



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr. M. Jastrzebski

v

Xing Sheng Limited

Heard at: Birmingham

On: 9, 10 and 11 January 2024

Before: Employment Judge Wedderspoon

Members Ms. M. Stewart

Mrs. S. Ray

Representation:

Claimant: In Person

Interpreter : Mr. Miernik (Polish interpreter)

Respondents: In Person

Interpreter Mr. Trans (Vietnamese interpreter)

Ha Ming Hoang (Vietnamese interpreter)

Interpreter Ms. Irene Lee Brimmell (Chinese interpreter)

JUDGMENT

1. The claim of unfair dismissal is well founded and succeeds.
2. The claimant is awarded a basic award of £3,501.36.
3. The claim for wrongful dismissal (notice pay) is well founded and the claimant is awarded 4 weeks' notice pay, £2,154.68 gross.
4. The claim of harassment related to race is dismissed upon withdrawal.
5. The direct race discrimination is dismissed upon withdrawal.
6. The holiday pay claim is well founded, and the claimant is awarded 1.5 days of holiday £161.59 gross.
7. The unlawful deductions (wages) claim is out of time, and it was reasonably practicable to have brought the claim in time. The claim is dismissed.
8. The claimant was not provided with written terms and conditions and is awarded two weeks' pay of £1,077.34.
9. The judgment sums are payable forthwith.
10. The compensatory award and ACAS uplift will be assessed at a further remedy hearing on 8 March 2024.

REASONS

1. By claim form dated 21 June 2022 the claimant brought complaints of unfair dismissal, wrongful dismissal/notice pay, harassment related to race and

direct race discrimination, holiday pay claim and an unlawful deductions complaint. The hearing

2. The matter came before Judge Feeney at a preliminary hearing on 31 August 2023 and the claimant was provided with time to send further details about his harassment related to race claim and direct race discrimination complaint to the Tribunal and the respondent. The claimant did not communicate any further information about his discrimination complaints. The claimant clarified on the first day of the hearing that his claims of direct race discrimination and harassment related to race based on his Polish nationality were based on his dismissal only on 15 May 2022. However, during his evidence the claimant withdrew his discrimination complaints and therefore these claims were dismissed upon withdrawal. The Tribunal also removed the time issue from the list of issues as it was no longer relevant. The claimant clarified that he had only been paid 80% of his wages in March and April 2020 when he said he was required to work. The Tribunal determined that it was necessary to consider the issue of time in respect of this claim under section 48 of the Employment Rights Act 1996 and added this issue to the list of issues.
3. The respondent confirmed that it did not assert an admissible reason for the claimant's dismissal pursuant to section 98 of the Employment Rights Act 1996 because the respondent alleged it had not dismissed the claimant and he just left work and he failed to return.
4. There was little compliance with case management directions. The claimant had not received the final bundle from the respondent. He was asked how long it would take him to check whether he agreed the bundle, he asked for one hour which the Tribunal granted. The claimant had not provided a witness statement and the respondent's manager had not produced a witness statement. The Tribunal determined pursuant to the overriding objective that it would be in the interests of justice to proceed with the case with the following modifications to the usual process. The claimant would confirm his claim form, schedule of loss, case summary prepared by the Judge Feeney and take the Tribunal to any relevant documents in the bundle, and this would stand as his evidence in chief. The respondent would be given time if necessary to consider this information before proceeding to cross examine the claimant. The Tribunal would then hear from the claimant's other two witnesses Jaspal Singh Samra and Zhuo Zheng. The claimant also relied upon a written representation from Dariusz Budner.
5. The respondent took steps so that the manager Mr. Lee attended the Tribunal mid-morning. It was proposed that he confirm the contents of the ET3 as a witness statement that dealt with the conversation between himself and the claimant on 15 May 2022. The Tribunal was informed that the witness required a Chinese interpreter. The Tribunal took steps to book a Chinese (Mandarin) interpreter for the following part of the week. Following the evidence of Mr. Lee. The respondent would call two witnesses Ms. Xiaochen Li and Mr. Valentin Marius Corcoveanu.
6. The Tribunal having heard the claimant's case noted that that the director, Ms. Lam who had prepared the ET3, and who was conducting the case was cross examining about a conversation she had with Mr. Sharma and provided a lot of back ground about the position of the respondent's

business. Ms. Lam had not provided a witness statement because she said she did not believe she was entitled to as she was the director of the company. Ms. Lam was also permitted to give evidence (without any objections from the claimant; he was given overnight to consider his questions in cross examination to her). Ms. Lam confirmed her evidence in accordance with the ET3.

7. The situation here was not ideal, but the Tribunal was mindful that both sides were litigants in person; the case dated back over 18 months; two interpreters were booked. The Tribunal took proportionate steps to hear the case and ensure both sides could be placed on an equal footing and have a fair hearing.
8. On the third day of the hearing due to Mr. Trans unavailability who had attended the hearing in person in the earlier part of the week, a new Vietnamese interpreter joined the hearing via CVP. In the circumstances that Ms. Lam did not have an interpreter in person to assist her, the Tribunal determined to provide the parties with the headlines of its findings and send written reasons to the parties. It listed a further remedy hearing to take place on 8 March 2024, in person at Birmingham Employment Tribunal to consider issues of compensatory award (loss of wages and any incidental expenses) and ACAS uplift. The claimant was reminded of the need to provide documents showing he had applied for other jobs.

The Issues

1. **Unfair dismissal**

- 1.1 Did the respondent dismiss the claimant on 15 May 2022;
- 1.2 If so, was his dismissal unfair.

2. **Remedy for unfair dismissal**

- a. Does the claimant wish to be reinstated to their previous employment?
- b. Does the claimant wish to be re-engaged to comparable employment or other suitable employment?
- c. Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.
- d. Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.
- e. What should the terms of the re-engagement order be?
- f. If there is a compensatory award, how much should it be? The Tribunal will decide:
 - i. What financial losses has the dismissal caused the claimant?
 - ii. Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
 - iii. If not, for what period of loss should the claimant be compensated?

- iv. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
 - v. If so, should the claimant's compensation be reduced? By how much?
 - vi. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
 - vii. Did the respondent or the claimant unreasonably fail to comply with it ?
 - viii. If so, is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
 - ix. If the claimant was unfairly dismissed, did they cause or contribute to dismissal by blameworthy conduct?
 - x. If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
 - xi. Does the statutory cap of fifty-two weeks' pay or £105,707 apply?
- g. What basic award is payable to the claimant, if any?
- h. Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

3. Wrongful dismissal/Notice pay

- 4.1 What was the claimant's notice period ?
- 4.2 Was the claimant paid for that notice period?
- 4.3 If not can the respondent prove that the claimant was guilty of gross misconduct which meant that the respondent was entitled to dismiss without notice?

5. Holiday Pay (Working Time Regulations 1998)

- 5.1 Did the respondent fail to pay the claimant for annual leave the claimant had accrued but not taken when their employment ended?
- 5.2 What was the claimant's leave year?

11. Unauthorised deductions

- 6.1 Did the respondent make unauthorised deductions from the claimant's wages and if so how much was deducted ?
- 6.2 The claimant claims that the respondent underpaid him by 20% during lockdown March and April 2020) when he was required to work;
- 6.3 Was it not reasonably practicable to have brought the claim in time;
- 6.4 If not, was it brought within such further time as is reasonable.

The Law

- 7 A dismissal can take place in law when the respondent terminates the contract of employment of an employee with or without notice (section 95 of the Employment Rights Act 1996 "ERA"). Where the words used are alleged to have been

ambiguous the test as to whether those words amount to a dismissal is an objective one so that all the surrounding circumstances both before and following the incident and the nature of the workplace in which the misunderstanding arose must be considered. If the words are still ambiguous the Tribunal should ask itself how a reasonable employer or employee could have understood them in light of those circumstances.

- 8 Where an employee with more than two years' service is dismissed by the employer, the employer can only do so fairly if its reason for doing so was an admissible reason in accordance with section 98 (4) of the ERA 1996.
- 9 Pursuant to section 23 of the ERA, unlawful deductions or wages claims must be brought to the Tribunal within 3 months of the last deduction. The claimant has the burden of establishing if it was not reasonably practicable to have brought the claim in time. If it was not so reasonably practicable, the claimant has to establish it was brought within a further reasonable period. The time limit is strict, and the test is whether it was reasonably feasible to have brought the complaint in time. In **Cygnnet Behaviour Limited v Britton (2022) IRLR 906** it was held that litigants are expected to appraise themselves of the time limits.

Facts

- 10 From 2016 the claimant worked as a driver for the company know as Xheng Xin Trading Limited which was based at 65 Pershore Street, Birmingham. The business was owned by Mr. Lee. On 1 March 2018 the business was purchased by Mr. Lee's ex/partner Ms. Lam. The claimant and Mr. Samra informed the Tribunal that everything about the company was the same; the premises were the same; the vehicles were the same; the work they did was the same; the name just changed to Xing Sheng Limited. Ms. Lam did not understand the implications of TUPE.
- 11 There was a dispute of evidence as to whether there was a break in the continuity of service of the claimant. The claimant's evidence is that he was employed for 6 years. This in part was supported by the respondent's manager and the evidence of Mr. Samra who recalled that he and the claimant carried on working the same. The evidence in conflict with this, is the P45 bundle included in the bundle and the oral evidence of Ms. Li given during the hearing (and not contained in her witness statement) that the claimant left the respondent's employment in January 2018 and returned 6 weeks later. The evidence of the claimant is that he was not given and had never seen the alleged P45 contained in the bundle. On the balance probabilities the Tribunal preferred the claimant's evidence as corroborated by Mr. Samra, and did not find there was any break in his continuity of service. The Tribunal found that the claimant was employed by the respondent and its predecessor for a period of 6 years.
- 12 On 15 May 2022 (page 202) the claimant was called by Mr. Lee to meet him at his new company Q Mart (p.88). The claimant recorded the conversation on his mobile phone and and transcribed it for the Tribunal hearing. The claimant knew about the difficulties the business had at this time and the Tribunal finds he was aware that it was likely to close.
- 13 During the conversation, the claimant was told by the manager, Mr. Lee that the respondent "*had closed down today*". The manager explained that the supplier would not supply anymore because they were closing down. He said he wanted the guys jobs to continue but nobody wanted their products; he described losing money and that the road was closed and there was no car park at the premises so

no place to park or load. He discussed with the claimant the possibility of the claimant going to work elsewhere with a contact of Mr. Lee's. He told the claimant that the other driver Mario would be retained for another one to two weeks but was letting the claimant and Mr. Samra go.

- 14 The respondent sought to suggest in evidence that the claimant was not dismissed then. The Tribunal accepted that the words dismissal or termination of contract were not used but it was made clear to the claimant that the business had closed down that day and that Mr. Lee was willing to try and find the claimant another job for someone else. The fact that the employment relationship was at an end was corroborated by the witness evidence of Mr. Samra who the Tribunal found to be an honest witness and the recording of a conversation between him and Ms. Lam and Mr. Lee on 2 June 2022. Mr. Samra in that discussion (recorded and transcribed by the respondent) recalled the respondent telling him that "we were finished, and you said you'd pay holiday pay". Following 17 May 2022 both the claimant and Mr Samra applied for benefits. The Tribunal found the evidence of Mr Samra compelling that he would not have given up a good job simply to claim benefits; he was dismissed along with the claimant.
- 15 The claimant had already organised with the respondent to have personal use of the vehicle on the 15 of May 2022. He was called on Sunday evening by the manager Mr Lee and asked whether he could do one more day's work on 16 of May to which the claimant did. Although Mr. Lee disputed this, the Tribunal preferred the evidence of the claimant. The was informed that he could purchase the vehicle for £1,000 plus VAT. The claimant actually bought the van on 17 of May 2022 for a sum of £1,800 including VAT and returned all the paperwork of the business to the respondent in accordance with his instructions (see invoice page 161). The respondent stated it would contact the claimant about holiday pay and did so on 31 May 2022 and stated that there was 1.5 days outstanding.
- 16 The claimant entered ACAS conciliation 22 May 2022. Thereafter the respondent did try to contact the claimant by telephone, text and letter as they wished him to return to work. The Tribunal determined that ACAS having alerted the respondent to the fact that the claimant wished to make a Tribunal claim, the respondent decided to invite both the claimant and Mr. Samra to work for them. The Tribunal notes that on 31 May 2022 (page 55) the accountant prepared for the respondent a redundancy payment calculation for the claimant and Mr. Samra. It showed a liability of about £8,000. The Tribunal finds this tied in with the attempted contact then made by the respondent to the claimant and Mr. Samra; the respondent became aware that the claimant intended to bring a Tribunal claim; the potential financial liability was significant and that triggered the respondent to make contact with the claimant and invite him back to the workplace.
- 17 The claimant was paid in arrears by the respondent. Generally, he was paid on the first day of the month but due to a bank error he was paid his final pay on 6 June in the sum of £1,820. The respondent state that he was provided two weeks' notice. On the respondent's own case of having employed the claimants since 2018 this was insufficient notice. The Tribunal found the respondent paid two weeks' notice hoping that this would be the end of the matter, now being aware that the clamant was proceeding against the respondent for a Tribunal claim.
- 18 The holiday year starts 1 January. The claimant's employment ends part way through the holiday year. His evidence is that he had taken up to 5 days that year. The respondent's document at page 119 shows the claimant took 18 days leave in

that period. The claimant did not agree this document and he said he did not sign the document. The respondent said he did not sign any documents. The document appeared inconsistent with page 49 and the calculation via text of holidays.

- 19 The respondent does not work bank holidays. The Tribunal accepted the claimant's evidence that he took five days holiday leave; this on top of the five days of bank holiday (which are not worked but included as part of his holiday entitlement) to end of May 2022 equates to 10 days of holiday. For the period of 1 January to 31 May 2022, the claimant had the entitlement of 11.5 days. In the circumstances the Tribunal finds that there was 1.5 days of holiday outstanding. From the pay slips this does not appear to have been paid to the claimant.
- 20 The claimant claimed he was required to work full time between March and April 2020 but was only paid at 80%. He should on his own case have been paid no later than May 2020 for the shortfall. The claimant did not take any steps to find out his employment law rights and whether he could bring a claim for a deduction in wages. He brings the claim as an unlawful deduction complaint, significantly outside the primary limitation period. He did not provide any explanation as to why he had not pursued this claim before.
- 21 The respondent did not provide a contract of employment to the claimant. Ms. Lam stated she was unaware of this statutory right and she had made a mistake. Ms. Lam's first language is Vietnamese and she was an inexperienced business person. The Tribunal found that Ms. Lam was genuinely unaware of the need to provide a written contract of employment. Credibility
- 22 The Tribunal found the evidence of the claimant more credible than the respondent's evidence because it was corroborated by Mr Samra who the Tribunal found to be an honest witness who provided cogent evidence. The Tribunal found the witness evidence of Mr Mario incredible; he did not get on with the claimant at all. His evidence was inconsistent; first telling the Tribunal he started work at 9 to 11am. Later agreeing he started at 6am in the market. The Tribunal attached little weight to the claimant's witness Dariusz Budner's witness statement at page 206 because he did not attend the Tribunal to be cross examined.
- 23 The director of the respondent, Ms. Lam, was naïve about her employees' employment rights. The evidence from herself and Mr. Lee was that the claimant's employment did not end in May 2022 was not credible bearing in mind the respondent told him the business was closed and the van he used for work was sold to him on 17 May. Mr. Lee made concessions about the 6 year history of the claimant's employment. The respondent's account manager could not assist the Tribunal what was said on 15 May.

Submissions

- 24 The Respondent submitted they had wished to resolve the matter in the right way by contacting the claimant by telephone, text and letter but the claimant did not respond or co-operate. After 17 May 2022, the respondent submitted the claimant left the company. The respondent said it was aware how important the relationship between employer and employees and without employees the respondent could not do business. The business cannot be run without a driver. Ms. Lam submitted that she cannot find another driver that she trusts. The respondent submitted the claimant had prepared for this. The claimant did not sign the holiday form but he refused to sign any documents. The respondent felt that the claimant may have misunderstood her; she tended to speak loud but was not yelling. Ms. Lam

submitted that the two drivers put her to the end of the road and her business closed down and she faced a lot of trouble.

- 25 The claimant submitted on 17 May 2022 was his last day at work. The respondent asked me what I was going to do now. For the following two weeks he had no message or text from the respondent. The respondent only contacted him when they found out I was taking them to the Tribunal. They have called untruthful witnesses e.g. Mr. Mario. All the vans they sold; left one and sold others within one week. I do feel bad as I worked for them for so long and have to face them in court.

Conclusions

Was the claimant dismissed ?

- 26 The Tribunal preferred the evidence of the claimant that he was informed on the 15 of May 2022 that the business had closed down and that the manager was trying to find him work for another company. The Tribunal preferred the claimant's evidence because the claimant had made a contemporaneous recording on his phone and transcribed it into a note to page 205 and had also sent a text message to the respondent on 6 of June 2022 recalling the conversation between himself and the manager. Although the words "dismissal" and "termination" were not used it was clear that there was no work for the claimant and the respondent only intended to retain Mario for a further week or two. the claimant is also purchased the vehicle on 17 of May 2022 this evidence was corroborated by the evidence of Mr Samra who told the tribunal on 17 of May he was told to bring back the van and deliver the keys and that was the end of his employment.
- 27 The Tribunal determined that the respondent having been alerted to the fact that the cost of redundancy payment for two workers following ACAS contact with them, would be nearly £8,000 changed their mind and sought to backpedal and re-invite both Mr Samra and the claimant back into the employment. However, they had already dismissed the claimant and both he and Mr. Samra had made claims for job seekers allowance. The Tribunal did not find the respondent's evidence credible and the claimant's employment was terminated by the respondent. Unfair dismissal
- 28 In the circumstances, the respondent having informed the claimant the business had closed, there was no job for the claimant. He was dismissed without any process or procedure being followed and the dismissal was unfair. The respondent clarified before the tribunal did not put forward any admissible reason for dismissal as it relied solely on the fact that the claimant had not returned to work. The Tribunal found in the circumstances this dismissal was both procedurally and substantively unfair.
- 29 The claimant is awarded a basic award calculated taking account of his years service; dismissal date and age at a total of £3,501.36. Notice Pay
- 30 The Tribunal found that the claimant was employed by a previous company, Xing Sheng Limited since 2016 owned by Mr. Lee which TUPE'd him across to the respondent along with Mr. Samra in 2018. The business was sold to Ms. Lam, ex/partner of Mr. Lee. The evidence of Mr. Samra was cogent in that he told the Tribunal (and the Tribunal accepted) that everything remained the same; the same people; the same vehicles; the same job; all that changed was the name on the paperwork. The Tribunal determined therefore that the claimant's employment commenced on 5 May 2016 and not 2018. There was no break in his continuity of service; this evidence was rejected by the Tribunal. In the circumstances, the

claimant was employed for 6 years but paid only for 2 weeks notice. There is a shortfall of four years in terms of the four weeks notice for the claimant.

- 31 The claimant is awarded gross 4 weeks notice; £2,154.68. Holiday pay
- 32 The respondent's holiday year ran from 1 January; the period from 1 January to 31 May the claimant had an entitlement of 11.5 days including 5 bank holidays. His evidence is that he had also taken 5 days of holiday. There are 5 bank holidays between 1 January and 31 May 2022. He was not required to work on these dates so had taken 10 days leave in total. The Tribunal finds that the claimant had 1.5 days of holiday owing to him.
- 33 The Tribunal makes an award of 1.5 days of holiday pay gross in the sum of £161.59.

Unlawful deductions

- 34 The claimant made a complaint for unlawful deductions/unpaid wages. The claimant claimed he was required to work full time between March and April 2020 but was only paid at 80%. His case is that he should have been paid no later than early May 2020. His claim is brought significantly outside the three month primary limitation period. He did not take any steps to find out his employment law rights. There is an expectation that an employee will appraise themselves of their rights. There is no evidence as to why it was not reasonably feasible to bring this claim in time. He has been unable to discharge the burden that it was not reasonably feasible to have brought his claim in time and it is dismissed.

Statement of terms and conditions

- 35 The respondent accepted that the claimant was entitled but was not provided with a written statement of terms and conditions of employment by reason of her lack of knowledge of an employee's employment rights. The right to such written particulars is set out in section 1 of the ERA. The respondent's lack of knowledge of the need to provide written terms and conditions was genuine. English is not Ms. Lam's first language and she accepted she had made a number of mistakes. The Tribunal determined that it is just and equitable to award two weeks.
- 36 The claimant is awarded two weeks gross pay which equates to £1,077.34. Other awards/Remedy
- 37 A remedy hearing to consider a compensatory award including loss of wages and a loss of statutory rights and ACAS uplift was postponed to 8 March 2024. The claimant was reminded to provide the respondent and the Tribunal with any documents related to his job searches as soon as possible.
- 38 The respondent was unable to confirm her availability for 8 March 2024. The Tribunal has fixed the remedy hearing for this date. If it is an inconvenient date for the respondent a written application with reasons and supportive evidence should be made to the Tribunal within 7 days with a suggested alternative listing.

—
Employment Judge Wedderspoon

11 January 2024

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