EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Mr D Leonard	**v**	**1. Fanghh Catering Limited** **2. Quan Mai Yang**

Heard at: **London Central Employment Tribunal (CVP)**

On: **21, 22 May 2024 (and 23 May 2024 in chambers) [CHECK DATE]**

Before: **Employment Judge Adkin**
Ms J Cameron
Mr R Baber

Appearances

For the Claimant: **In person**
For the Respondent: **Mr L Robert-Lennard, Consultant**
(acting *pro bono* - this means he cannot charge the Respondents money, nor should they pay him anything.)

JUDGMENT

(1) The First Respondent failed to provide the Claimant with itemised pay statement pursuant to section 8 of the Employment Rights Act 1996.

(2) The following claims are well founded and succeed. The First Respondent should pay to the Claimant **£5,572.01**, made up of the following:

a. Unlawful deduction from wages (failure to pay the National Minimum Wage), £3,907.32;

b. Failure to provide written terms of employment, £832.35;

c. Failure to pay accrued holiday pay on termination of employment, £832.35.

(3) The following claims are struck out pursuant to rule 37 of the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013, Schedule 1 ("the Rules"):

a. Claim for redundancy pay;

b. Claim of disability discrimination relating to an ankle injury.

(4) The following claims are not well founded and are dismissed:

a. All claims against the Second Respondent.

b. Claims of automatic unfair dismissal pursuant to sections 103A and 104A of the Employment Rights Act 1986 (“ERA”);

c. Direct disability discrimination and direct age discrimination pursuant to section 13 of the Equality Act 2010 (“EqA”);

d. Unlawful deduction from wages (alleged breach of contract in relation to guaranteed number of hours);

e. Claim for notice pay.

REASONS

The Claim

1. By a claim form presented on 25 July 2023 the Claimant brought complaints of automatic unfair dismissal on the grounds of whistleblowing and national minimum wage; direct age and disability discrimination; failure to pay the National Minimum Wage; other unlawful deductions from wages and; failure to a redundancy payment, notice pay and holiday pay, against the Respondent, his former employer.

2. Regarding his unfair dismissal claim, the Claimant confirmed that he was bringing a complaint of automatic unfair dismissal, for making a protected disclosure under *s103A Employment Rights Act 1996* and on the grounds of the national minimum wage, *s104A ERA 1996*. He is not bringing an ordinary unfair dismissal claim.

Evidence

3. We received a bundle of 103 documents, to which 14 pages were added from the Claimant which we marked C1-C14.

4. We received a witness statement from the Claimant and oral evidence from him.

5. The witness statement put in by the Second Respondent was something of a mixture of evidence and submissions. We felt that in combination with her oral evidence we were able to understand her position on points in dispute.

Representation

6. The Respondents purportedly confirmed in correspondence that Mr Robert-Lennard was a family friend acting pro bono, from which we understand that he was charging no professional fee for his services to the Respondents.

Strike out

7. For reasons given orally on the first day of the hearing the claims for redundancy pay and for direct disability discrimination relating to an ankle injury suffered in May 2023 were struck out.

Amendment

8. On the second day of the hearing we heard the Claimant's application to amend his claim to say that if he was not dismissed he resigned and this was a constructive unfair dismissal.

9. For full reasons given orally, we did not allow that application.

Findings of fact

Disability

10. On 11 August 2006 the Claimant's GP record confirmed a diagnosis of autism.

11. Several years later the GP record on 4 August 2014 has a recorded diagnosis "Asperger's syndrome" in the context of matters relating to the Claimant's domestic circumstances and his schooling.

Car insurance

12. In December 2022 the Claimant paid in the region of £3,000 insurance for his car. We have not received detailed evidence on the Claimant's vehicle but we understand in general terms that it was an older diesel vehicle in respect of which he had to pay ULEZ charges when driving in the ULEZ zone.

Work provided by by the First Respondent

13. The Claimant commenced working for the First Respondent on 1 January 2023, delivering food by car from a take away restaurant in Enfield. The registered address for this business is 42 London Road, Enfield, England, EN2 6EF.

14. The Claimant says that the terms agreed with the First Respondent were that he would be paid £8 per hour plus £1 per delivery. He said that it was agreed that he would be paid for 7½ hours per day 6 days a week, save Sunday. The hours he says were 12:00 – 14:30 and 17:00 – 22:00, but only 5 hours on a Sunday.

15. In his schedule of loss the Claimant is claiming for 44.5 hours per week. In the Claimant's first week working for the First Respondent he was paid 44.5 hours – five hours on the first day, 7.5 hours on the next three days and then 8.5 hours on the next two days.

16. The Second Respondent was the manager of the restaurant. She would tend to come to the business toward the end of the day. A man called Josh generally looked after the restaurant earlier on in the day. His responsibilities are discussed below.

17. The Second Respondent's evidence at paragraph 25 of her witness statement is that there was no verbal agreement for the Claimant to work 6 days per week and from 12.00-14.30 and from 17.00-22.00 each day as it simply did not make sense to stop working having worked just 2½ hours. Insofar as there was a conflict on this point we accept that the Claimant did on most days have a period between lunch and evening hours when there was nothing for him to do and he went home. Split shifts are not unusual in the catering industry.

18. It is clear from the pattern of the hours worked that the Claimant worked 5 days in the region of 7-7.5 hour, sometimes more, then one shorter day and he had one day off.

19. We find that the initial discussion about hours was simply about the opening hours where the Claimant was expected to be at the restaurant to be available for deliveries. We find unlikely that there was any express discussion about payment on days when the shifts were short because the restaurant was quiet. We find that on the balance of probabilities that this was not discussed at the outset.

20. What happened in practice was that the Claimant sometimes worked longer hours, e.g. 8.5 hours on 6 & 7 January and was paid more. He sometimes worked shorter hours e.g. 9 and 16, 17 January and was paid less. The interpretation that we place on this is that it was agreed by conduct and a course of working that there was not a guaranteed number of hours. There were usual working hours, but the Claimant would be paid more or less to point depending on hours he was in attendance.

21. We accept the Claimant's evidence that during the period relevant to this claim – January to May 2023 he did not work for any other person or organisation.

Rate of pay

22. The Second Respondent agreed with the Claimant that the agreed pay scale was £8 per hour plus an additional element for deliveries.

23. There is a disagreement over how much was paid for each individual delivery. The Second Respondent says that for deliveries over 4 miles the driver would be paid £2 and if it was 3 ½ miles it would be £1.50.

24. Whether or not this "sliding scale" of delivery fees may have offered to other drivers falls outside of the scope of this hearing. The Tribunal accepted the Claimant's evidence that that these terms were never offered to nor paid to him. The sliding scale described by the Second Respondent was not referred to the response, nor in her witness statement nor is it evidenced by any contemporaneous documentation. No contemporaneous documentation demonstrating what the Claimant was paid and on what basis has ever been produced by the Respondents at any stage.

25. We accepted the description of the pay scale given by the Claimant, which was clear and consistent. His evidence was that he was simply paid £1 per delivery, irrespective of distance.

Knowledge of autism

26. Josh's responsibilities included taking orders and giving deliveries out to drivers to take to customers. We accept Second Respondent Ms Mai Yang's evidence that "Josh" was his English name, just as "Vanessa" was her English name. From that we understand was not their given name but a name that they used when dealing with English speaking clients or colleagues.

27. The Claimant says that he mentioned he had autism on the first day of his work to Josh who managed at the First Respondent's restaurant in Enfield. This was 1 January 2023.

28. We have not received any written or oral evidence from Josh, who has not appeared as a witness. We accept the Claimant's evidence that he told Josh that he had autism. What Josh understood by this or whether he understood this at all is impossible for the Tribunal to know based on the evidence we have received.

29. The Second Respondent Ms Mai Yang denies that the Claimant or Josh mentioned that the Claimant had said he had autism. We have no evidence that it was mentioned directly to Ms Mai Yang. We have not found facts which leads us to infer that Josh must have told her what the Claimant told her. On balance of probabilities we find that the Claimant having autism was not mentioned to Ms Mai Yang.

Probationary period

30. The Respondents have suggested that the Claimant was on a probationary period and that this was relevant to whether he should receive holiday pay and his rate of pay.

31. The Claimant denies that he was in a probation period.

32. On the balance of probabilities we find that there was no probationary period at all, for the following reasons:

33. The Claimant denies that there was a probation period or any communication about this. The Tribunal found his evidence on this point credible.

34. The Respondents' own case on this is internally inconsistent. Paragraph 12 of the grounds of resistance filed on 25 August 2023 refers to the Claimant being still on probation in the first 3 months. Ms Mai Yang's witness statement at paragraph 4 refers to a probation period of 6 months.

35. There is no documentary evidence, either in contractual documents or in a policy document which refers to a probationary period.

36. Inherent plausibility. In our experience as an industrial tribunal, a probation period is far more likely to be a feature of an employment relationship where there is a formal written contract of employment conferring employee status, which is a valuable status conferring various rights. By contrast the Claimant was a worker working under terms agreed orally in an informal context. The features of the situation do not suggest to us that a formal probation policy was likely.

Shifts worked

37. The Claimant's schedule of loss dated 30 October 2023 contains a careful account of every day that the Claimant worked and the amount that he received in payment on that day. It also has expenses items which we deal with below.

38. There was a dispute between the parties as to whether the Claimant was working for certain periods. The Respondents, in a document filed during the

course of the tribunal hearing suggest that the Claimant did not work between 23 – 27 January, 20 – 24 February and 20 – 31 March 2023.

39. The Respondents have failed to produce any record of when the Claimant was working and the payments made to him.

40. The Claimant's evidence under oath is that the schedule contains the sums that he received and the days that he worked. There are contemporaneous text messages in an exchange between the Claimant and Josh which demonstrate that he was working even at times when the Respondent says he was not working. We accept the Claimant's evidence where there is a conflict on the question of whether or not he was working.

Payment

41. The Claimant was paid cash. There were no pay slips.

42. The only evidence the Tribunal has of what the Claimant was paid day to day is his oral evidence when he confirmed the sums in his schedule of loss. This is the best and only evidence of what he was paid. We accept this evidence.

Mileage

43. The Claimant has not given the Tribunal detailed evidence of the mileage that he did. He estimated that on an average day he drove 100 miles.

44. We have taken account of the fact that on the majority of his shifts the Claimant drove the 7 miles journey from his home to the restaurant in Enfield there and back twice. In other words 4 x 7 = 28 miles of his daily mileage was a commute.

45. The Respondents say in general terms that the mileage put forward by the Claimant is grossly exaggerated, but have not substantiated that or put forward their own figures.

46. The Claimant says, and we accept that some of his deliveries were further afield than Enfield. He delivered for example to Tottenham. We take judicial notice of the fact that the London Borough of Enfield is a large suburban area in which delivery drivers might reasonably expect to drive further than in more densely populated city centre urban areas.

47. We find that the figure of (100 – 28 miles =) 72 miles is a plausible average daily mileage for delivery. On a typical 7 hour shift that would represent approximately 10 miles driven in an hour. Breaking that down that might be 2 round trips of 5 miles, or perhaps 3 slightly shorter round trips of a little over 3 miles. This seems plausible.

48. We accept the average mileage figures forward by the Claimant.

Expenses

49. The Claimant's evidence is that because of his vehicle he had to pay a ULEZ charge of £12.50. At the time of his employment January – May 2023 we have

taken judicial notice of the fact that the ULEZ zone run as far north as the North Circular Rd. In practical terms that meant that the Claimant's home in Hornsey north London was within the ULEZ whereas his place of employment in Enfield was just outside of the zone. Based on the Claimant's evidence that he was routinely delivering to places such as Tottenham, which were within the ULEZ zone, we accept that he needed to pay the ULEZ charge not only for his commute but also in order for him to deliver.

Ankle injury

50. In May 2023 the Claimant injured his ankle. He was told by a doctor that the injury was likely to resolve in a week. In fact it seems to have taken longer to resolve. For reasons given orally by the Tribunal in striking out part of a disability discrimination claim, we found that this was unlikely to amount to a disability within the meaning of section 6 of the Equality Act 2010.

51. Following this injury the Claimant borrowed a walking stick from his father. It was traditional type walking stick (rather than a medical crutch).

52. There was an initial reaction of amusement when the Claimant attended work with this walking stick. The Claimant says in his statement "When I first arrived at work". We find that some reaction is more plausible than nothing at all said which appears to be the Respondents' case. We accept that Josh's initial reaction was to laugh, and that Ms May Yang was present on at least one occasion when the Claimant came in with the stick.

53. The Claimant says that he felt that he was being mocked.

Earlier complaint about wages

54. The Claimant says in his witness statement that he raised with the Respondents on a weekly basis that his pay was below minimum wage. He did not specify any particular date other than the final text exchange which we deal with below.

55. The Tribunal is not satisfied that the Claimant has made out this allegation exactly as in his witness statement i.e. that he raised this on a weekly basis. We are conscious of the fact that at least part of the communication between the Claimant and the First Respondent was by text. There is no evidence that a breach of minimum wage legislation was raised by that medium. We find it implausible that the Claimant would continue to raise on a weekly basis that the Claimant was in breach of minimum wage legislation. We find it inherently unlikely that he would continue to raise it week after week if the Respondent gave a negative response every time.

56. We do accept however that the Claimant had raised with his employer previously that he found that the wages were inadequate. We infer that it must have become clear to him that taking account of expenses (principally fuel and ULEZ) he was left with very little in his pocket.

Termination of employment

57. The Claimant sent a text at 11:30 on 14 May 2023 to the Second Respondent:

> "Morning Vanessa I can't do it anymore your wages are far too low miles too low far away ones I lose money theres no point of me coming don't make much Can you pay more or You fire me"

58. Ms Mai Yang replied:

> "Ok"

59. Thereafter the Claimant did not present himself for work and there was no further communication.

Claim

60. A claim was presented to the Employment Tribunal on 26 July 2023 after an ACAS early conciliation period 20-25 July 2023.

THE LAW

National minimum wage

61. Regulation 13 of the National Minimum Wage Regulations 2015 (as amended by SI 2020/339 National Minimum Wage (Amendment) (No 2) Regulations 2020 (SI 2020/339) is as follows:

> "13 Deductions or payments as respects a worker's expenditure
>
> (1) Subject to the exception in paragraph (2), the following deductions and payments are to be treated as reductions if the deduction or payment is **paid by** or due from **the worker** in the pay reference period—
>
> (a) deductions made by the employer as respects the worker's expenditure in connection with the employment;
>
> (b) payments—
>
> (i) paid by or due from the worker to the employer as respects the worker's expenditure in connection with the employment, or
>
> (ii) **to any other person on account of such expenditure**.
>
> (2) The payments referred to in subparagraph (1)(b) are not to be treated as reductions if the expenditure is met, or intended to be met, by a payment paid to the worker by the employer.".

62. The Employment Appeal Tribunal considered the scope of regulation 13 of the National Minimum Wage Regulations 2015 in the case of **Mr W Augustine v**

Data Cars Ltd (Case No: EA-2020-000383-AT, previously UKEAT/0254/20/AT). That case considered reductions due to various expenses in calculating what a minicab driver had been paid. The Employment Tribunal found that both fuel and minicab driver insurance should be deducted for NMW purposes, as should cleaning charges and "circuit fees, equipment rental fees". However the Tribunal found that rental payments for the vehicle and uniform costs fell outside of the regulations. The EAT held that vehicle rental use payments were charges "in connection with the employment".

63. HHJ Auerbach, giving the judgment of the EAT said as follows:

> 35. The claimant is correct that the relevant legal test was whether the expenditure on renting a vehicle was **in connection with the employment**, and, which was not disputed, not reimbursed by the respondent. The fact that the claimant could have met his obligation by using his own vehicle, if he had one, is not relevant to the application of that test. What was relevant was whether the expenditure incurred by the claimant was in connection with the employment.
>
> 36. It did not, in fact, have to be a requirement of the employment. It neither had to be necessarily incurred, nor wholly or exclusively incurred. The test that Parliament has determined appropriate in the context of a national minimum wage calculation is whether the expenditure is **in connection with the employment**. The tribunal did not apply that test, but decided the matter on a different and irrelevant basis; and it erred in doing so. It appears to us that, had the tribunal applied the correct test on the facts found, it could only have concluded that this expenditure was incurred in connection with the employment, and we will accordingly allow ground 1 and substitute a decision to the effect that the vehicle rental expenditure was allowable as a deduction when calculating the national minimum wage under regulation 13.

<u>National minimum wage automatically unfair dismissal</u>

64. The Employment Rights Act 1996 contains the following provision:

> 104A The national minimum wage.
>
> (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—
>
> > (a) any action was taken, or was proposed to be taken, by or on behalf of the employee with a view to enforcing, or otherwise securing the benefit of, a right of the employee's to which this section applies; or

(b) the employer was prosecuted for an offence under section 31 of the National Minimum Wage Act 1998 as a result of action taken by or on behalf of the employee for the purpose of enforcing, or otherwise securing the benefit of, a right of the employee's to which this section applies; or

(c) the employee qualifies, or will or might qualify, for the national minimum wage or for a particular rate of national minimum wage.

(2) It is immaterial for the purposes of paragraph (a) or (b) of subsection (1) above—

(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, if applicable, the claim that it has been infringed must be made in good faith.

(3)The following are the rights to which this section applies—

(a) any right conferred by, or by virtue of, any provision of the National Minimum Wage Act 1998 for which the remedy for its infringement is by way of a complaint to an employment tribunal; and

(b) any right conferred by section 17 of the National Minimum Wage Act 1998 (worker receiving less than national minimum wage entitled to additional remuneration)

PROTECTED DISCLOSURE LEGISLATION

Protected disclosure detriment ("whistleblowing")

65. In relation to "automatically" unfair dismissal because of protected disclosure, the Employment Rights Act 1996 contains the following provisions:

43B Disclosures qualifying for protection.

(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following-

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

47B Protected disclosures.

(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

103A Protected disclosure.

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 made a protected disclosure.

104A The national minimum wage.

(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—

(a) any action was taken, or was proposed to be taken, by or on behalf of the employee with a view to enforcing, or otherwise securing the benefit of, a right of the employee's to which this section applies; or

(2) It is immaterial for the purposes of paragraph (a) or (b) of subsection (1) above—

(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, if applicable, the claim that it has been infringed must be made in good faith.

(3) The following are the rights to which this section applies—

(a) any right conferred by, or by virtue of, any provision of the National Minimum Wage Act 1998 for which the remedy for its infringement is by way of a complaint to an employment tribunal; and

(b) any right conferred by section 17 of the National Minimum Wage Act 1998 (worker receiving less than national minimum wage entitled to additional remuneration).

66. The burden of proving each of the elements of a protected disclosure is on a claimant (*Western Union Payment Services UK Ltd v Anastasiou*, 13 February 2014 per HHJ Eady QC at [44]).

Disclosure

67. In *Kilraine v London Borough of Wandsworth* [2018] ICR 1850 the Court of Appeal held that a sharp distinction between "allegations" and "disclosures" which appeared to have been identified in earlier authorities was a false dichotomy, given than an allegation might also contain information tending to show, in the reasonable belief of the maker, a relevant failure. At [35], Sales LJ said:

> "In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a **sufficient factual content and specificity** such as is capable of tending to show one of the matters listed in subsection (1)."
>
> [emphasis added]

CONCLUSIONS

Automatic Unfair Dismissal (section 103A) – protected disclosure

Dismissal

68. The Claimant says that he was dismissed.

69. The Respondents denies that there was a dismissal. They say that the Claimant resigned.

70. Whereas the Claimant thought that he was offering the Respondents a choice, Ms Mai Yang explained that she saw the wording that the Claimant was not making enough money and essentially treated this as a resignation, hence she did not enter into any further communication other than acknowledging with the single word response "Ok".

71. We accept that the Claimant had previously raised the question of low wages. There had been no increase in response to that being raised.

72. Given that context, it seems that neither party expected that the First Respondent would offer improved terms to the Claimant in response to his text on 14 May 2023. While the Second Respondent could have responded to make an offer of more generous financial terms, neither side expected that. This was in reality a resignation, especially taking account of the fact that the Claimant did not come back to work and there was no further communication beyond "Ok".

73. On balance the Tribunal accepts the position of the Respondents, i.e. that the exchange of text messages and decision of the Claimant not to attend work represented a resignation by the Claimant.

74. It follows that the claim of automatic unfair dismissal does not succeed.

Automatic Unfair Dismissal (section 104A) – protected disclosure

75. Given that there was no dismissal, this claim cannot succeed.

Direct Disability Discrimination

2.1 Was the Claimant a disabled person at the relevant times by reason of:

2.1.1 His autism condition?

76. The Tribunal finds that the GP record supports the Claimant's evidence that he is autistic. This is a lifelong condition.

2.1.2 His leg injury sustained in May 2023?

77. This part of the claim was struck out for reasons given orally.

3.1 If so, did the Respondents treat the Claimant less favourably than they did treat or would have treated a person who was not disabled by autism by doing the following:

3.1.1 Paying the Claimant less than the national minimum wage, refusing to pay more when the Claimant asked to be paid more, and shouting at him instead;

78. The Claimant's case on this point has not been consistent. The reference to shouting in the claim form is not consistent with the witness statement which simply says "they would threaten me with getting someone else to do the job or telling me that everyone was broke at the moment it was always some excuse or threat not to be able to paid minimum wage". There is no reference to shouting in the witness statement.

79. An allegation of shouting did not come in the Claimant's evidence or in the questions that were put to the Second Respondent

80. The Tribunal accepts nevertheless that the Claimant asked to be paid more and that the Respondents declined to pay him more. The element of them refusing to pay more is made out.

81. We have not concluded that the Second Respondent was aware of the Claimant being autistic. In any event we have not concluded that the position of the First Respondent in declining to pay the Claimant more was because of his disability. It was purely for commercial reasons. In short the Respondents wanted to pay the staff as little as they can get away with. That this fell below the minimum wage, we have addressed and compensated the Claimant for under a different head of claim.

3.1.2 Telling the Claimant to ask customers for an additional delivery charge when the customers lived far away, but then the Respondents keeping the additional charge, rather than paying the Claimant his additional fuel expenses;

82. The burden was on the Claimant to establish this allegation and he did not satisfy the burden on him. This allegation did not feature in his witness statement, nor did it feature in the hearing nor was there any contemporaneous evidence to support it.

3.1.3 Cutting the Claimant's hours when work was quiet.

83. The Tribunal accepts that there were occasions when the restaurant was quiet when the Claimant was not required to work and therefore was pay less if he had worked a full shift. We did not find that he had been guaranteed hours, nor that it had been agreed that he would be paid even he did not work the hours.

84. To repeat, we have not concluded that the Second Respondent was aware of the Claimant being autistic. In any event the actions for the Respondents were purely for commercial reasons. In short the Respondents wanted to pay the staff as little as they can get away with. That this fell below the minimum wage, we have addressed and compensated the Claimant for under a different head of claim.

Direct Age Discrimination

5.1 The Claimant relies on being a young person

85. The Tribunal accepted in general terms that the Claimant was young person. At the material time he was in his early 20s.

5.1 Did the Respondents treat the Claimant less favourably than they did treat or would have treated an old person by doing the following:

5.1.1 mocked him for being like an old man?

86. Beyond an initial reaction of amusement to the Claimant turning up with a walking stick, we did not find that the Claimant has proven express language connecting this to his age. The witness statement says that they were laughing and the reaction was amusement, but no speech is set out. We formed the impression from the Claimant's witness statement "When I first arrived at work" suggests that this was an initial reaction rather than protracted mockery.

5.2. The Claimant relies on a hypothetical old comparator.

5.3 If so, has the Claimant shown facts from which the Tribunal could conclude that the Respondents discriminated against the Claimant because of age?

87. We acknowledge the Claimant's point that an older colleague may have experienced a different reaction had they attended work with a wooden walking stick.

88. We have reminded ourselves however following the guidance of the Employment Appeal Tribunal in the case of **Richmond Pharmacology v Dhaliwal** [2009] ICR 724 that Tribunals should not encourage culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.

89. In the case of Mr Leonard nothing was actually said, although we think that the principle in Dhaliwal should hold for a reaction. The Claimant's colleagues could have been more sympathetic rather than reacting with amusement.

90. It is evident that the Claimant did not think the situation was funny. Nevertheless there is a minimum threshold before a tribunal to conclude that unlawful conduct has occurred such that legal liability should be imposed. In the circumstances of this case we do not find that the threshold has been met.

5.4 if so, have the Respondents shown that age was no part of the reason they acted as they did?

5.5 Was the treatment justified?

91. Justification is not part of the defence in this case.

Unlawful Deductions from Wages

6.1 Did the employer Respondent make unlawful deductions from the Claimants wages when it:

6.1.1 Failed to pay him the National Minimum Wage; and

92. The Respondents through their representative rightly conceded that there had been a failure to pay the National Minimum Wage. We formed our own conclusion, quite apart from this concession, that there had been such a failure.

93. The dispute between the parties was over the quantum (i.e. the amount to be paid).

94. As to quantifying this claim, the Tribunal has accepted that the Claimant has correctly stated in his schedule of loss figures that he was paid on 114 days between 1 January 2023 and his last day of work which was 13 May 2023. The total of those payments is £6,850.

95. The Tribunal accepts that under regulation 13 of NWMR 2015 read together with the guidance in the case of **Augustine** the figure paid to the Claimant by his employer should be reduced to take account of expenses paid by him in connection with his employment before considering whether the amount paid fell below the minimum pay threshold. There are two elements which we find were expenses paid by him in connection with his employment.

Deductions/expenses in connection with employment

96. First, was fuel. The Claimant estimates that he spent £25 per day for fuel. We accept the Claimant's evidence that on average he drove one hundred miles per

working day. We should take account of the fact that on most days he did at two round trips of 14 miles (7 miles from home to work, 7 miles from work to home). This is because he returned home after lunch shift and then returned back to work at 5pm. It follows that of the 100 miles he drove, only 72 miles was for work. Based on that mileage, we have concluded that £25 a day is too high, even allowing for the fact that the Claimant may not have had the most efficient vehicle and that diesel costs in early 2023 were fairly high (although such costs had passed the peak of fuel costs in 2022). Doing the best that we can, we consider that **£12.50** a day for fuel for work mileage would be a more realistic estimate of the cost of fuel for 72 miles.

97. Second, was the ULEZ charge. Had this solely been for the purposes of his commute to work, we would have doubted whether this was in connection with his employment. However, the evidence we accepted from the claimant is that most of his deliveries were between 3 – 5 miles from the Respondent's restaurant. We also accepted that he delivered to Tottenham, this is one of the areas within the ULEZ zone, i.e. south of the N. Circular Rd. It followed that the Claimant routinely needed the ULEZ payment in connection with his employment as well as for the commute. The Claimant would only need to make single delivery during a shift to have to pay the ULEZ charge. In the circumstances we find that this item was also an expense paid which was in connection with his employment.

Expenses not in connection with employment

98. There are some other items which the Claimant suggests were expenses in connection with his employment, which we will not allow.

99. First was the £3,000 sum which he expended in December 2022 for insurance. At that time the Claimant was not working for the First Respondent. It seems to us that he must have obtained insurance for that vehicle which he owned, not specifically for employment. We do not see how this figure has been incurred in connection with employment.

100. Other costs include breakdown and repair costs which the Claimant in his claim form suggests represented £5 per day. The Claimant said his oral evidence that he had to replace the tires and he had to replace a door which he kept opening as part of his duties. The Claimant has not provided documentary evidence of these items. We are not satisfied on the balance of probabilities that these were expenses incurred in connection with his employment. They seem to be more properly characterised as general wear and tear costs associated with the ownership of that vehicle.

101. It follows from the above that we find that the claimant *is* entitled to deduct **£25 a day** (£12.50 fuel plus £12.50 ULEZ charge) when assessing whether or not he received the minimum wage.

102. Adding that up for the 114 days that the claimant worked, this represents £1,425 for fuel and £1,425 ULEZ. In the interests of proportionality, and representing the broadbrush nature of this assessment, and the imperfect evidence provided by the Claimant and total absence of evidence provided by the Respondents, the

Tribunal has done the best that we can. We have not tried to vary the fuel allowance by day, since that would make this too complicated an exercise.

103. The net receipt that the Claimant received from his employment, taking account of those deductions is (£6,850 - £1,425 - £1,425 =) £4,000.00.

104. Based on the information provided in the Claimant's schedule of loss, we find that the Claimant worked 776.75 hours in total for the First Respondent.

105. Dividing £4,000 by number of hours gives an hourly rate of £5.15 (£4,000 / 776.75), which is below the minimum wage then in force of £10.18.

106. Had the Claimant been paid the minimum national wage of £10.18 per hour for 776.75 hours, he would have been paid £7,907.32 (i.e. £10.18 x 776.75). The discrepancy between what he should have been paid and his net receipt, i.e. £4,000 is (£7,905.32 - £4,000 =) **£3,907.32**.

6.1.2 Reduced his hours when work was quiet, in breach of his verbal employment contract that he would be employed to work 6 days a week, for the hours 12.00 - 14.30 and 17.00 – 22.00 each day; and failed to pay him for the lost hours?

107. The Tribunal did not find that there was an express agreement for guaranteed hours. When there was a longer shift the Claimant was paid more. When there was a shorter shift the Claimant paid less. This corresponded to how busy the First Respondent restaurant was.

108. While we find that the hourly rate below the national minimum wage, and will order compensation accordingly, we do not find that the Claimant ought to have been paid for hours which he did not work. That was not the agreement.

Written Terms of Employment and Pay Slips

7.1 Did the Respondent fail to provide the Claimant with:

7.1.1 Pay slips;

109. We find that the First Respondent did fail to provide the Claimant with payslips and is entitled to a declaration to this extent.

110. We have not found that there were any unnotified deductions within the last 13 weeks before the claim was presented which ought to lead to compensation in addition to the compensation the claimant will already receive to bring him up to the national minimum wage.

7.1.2 Written terms of employment?

111. We find that the First Respondent did fail to provide the Claimant with written terms.

7.2 Is the Claimant entitled to an uplift of 2 weeks or 4 weeks' pay under s38 Employment Act 2002 for failure to provide written terms of employment?

112. We have taken account of the fact that this was a small takeaway restaurant without any HR function. In the circumstances we have awarded two weeks' pay.

113. We have calculated the weekly pay as the figure that the Claimant should have been paid in total for his employment divided by the 19 weeks he worked to give a weekly figure. £7,907.32 / 19 weeks = £416.17 per week.

114. 2 weeks x £416.17 per week = £832.35.

Notice Pay

8.1 Was the Claimant dismissed without notice, in breach of s86 Employment Rights Act 1996, pursuant to which he was entitled to a week's notice

115. In view of our finding that that the Claimant resigned, this claim does not succeed.

Holiday Pay

9.1 Did the Respondent fail to pay the Claimant his accrued holiday on termination of his employment? The Claimant contends that he was paid no holiday pay at any time.

116. It had not been argued by the Respondents that the claimant was self-employed.

117. We conclude that he was a worker within the meaning of section 230(3)(b) of the ERA.

118. There was an argument developed that the Claimant was merely on probation. We do not see that this was an argument in law that he was not entitled to holiday pay as a worker.

119. The Claimant's entitlement to holiday pay is an arithmetic exercise.

120. He worked for 19 weeks. His minimum entitlement was 28 days annual leave per year. 19/52 x 28 = 10 days (rounded to the nearest 0.5 days).

121. We find that he should be paid for 10 days' holiday pay, which equates to two weeks' pay, calculated as above. 2 weeks x £416.17 per week = £832.35.

122.

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Employment Judge Adkin

Date: 15 July 2024

SENT to the PARTIES ON

19 July 2024

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FOR THE TRIBUNAL OFFICE

Other matters

Public access to employment tribunal decisions
All judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Some reasons having been given orally at the hearing, the parties may apply for written reasons within 14 days of the date of this order being sent to them pursuant to rule 62 of the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013, Schedule 1.