to be the reason for his dismissal, but based on the evidence, both oral and documentary, I cannot conclude that he has discharged the burden of proving prima facie, i.e. on the face of it, that the principal reason was the assertion of a statutory right.
71. I have considered the facts carefully and conclude that there were a number of reasons for dismissal.
72. I consider that the fact that he raised that he was not being paid National Minimum Wage was part of the background that led to dismissal but given that efforts were promptly made to try and rectify the error and engage with the Claimant in this respect I do not consider the assertion in itself to be a reason for dismissal. However, I do conclude that the Claimant's behaviour around the request and the manner of his engagement and correspondence with Ms., Metaj formed part of the reason, together with others.
73. The Respondent, in particular Ms. Metaj and Mr. Cox were frustrated with the Claimant. They did not consider him to be committed to the Respondent and were not happy with this attitude or behaviour. Concerns had been raised as early as August 2022 and although not formally addressed, the Claimant's approach to raising matters caused further difficulties in working relationships. The range of the discussion at the meeting on 12 January 2023, as set out in the notes, supports this, and although subsequent to the decision, comments by John Regan of the view of the Claimant within the business supports this.
74. I consider the reason for dismissal is that Ms. Metaj and Mr. Cox did not consider the Claimant was an appropriate fit for the Respondent and due to a range of concerns such as timekeeping, expense management,

feedback from managers, the Claimant's attitude and approach, they decided to dismiss the Claimant.

75. Although dismissing an employee with less than 2 years' service without following any procedure may feel harsh, or unfair, it is not relevant to consideration of the reason for dismissal.
76. This is not a case where the real reason for dismissal is hidden from decision maker. Ms. Metaj and Mr. Cox made the decision to dismiss following extensive dealings with the Claimant and obtained approval from Managing Director.
77. Accordingly, the claim fails, the Claimant was not unfairly dismissed, and the complaint is dismissed.
78. For completeness, it is also important to address the fact that the Claimant appealed the dismissal, and the Respondent reinstated him. As set out above, the effect of reinstatement is that the dismissal vanishes. There was no evidence that the Claimant withdrew from the appeal process. Accordingly, there was no dismissal, and therefore the complaint would have failed in any event.

Employment Judge Cawthray

Date 21 September 2023