EMPLOYMENT TRIBUNALS

Claimant **Respondents**

Mr D Leonard-Elmaz **v** **1. NHK Enfield Ltd**
2. Chung Ying Healthy Life Project Ltd

Heard at: Watford
On: 23 February 2024
Before: Employment Judge R Lewis

Appearances
For the Claimant: In person
For the Respondents: No attendance or representation (debarred)

RESERVED JUDGMENT

The judgment of the tribunal is the following:

1. All claims against the second respondent are dismissed.

2. The first respondent unfairly dismissed the claimant and is ordered to pay to him a basic award of £480.00 and a compensatory award of £480.00, a total therefore for unfair dismissal of £960.00.

3. The claimant's claim of disability discrimination fails and is dismissed.

4. The claimant's claim for a redundancy payment fails and is dismissed.

5. The claimant's claim for notice pay succeeds and the respondent is ordered to pay to him the sum of £480.00 in respect of two weeks' notice pay.

6. The claimant's claim for holiday pay succeeds and the first respondent is ordered to pay to him the sum of £2,256.00

7. The claimant's other claims for arrears of pay, including any claim in respect of the National Minimum Wage, fail and are dismissed.

8. The first respondent is ordered to pay to the claimant four weeks pay for failure to issue terms and conditions of employment, a total of £960.00.

9. The first respondent is therefore ordered to pay to the claimant a total sum of £4,656.00.

REASONS

History of this claim

1. The claimant has at all times acted in person in this case. He has had no access to legal advice.

2. He started early conciliation against both respondents on 7 January 2023 and early conciliation ended on 9 January 2023. He presented his claim on 8 February 2023.

3. In accordance with usual procedure, the tribunal sent the claim to both respondents on 31 March 2023. The claimant had given the same address for both of them, and the tribunal served the claims on both respondents at the same address in Enfield EN1.

4. Neither respondent replied or submitted a Form ET3 or Response. On 14 November the tribunal informed the parties that the respondents were debarred from taking part in the case in accordance with Rule 21(3).

5. On 14 November, notice of hearing was sent, again correctly addressed to the respondents.

6. The claim included a claim for disability discrimination. As a discrimination claim, it would ordinarily be heard by a panel of three. However, applying s.4(3)(g) of the Employment Tribunals Act 1996 and rule 21(3), both hearings of this case were properly listed before a Judge alone.

7. The first hearing took place on 8 January 2024 before Judge French, and she considered that she had to adjourn for the reasons given in her Order.

8. Between that date and today, the claimant sent in some limited information about his claims and the calculations.

9. The claimant attended at this hearing. I asked him a number of questions for clarification, and after about 40 minutes, I adjourned so that I could reserve judgment.

10. I thank the claimant for his frankness and his co-operation with the tribunal during this hearing.

11. I confirm, for avoidance of doubt, that throughout the lifetime of this claim, the tribunal has no record of having received any communication whatsoever in any medium from or on behalf of either respondent.

Summary of the case

12. I will first give a brief summary of the case.

13. The respondent is a take away restaurant. It offers a delivery service to customers. It continues to operate from the premises in EN1 where the claimant worked, and to which the respondent has sent its correspondence.

14. The claimant's case was, as I will give below in my findings, that he walked into the premises one day and was given a job, due to start the following day; and that he worked for the respondent(s) for about two and a half years, before being summarily dismissed and insulted. He has brought a number of legal claims. It is obvious, reading what he has written, that he has undertaken legal research, but that his legal knowledge is far from trained or complete. He has certainly done his very best.

15. The respondents have taken no part whatsoever in these proceedings, although they have been correctly notified of them. Both companies are now listed as proposed to be struck off. The picture painted by the claimant, unchallenged by either respondent, has been of a comprehensive dereliction of their responsibilities as employers, and also of their responsibilities in relation to tax and national Insurance (over which the tribunal has no power).

Findings of fact

16. My relevant findings of fact are the following:

    16.1 The claimant was born in June 2002. While working for the respondents he was between ages 18 and 20.

    16.2 The claimant told me that he is autistic. In reply to my question, he did not ask for any adjustment or assistance for communication at this hearing.

    16.3 The respondent business is a Chinese food takeaway in Enfield.

    16.4 The first respondent was incorporated on 8 March 2017. Its registered office has at all times been the premises in EN1. Companies House records show one person with significant control, Mr T Huang. His correspondence address is the registered office. Records describe the nature of the business as within the category 'Take away food shops.' On 24 May 2022 an application was made for compulsory strike off of the company. The application was suspended on 14 June 2022. It is listed as an active application as at the date of this hearing.

    16.5 The second respondent was incorporated on 7 November 2022. Its registered office has at all times been the premises in EN1. Companies House records show one person with significant control, Ms R Chai. Her correspondence address is the registered office. Records describe the nature of the business as within the category 'Take away food shops.' On 31 May 2023 the company made an application for voluntary strike off. That is listed as an active application as at the date of this hearing.

    16.6 In late June 2020 the claimant went into the takeaway speculatively, and asked for work. He spoke to the manager, who was a lady known to him only as Cherry. At all times, Cherry was the person to whom he reported, and was his boss. He believes, but does not know for sure, that she may well be Ms R Chai.

16.7 He was offered the opportunity of delivery work, starting the following day, which he accepted. He started on 1st July 2020.

16.8 At no time was the claimant ever issued with any paperwork: he had no offer of employment, or contract of employment, or any employment rules or procedures, including holiday procedures, or any payslip, or P60 or P45. He has made inquiries with HMRC, who tell him that there is no record of employer payments of tac or national insurance in relation to his employment.

16.9 The claimant worked 5pm to 10pm, six days a week. His rate of pay throughout was £8 per hour plus £1 per delivery.

16.10 At the end of each day he returned to the takeaway premises, and was paid in full in cash for that day's work. Payment was never late.

16.11 He took little holiday, if any, and was not paid for it. If he did not work, he was not paid.

16.12 He carried out deliveries using his own car, a very old VW. He was responsible for all expenses of the car, including petrol, insurance and maintenance.

16.13 From time to time the claimant asked Cherry for a pay rise, and was always fobbed off. No higher rate than £8 per hour was ever agreed or paid.

16.14 There was no agreement about the motor costs incurred by the claimant. Cherry certainly understood that the claimant was making deliveries, and knew that she had not provided or paid for transport, but the topic was not discussed. The claimant from time to time supported his unsuccessful requests for a pay rise by mentioning the rising cost of petrol.

16.15 On New Year's Eve 2022 the claimant returned to the takeaway as usual, and was paid as usual for that day's work. Cherry then said to him words to the effect, "I don't need you any more". He was thereby dismissed. His dismissal was not confirmed in writing. The claimant's dismissal came completely out of the blue. Possible termination of the claimant's employment had never been discussed before.

16.16 There was an exchange during which Cherry said to the claimant, 'Fuck off you fat spastic.'

16.17 Cherry told the claimant that she would use kitchen staff to make deliveries. There were two kitchen staff. From his knowledge of the business, the claimant did not believe that this was operationally feasible. Within a day or two of his dismissal, the claimant saw deliveries being undertaken by a previous driver, who he understood had left his employment some time before, and now seemed to have returned. The claimant did not consider that it was true that kitchen staff would undertake delivery work, or that they did so.

16.18 The claimant found his next job the very next day, again by the method of simply walking in the door and asking for work. That was also delivery work. That employment lasted over four months, and the claimant experienced difficulties in payment from that employer.

Identity of respondent

17. The first question for the tribunal is to identify who is the correct respondent. The correct response in law is the party with whom the claimant was in contract. Given the employer's utter dereliction of its responsibilities, and therefore the absence of any paperwork, how is that to be determined? I asked the claimant if he recalled seeing a business name posted on the premises wall, but he did not.

18. I asked how he had identified the names of the two respondents. The answer was that he had searched online, and found that both the named respondents have their registered office at the same address as the premises of the takeaway. Their overview details, set out above, were both consistent with the takeaway business where he had worked.

19. As Chung Ying Ltd was not incorporated until 28 months after the claimant began his employment, it cannot have been his employer before 7 November 2022. There was no evidence that it took over the claimant's employment by any means between that date and the date of the claimant's dismissal. I find that it was not the claimant's employer. The claim against it is dismissed.

20. I cannot, on the claimant's evidence, find that he was employed by Cherry as an individual employer, or, if she is not the same person, by Ms Chai. The facts that Cherry was the boss and manager, and / or that Ms Chai was and is a person with significant control are not sufficient evidence of a contractual relationship between the claimant and either (or the same) individual.

21. On the claimant's evidence, it seems to me overwhelmingly likely that the first respondent was his employer. I find that it was.

Terms of employment

22. I find that the terms of the claimant's employment were those set out above. He was employed for 30 hours per week, at £8.00 per hour plus £1.00 per delivery, and he was responsible for providing and paying for his own means of transport to make deliveries.

23. The tribunal must calculate weekly pay in accordance with sections 220-227 Employment Rights Act 1996. The claimant falls in the category set out at s.221(3), ie his pay varied with the amount of work done. The tribunal's approach should be to calculate weekly pay with reference to average pay in a 12 week calculation reference period.

24. I had no reliable evidence on which to make that calculation. I did not consider that I had power to apply a common sense average (eg one delivery per hour, say £5.00 per day). With both misgivings and reluctance I

have taken weekly pay to be 30 hours @ £8.00 per hour, ie £240.00 per week.

Unfair dismissal

25. In a claim of unfair dismissal, it is for the respondent to show on evidence what was the factual reason for the dismissal, and that the factual reason was one of the potentially fair reasons for dismissal found in s.98 Employment Rights Act 1996. The tribunal must then consider whether the requirements of a fair procedure have been followed.

26. I find that the claimant was unfairly dismissed. My finding is that the reason was that he was summarily – brutally even -- dismissed to make way for a former employee. That was not a fair reason for dismissal, no procedure was followed before dismissal, and the respondent has put forward nothing, either at the time, or to this tribunal, to support an argument of fairness. The claimant is entitled to a basic award of two weeks pay, ie £480.00.

27. I then turn to what compensatory award to make to compensate the claimant for loss of earnings after his dismissal, insofar as that loss is attributable to his dismissal by the respondent.

28. Although the claimant had great difficulty with the employer he went to after this dismissal, I accept that that is not the responsibility of this respondent. I accept that the claimant extinguished his financial losses in principle immediately after his dismissal. I therefore award a compensatory award of £480.00 for loss of his statutory rights, but I make no award for loss of income after his dismissal. It follows that recoupment does not apply.

Disability discrimination

29. The claimant ticked the box for disability discrimination. When I asked him what that claim was, he said that when dismissing him, Cherry had used the words, “Fuck off you fat spastic.”

30. I considered whether the use of those words constitutes a single act of harassment related to disability, contrary to s.26 Equality Act 2010. Harassment takes place if the respondent engages in unwanted conduct related to the protected characteristic (disability in this case), with the purpose or effect of creating a hostile environment for the claimant, and that it was reasonable for the conduct to have that effect.

31. I accept that Cherry’s words amount to ‘unwanted conduct related to disability.’ It does not, for the purposes of that phrase, matter that the disability referred to is not that of the claimant or of any specific individual involved in the case.

32. However, for the claim to succeed, the claimant must show that the words had the purpose of effect of creating a hostile or offensive environment at work, and that it was reasonable for them to do so. The claimant seemed to me to say that the words were insulting, and that they added to the hurt of his dismissal, but did not go beyond that.

33. The phrase in question is an offensive and abusive insult. But it was used in a confrontational context, as an insult, which had no link or relationship with the claimant or with any other person or event or factor in this case. That being so, I find that it was not reasonable to have the effect summarised in the previous paragraph, and that disability discrimination has not been made out.

Redundancy

34. The claimant ticked the box in the ET1 for a redundancy payment. A redundancy payment may be payable if an employee with two years service or more is dismissed because the employer's needs for work of his type have ceased or diminished. The claimant was in fact replaced almost at once after his dismissal. I take that to show that the respondent's needs for a delivery driver continued after the claimant's dismissal. That position is not changed by Cherry's untruthfulness when she said that the deliveries would be done by kitchen staff. It follows that the claimant was not dismissed by reason of redundancy, and therefore that claim fails.

Notice pay

35. The claimant had completed two years service and was entitled under s.86 Employment Rights Act 1996 to two weeks pay in lieu of notice. I award him that sum, ie £480.00.

Holiday pay

36. I accept the claimant's evidence on holiday pay. I find that he took no paid holiday at any time throughout his employment. If he did not for example work on Christmas Day, he was not paid for that day.

37. I find that the claimant's holiday year began on 1st July each year, and that his annual holiday entitlement was 188 hours ie (52 weeks x 30 hours) x 12.07%.

38. I find that the claimant has shown that he was in reality unable to take holiday because of the severe financial pressures caused by the respondent's pay arrangements with him, including, but not limited to, its failure to pay holiday pay. I find that he is able to claim for holiday incurred since 1st July 2021, ie, that he may carry forward one year's holiday from the holiday year before dismissal, to which is added holiday accrued in the holiday year starting 1st July 2022 until date of dismissal. He is accordingly entitled to 18 months holiday pay.

39. I calculate that figure as (188 x 1.5) x 8, a total therefore of £2,256.00.

National minimum wage

40. The claimant had produced a schedule of a very significant claim indeed under the National Minimum Wage Act. His point was that factoring in his expenses, mainly the expenses of running the car with which he did the deliveries, his wage was almost entirely taken up with expenses and was reduced far below the minimum wage. His calculations contained three flaws. One was that he had not taken account of the applicable minimum

wage for a person of his age at the time (respectively £6.45 from 1 April 2020, £6.56 from 1 April 2021, and £6.83 from 1 April 2022).

41. The second flaw was that I do not agree with the claimant's basic premise. To the extent that there was an agreement between the parties, it was that the claimant would be paid per shift as described above and was responsible for his own transport and transport costs. There was no evidence of an agreement to the contrary between the parties, and I cannot in the Act or regulations find any power which would enable me to calculate the claimant's pay after his travel expenses. This element of the claim fails.

Interest

42. The third flaw was that the claimant had attached to his schedule of loss a claim for interest at 8%. I deal with the interest claim very shortly: the tribunal has no power to award interest on any of the claimant's successful claims for any period before judgment was given. The only claim which the claimant brought for which the tribunal does have that power was the claim for discrimination, which has failed for the reasons given above.

Other elements

43. The tribunal has power to make an award of two weeks or four weeks pay for failure to issue written terms and conditions of employment. This seems to me a clear case of, as said above, comprehensive and prolonged dereliction of the responsibilities of an employer. It is therefore right to award four weeks, a total of £960.00.

44. I have considered whether this is a case for uplift due to failure to follow an ACAS Code. I do not think that it is appropriate to do so, as the dismissal was not for a disciplinary reason.

45. I have considered whether there are aggravating features, such as to merit a penalty payment under s.12A Employment Tribunals Act 1996. While there are aggravating features, it seems to me that an order for a penalty payment is not in the interests of justice, and that the interests of justice will be satisfied by the respondent discharging the above Judgment sum.

_____

Employment Judge R Lewis

Date: 6 March 2024

Sent to the parties on: 12 March 2024

For the Tribunal Office

Recording and Transcription
Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here: https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/