



EMPLOYMENT TRIBUNALS

Claimant

Mr Thomas James

v

Respondent

The 8th Earl Spencer Family
Settlement

Heard at: Norwich (by CVP)

On: 15 and 16 April 2024

Before: Employment Judge Postle

Members: Miss C Knapton and Miss L Davies

Appearances

For the Claimant: Mrs James, Mother

For the Respondent: Mr Brockley, Counsel

RESERVED JUDGMENT

1. The Claimant's claim for constructive unfair dismissal is not well founded as the Claimant does not have two years' continuous employment.
2. The Claimant's claim under Regulation 12 of the Working Time Regulations 1998 is not well founded.
3. The Claimant's claim that he was discriminated against directly on the grounds of his age is not well founded.
4. The Claimant's claim that he was subjected to less favourable treatment under the Part Time Worker (Prevention of Less Favourable Treatment) Regulations 2000 is not well founded.
5. The Claimant's claim for unlawful deduction of wages under the Employment Rights Act 1996 was withdrawn at the outset of the proceedings as it was accepted any such sums due have been paid.

REASONS

Background

1. The Claimant originally brought claims for unauthorised deduction of wages. This was withdrawn at the outset of the proceedings, the Claimant having been paid with a good will gesture at the time he allegedly worked through his rest breaks.
2. The Claimant also has claims under Regulation 12 of the Working Time Regulations 1998 (Right to Rest Breaks), a claim for direct age discrimination under s.13 of the Equality Act 2010, a claim under the Part Time Worker (Prevention of Less Favourable Treatment) Regulations 2005 particularly Regulation 5 and a claim that he was constructively unfairly dismissed.
3. The issues were more particularly described in the Case Management Hearing Summary at pages 68 – 71 of the Bundle.
4. In this Tribunal we heard evidence from the Claimant through a prepared Witness Statement.
5. For the Respondents we heard evidence from the 8th Earl Spencer and from Miss Cessford, both giving their evidence through prepared Witness Statements.
6. The Tribunal also has the benefit of a Bundle of documents consisting of 178 pages.

The Facts

7. The Claimant had been engaged on a casual basis each summer from 2019 working at the Estate Althorp House when it was open to the public from approximately 3 July until the end of August. This would have occurred when the Claimant was at school and latterly at University. Clearly at the end of each summer season he would return to University in Oxford. It is accepted on occasions such as Christmas Holidays the Claimant may have been offered some work, particularly in 2019, 2021 and 2022.
8. There was clearly, under the terms of the engagement, no obligation to offer the Claimant any specific hours and nor was the Claimant under any obligation to accept a specific number of hours. It would appear the arrangement was very informal and the Claimant, certainly in 2023, would text Sarah Pestell (one of the Managers at the Estate) simply saying (page 103),

“Hope you’re well, just letting you know I am back from Uni for the summer so just give me a call if you need an extra hand anywhere on the Estate”

9. Indeed, the Claimant’s Schedule of Payments (page 96), shows that on the whole the Claimant had no work from the end of the summer until the following year. He occasionally had ad hoc work, for example, in 2020 for a short period in October, in 2021 for a very brief period amounting to £44 in December, in 2022 nothing after September until the Claimant returned the next summer season.
10. The Claimant’s work during the summer was split between the house and the East Gate, not the Main Gate which was for visitors. The Gate the Claimant operated was used by suppliers, couriers and tradespersons and there was clearly not a constant flow of traffic, or an onerous task. It required only one person to man that gate, but it did involve the monitoring of security cameras. The Claimant also worked in the house on occasions. His Line Manager in the House was Sarah Pestell and his Line Manager for the Gate was the Estate Manager Stuart Coleman.
11. Mr Coleman, the Estate Manager was often busy managing a number of staff. Following an incident in 2022 when the Claimant had sun stroke he would arrange with Miss Cessford to take his break and be replaced by a relief. Since the Claimant suffered sun stroke in 2022 the East Gate has been considerably refurbished and was now a building consisting of an office set up with kitchen and bathroom facilities.
12. The Claimant had no fixed hours, his hours fluctuated each week and the Respondents under the terms of engagement (page 83) agreed the Claimant was engaged on a casual basis with no obligation on either side to either accept or offer hours of work.
13. Clearly the Claimant was aware of his right to take rest breaks. From the evidence what happened in 2022 (reference to sun stroke) thereafter Miss Cessford organised and arranged the Claimant’s relief and rest breaks. When the Claimant was working in the house there was a clear shift system which had built in rest breaks. In 2022, it is clear the Claimant was contacting Miss Cessford when on the gate to arrange breaks through his own telephone. This arrangement would continue with Miss Cessford in 2023. It is clear the Respondent / Miss Cessford assumed the Claimant was taking breaks in 2023 as the Claimant did not contact Miss Cessford, or indeed anyone else to arrange rest breaks. Nor did he raise any issue throughout his employment in 2023 until around 14 August.
14. Had the Claimant not been receiving rest breaks or being relieved, it is odd the Claimant did not raise this in those couple of months. He certainly did not raise the issue with the Estate Manager or Miss Cessford that he was unable to take breaks, given the Claimant was perfectly able to email Miss Cessford over his pay when that did not come through. The reason his

pay did not come through was because the Claimant had provided incorrect banking details.

15. Given also the fact the Claimant was not new at the job, he had been working at the Estate since 2019, he would be familiar with staff and who to approach. It would also appear that the other staff working in the Gate at the time had made arrangements for their break, whether full time, part time or casuals.
16. The Claimant clearly enjoyed working on the Gate as at 10 July 2023 (page 104) he writes to Miss Cessford to ask to be given a full time role working on the Gate,

“Hi Lisa

I am really enjoying my time here at East Gate and would like the opportunity to continue working here after the opening season has finished. My time working here has given me the necessary experience needed in order to successfully operate and maintain the security of the East Gate, West Gate and back of house as well as the authorisation of vehicles granted access onto the Estate.

If this is something that you would be interested in, please let me know.

Kind regards
Thomas James”

17. The Respondent did not need a full time employee to work on the Gate beyond the House opening times in the summer and so did not explore that with the Claimant. However, they were looking at other roles for the Claimant as they thought highly of him and did not want to lose him.
18. The Tribunal repeats, clearly the Claimant liked his work at the Respondent because he again emailed on 23 July 2023 (page 112),

“Hi Lisa / Stuart

I thought I would give you an update regarding my status. I know we have been discussing informally about a position at Althorp.

I was wondering if there had been any further discussions regarding a permanent position on the Gate? I have the ability to finish my final year at university remotely and live at home in Great Brington, which would be my first preference.

...

I don't want to push I just need to start planning.

Thank you! Thomas”

19. Miss Cessford replied on the same day,
- “We are still looking into this for you. A decision has been made not to man the Gate going forward so we wouldn’t be able to offer you that.
- But we are trying to find something suitable for you.
- Kind regards
Lisa”
20. The Claimant responds the same day, 23 July 2023 (page 112),
- “ Hi Lisa
- Thank you for your prompt reply in updating me regarding the Gate.
- I look forward to exploring other opportunities on the Estate.
- Enjoy your Sunday evening.
Thomas”
21. On 7 August 2023 the Claimant emails Miss Cessford about non-payment of wages. On 8 August 2023 the Claimant emailed his correct bank details as he had inadvertently provided the wrong details. However, by this time the Respondent’s Finance Officer was on holiday so the Claimant’s pay had not been processed and was to be paid later in August.
22. The Claimant worked on the Gate on 11 and 12 August 2023 and then in the house on 13 August 2023. On 13 August, or thereabout, the Claimant’s Mother telephoned the 8th Earl’s Personal Assistant about her son’s non-payment of wages. The result of the call, the PA immediately arranges for payment of the outstanding sum, which although there was a small error in the sums due to the Claimant, that was subsequently paid.
23. Then for the first time, in an exchange of increasingly heated emails from the Claimant’s Mother, it is asserted the Claimant had not been able to take lunch breaks. Furthermore her son had felt uncomfortable about another Tribunal claim against the Respondent in which the Claimant had provided information to Miss Cessford. All of this exchange taking place on 13 August 2023, culminating in the Claimant’s Mother saying the Claimant would be resigning.
24. Miss Cessford had responded to each and every email explaining the delayed payment of wages came about partly as the Claimant had not provided the correct bank details and that this had not been raised until 7 August 2023. The fact that Miss Cessford was unaware of any issues with the Claimant being able to breaks on the gate. The Claimant then formally resigns on 14 August 2023 (page 137),

“Dear Lisa

It is with regret that I hereby resign from my position as a casual worker, security, from Althorp due to my position becoming untenable.

I set out the following reasons for my resignation:

Breach of contract for unauthorised deduction of pay
No breaks or lunch breaks during a 9 hour shift
Lack of duty of care and loss of trust and confidence.

Many thanks
Thomas James”

Credibility

25. It has to be said that the Claimant was inconsistent and disingenuous in not only his evidence but the lead up to his resignation. Particularly a few weeks before his resignation he liked working on the East Gate so much he wanted a permanent position, whether on the Gate or some other position within the Estate.
26. His inconsistent evidence involving the 8th Earl in that his Claim Form he suggested,

“On one occasion I left the post and was told by a member of staff that Lord Spencer was not happy as the Gate was unmanned.”
27. By the time the Case Management Hearing came about in February 2024, his evidence had changed to,

“On deciding to take a break during one of the shifts in June 2023, in going to sit in his car, the Earl saw him and chastised him for leaving his post.”
28. The Claimant says that he raised the issue of breaks with his Manager but these were ignored.
29. It simply does not stack up when the Claimant was perfectly able to email Miss Cessford about his wages and about a permanent position on the East Gate and yet fails to mention anywhere, at any stage, he was a little concerned, or words to that effect, that he was not getting his full entitlement to rest breaks.
30. Interestingly, when it was put to him in cross examination that he had provided two different versions of events over the 8th Earl allegedly seeing him and alternatively when a member of staff saw him. The Claimant now says these were two different events and dates and oddly no mention in his Witness Statement of this fact.

31. The Tribunal accepted the evidence of the 8th Earl that this allegation never took place and had the Earl seen the Claimant in his car out of the East Gate, he would have simply addressed the matter with Miss Cessford and asked her to speak with him. The Tribunal accept the event did not happen in any event.
32. During the course of the Claimant's evidence he was evasive and on a number of occasions had to be reminded that he needed to answer the question put to him, rather than to go off at a tangent.
33. In the Tribunal's mind, if the Claimant had asked for breaks in 2023 and not been afforded them he clearly would not have been backward in raising the issue, as he did over his pay and wanting a permanent position.
34. There was then the inconsistent approach in the way he resigned. One answer is pressure to give evidence at the Tribunal and another is non-payment of wages.
35. Indeed, the Tribunal found his evidence on occasions confusing and lacking in clarity.
36. Whereas the Tribunal found the Respondent's Witnesses to be clear, helpful and straight forward.

The Law

Constructive Dismissal

37. Section 108 Qualifying period of employment, sub-section 1. Section 94 of the Employment Rights Act 1996 does not apply to the dismissal of an employee (or constructive dismissal) unless he has been continuously employed for a period of not less than two years ending with he effective date of termination.

The Tribunal's Conclusion:

38. On the Claimant's own evidence in his Claim Form, paragraph 5 page 9, his Dates of Employment being 13 June 2023 to 13 August 2023. The Claimant in his correspondence with the Respondent in late July 2023 is seeking a permanent position. He acknowledged in one email, if a permanent position is not available then he will return to University in Oxford and sort out his accommodation.
39. Terms of Engagement signed by the Claimant in 2023 make it clear he was a casual employee and sets out the terms and the basis of his engagement, particularly no obligation to accept hours and no obligation for the Respondents to offer hours.

40. The Claimant's own text message in May 2023 to Sarah Pestell,
"Hi Sarah hope you are well. Just letting you know I am back from uni for the summer, so just give me a call if you need an extra hand anywhere on the Estate."
41. There is then the payment schedule which clearly shows a massive gap between the end of the summer, brief employment on two occasions in December and then no employment throughout January until June 2023.
42. In simple terms, the Claimant clearly does not have the qualifying period of continuous employment for a period of two years in which to bring a claim for constructive dismissal. That claim therefore fails.

Direct Age Discrimination

43. Section 13,
13. Direct Discrimination
(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
44. Section 23,
23. Comparison by reference to circumstances
(1) On a comparison of cases for the purposes of section 13, 14 or 19, there must be no material difference between the circumstances relating to each case.
45. In this respect the Claimant compared himself to a permanent employees: Mr Greenfield who left sometime in 2023; Mr Robinson a casual worker dismissed in 2022; Mr Arnaboldi another casual worker in 2022; and finally someone known as 'Lau' who apparently left in 2021.
46. Broken down into simple terms, an employer directly discriminates against a person if:
- it treats that person less favourably than it treats or would treat others, and
 - the difference in treatment is because of the Claimant's age.
47. The test posed by the act is an objective one. The fact that the Claimant believes that he is being treated less favourably does not of itself establish that there has been less favourable treatment. Equally it is not enough to say the difference in treatment must be discrimination. The burden lies with the Claimant to establish the difference in treatment compared to that of the comparator and then the burden will shift to the Respondents to explain that treatment.

The Tribunal's Conclusion:

48. Whilst accepting that the Claimant is a litigant in person, nevertheless it was noted despite prompting by both Mr Brockley Counsel for the Respondent and the Judge, the conclusion of the Claimant's cross examination of the Respondent's Witness Miss Cessford, that he had not challenged or put to Miss Cessford the reason for his treatment was his age. Despite the prompt, the Claimant decided not to challenge the Respondent's Witnesses.
49. That said above, the Tribunal concluded there was absolutely nothing in the evidence which would suggest a difference in treatment because of the Claimant's age. The Claimant was perfectly able to arrange his shifts in 2022 via Miss Cessford. The Claimant was not a shrinking violet and was not backward in coming forward and one assumed throughout June and July the Claimant was working on the East Gate that he was taking his breaks. He knew previously that if there was a problem with his breaks, to contact Miss Cessford. He did not, in 2023, raise it until the last couple of days 12 and 13 August 2023 when his resignation came about.
50. One cannot ignore also the fact that the Claimant was clearly happy in his job on 23 July 2023, otherwise why would he be asking for a permanent job on the East Gate if he wasn't getting his breaks? It simply does not stack up. It lacks any credibility whatsoever.
51. The Claim for direct discrimination is therefore not well founded.

Part Time Worker

52. These come about under the Less Favourable Treatment Regulations. The first point is, *was the Claimant a worker employed by the Respondent, or was he a part time worker?* Clearly, the Claimant was engaged as a casual work and was never a part time worker. The situation is compounded by comparator issues in that none of his comparators are true comparators as their circumstances are materially different.
53. But in any event, even if the Claimant can be described as a part time worker, the fact remains the Claimant was allocated and allowed statutory rest breaks. Therefore that claim fails.

Working Time Regulations

54. Dealing very briefly with the Working Time Regulation Claim, namely the right to rest breaks of 20 minutes. Again, insofar as the Respondents were concerned, the Claimant was taking those rest breaks and had he not been doing so and that he knew if there was a problem he was to contact Miss Cessford. Again, there were no issues raised until he resigned on 13 August 2023.

55. Even if that claim was well founded, he has already been paid as a goodwill non-admission of liability gesture by the Respondent the sum of £336 for the time he allegedly worked through rest breaks in any event.
56. The Claims are therefore quite simply not well founded.

Employment Judge Postle

Date: 14 May 2024

Sent to the parties on: 21 May 2024

For the Tribunal Office.

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