Case Number: 2301356/2021

EMPLOYMENT TRIBUNALS

Claimant: **Mr D Osoja**

Respondents: **Hy-ten Reinforcement Limited**

Heard at: Ashford **On:** 6, 8, 9 June, 25, 26 September 2023
30 October 2023 (in chambers),
21 November 2023 & 17 April 2024

Before: Employment Judge Harrington, Mr S Corkerton and Mr C Rogers

Appearances
For the Claimant: In person
For the Respondent: Mr Williams, Legal Consultant, Peninsula

REASONS FOR JUDGMENTS GIVEN ON 21 NOVEMBER 2023 and 17 APRIL 2024

[All numbers in square brackets refer to pages within the trial bundle.]

Introduction

1 By an ET1 received by the Tribunal on 11 April 2021 the Claimant, Mr Osoja, brings claims of unfair dismissal, an unauthorised deduction from earnings, breach of contract, race discrimination and a claim pursuant to schedule 5 of the Employment Act 2002 against the Respondent, Hy-ten Reinforcement Limited [9].

2 Prior to the full merits hearing in the case, the Tribunal held a number of preliminary hearings.

3 On 8 September 2022 there was a Preliminary Hearing before Employment Judge Corrigan. At that stage a further Preliminary Hearing was listed in December 2022 with a requirement for an Albanian interpreter to attend. The Claimant was also requested to provide some further information [39-43].

4 On 13 December 2022 Employment Judge Corrigan held a further Preliminary Hearing. It was a lengthy hearing with an interpreter in attendance. The Order from this hearing is not included within the hearing bundle but, amongst other directions, it listed a further Preliminary Hearing in March 2023 and the final merits hearing in June 2023. The Case Summary prepared from this hearing set out a number of issues which arise in the claims.

5 On 1 March 2023, the third Preliminary Hearing took place before Employment Judge Barker [57-68]. The Tribunal noted the matters set out in paragraphs 6 and 7 of that Case Management Order including the Claimant's difficulties with reading and writing in English and his health issues [58]. Subsequently, the Claimant suffered a stroke, on 18 May 2023, and he continues to experience symptoms of depression. The totality of these matters informed the Tribunal's handling of this case during the full merits hearing.

6 The hearing was conducted in person at Ashford Employment Tribunal on 6, 8, 9 June, 25, 26 September, with a day for deliberation on 30 October 2023 and a day delivering judgment on 22 November 2023. Following this a remedies hearing took place on 17 April 2024. The Claimant represented himself and the Respondent was represented by Mr Williams. At the liability hearing, the Tribunal heard evidence from Mr Adam Kurszewski, Operations and Health and Safety Manager and Mr Ian Jeffries, Director, on behalf of the Respondent and from the Claimant and his witnesses, Mr Chkelqim Kuqi and Mr Elton Gishti. The Respondent's witnesses and the Claimant provided written witness statements.

7 There were several issues which arose during the course of hearing this case. Those included poor availability of appropriate interpreters which resulted in delays to the commencement of the hearing and to the progression of the hearing. For example, on 9 June 2023, the Tribunal hearing commenced at 1.35pm because of a lack of availability of an interpreter. The Claimant had also not received a copy of the trial bundle or the Respondent's witness statements and additional time was allocated for the Claimant to consider these materials.

8 During the afternoon session on 6 June 2023 the Claimant referred to documentary evidence he sent on a USB stick to the Respondent's representative in Manchester. The Claimant had not kept a copy of this evidence. In the event, it was confirmed that the USB stick was received by the Respondent but that not all of the evidence from that stick had been put into the trial bundle. Accordingly, the Tribunal requested that

the Respondent produce copies of the entirety of the evidence on the stick and this was done on 8 June 2023.

9 Before turning to the Claimant's case, the Tribunal notes that it heard a significant amount of evidence about many matters concerning the Respondent's workplace. For example, Mr Kuqi made allegations about another Albanian man being hurt at work whilst using machinery. Mr Gishti worked for the Respondent for 1 year in 2019 and gave evidence about that time and the Claimant made multiple allegations on a wide range of matters including, for example, a lack of breaks. The Tribunal must consider the claims before it rather than the entirety of the workplace issues raised by witnesses. The Claimant's allegations refer to matters from the year 2020 onwards. It is those claims that the Tribunal must determine by making findings on the issues relevant to those claims.

10 As set out above, the Tribunal was provided with three written witness statements. In addition to those statements, the Tribunal was referred to the following materials:

10.1 A bundle of documents paginated 1 – 244;

10.2 An email received on 8 June 2023 concerning the accident on 25 May 2021;

10.3 Three emails showing messages and screenshots from the Claimant's mobile telephone;

10.4 Documents in a separate purple folder produced from the USB stick.

11 On 26 September 2023 following the conclusion of the evidence on liability, both parties made brief closing submissions. The Tribunal sat for a further day on 30 October 2023 in chambers. It was on that day that the Tribunal deliberated and decided the case.

12 The issues in the case are as follows:

1. Unfair Dismissal

1.1 Was the Claimant dismissed?

1.2 Did the Respondent do the following things:

1.2.1 The respondent refused a number of the claimant's summer holiday requests including in 2021 when the respondent initially lost the request and then refused the request (some of the claimant's requests were because he wanted to take his children home to Albania during his allotted two weeks of the school holiday under a shared parenting arrangement);

1.2.2 Ian Jennifer, described by the claimant as 'the boss', often said he would buy the claimant a one way ticket home to Albania (in response to the claimant raising issues about his rights). Ian Jennifer was the name used by the claimant and so I have used that here but it appears from the response that the correct name maybe Ian Jefferies;

1.2.3 In March 2020, when the claimant had tonsillitis at the beginning of the pandemic, he asked the respondent for masks and Ian Jennifer responded with offensive comments and language about Albanian people including

1.2.3.1 that they are only motivated by money;

1.2.3.2 that they are faking it when they are ill

1.2.3.3 that they are 'disgusting'

1.2.3.4 that they want to destroy the company

1.2.3.5 that the claimant and other Albanians are 'murderers, thugs and involved in prostitution';

1.2.4 The respondent failed to pay the claimant in accordance with a furlough agreement for the period March-August 2020, which said that the claimant would be furloughed at 80% of his salary;

1.2.5 Instead, the respondent did not pay the claimant during the furlough period unless he in fact worked and he was only given 8 hour shifts on 2-3 days a week, working at night, whereas others were given more work including daytime hours? This was a substantial reduction in his contractual hours and pay;

1.2.6 Did the Respondent refuse to allow the Claimant to return to work in August / September 2020 despite the Claimant testing negative for Covid 19, allegedly because the Claimant had recently returned from Albania;

1.2.7 Ian Jennifer insisted the Claimant come to work when he had covid in January 2021, and accused him of faking having covid;

1.2.8 Before the claimant decided to leave his employment the respondent gave him a contract that stated his hours were 7.30am – 4 pm which did not reflect his true hours of work of 6am-6pm and 6am-3pm and Saturday 6am to 11am and meant he was not entitled to a bonus and overtime;

1.2.9 In March 2021 the claimant requested an improvement generally in the above conditions or he would resign, and the respondent's response was that he could resign;

1.2.10 The Claimant requested a meeting with the CEO of the respondent in an attempt to discuss the ongoing issues set out above but the respondent's management refused to meet him;

1.2.11 The respondent did the above conduct because of the claimant's race (see the race discrimination claim below).

1.3 Did some or all of the above conduct by the respondent breach the implied term of trust and confidence? The Tribunal will need to decide:

1.3.1 whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent, and

1.3.2 whether it had reasonable and proper cause for doing so.

1.4 Did some or all of the above conduct breach another term of the contract?

1.5 Was the breach a fundamental one? The Tribunal will need to decide whether the breach was so serious that the claimant was entitled to treat the contract as being at an end.

1.6 Did the Claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.

1.7 Did the Claimant affirm the contract before resigning? The Tribunal will need to decide whether the Claimant's words or actions showed that they chose to keep the contract alive even after the breach.

1.8 If the Claimant was dismissed, what was the reason or principal reason for dismissal i.e. what was the reason for the respondent's breach of contract?

1.9 Was it a potentially fair reason?

1.10 Did the Respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the Claimant?

3. Direct race discrimination (Equality Act 2010 section 13)

3.1 The claimant is Albanian.

3.2 Did the respondent do the following things:

3.2.1 The claimant relies on the same treatment as that relied on for the constructive unfair dismissal claim and in addition the following;

3.2.2 Ian Jennifer said the claimant was 'faking it' when, following a fall from his machine on 25 May 2021, the claimant broke his ribs and had to have a week off work.

3.3 Was that less favourable treatment? The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether s/he was treated worse than someone else would have been treated.

The claimant says he was treated worse than actual comparators who are Greek and who he says were treated better than he was. He did not

explicitly compare himself to a British or UK comparator though my view was that he did do so implicitly as he make repeated reference to being treated as he was because he was a foreigner and that a British / UK worker would not work in these conditions, they would be able to find a better job.

The Respondent objects to a UK comparator on the basis the claimant did not explicitly say this was his case and restricted the express comparison to his actual Greek colleagues. The question of the correct comparator is therefore a matter in dispute.

It was confirmed at the beginning of the hearing, that the Claimant wished to rely upon a hypothetical comparator of a UK national.

3.4 If so, was it because of race?

5. Unauthorised deductions / breach of contract

5.1 Did the Respondent make unauthorised deductions from the Claimant's wages and if so how much was deducted?

5.1.1 did the Respondent fail to pay the Claimant his contractual pay between March and August 2020?

5.1.2 did the Respondent fail to pay the Claimant his bonus throughout his employment?

5.1.3 did the Respondent fail to pay the Claimant overtime throughout his employment?

5.2 Was any deduction required or authorised by statute?

5.3 Was any deduction required or authorised by a written term of the contract?

5.4 Did the Claimant have a copy of the contract or written notice of the contract term before the deduction was made?

5.5 Did the Claimant agree in writing to the deduction before it was made?

6 Breach of Contract

6.1 Did this claim arise or was it outstanding when the Claimant's employment ended?

6.2 Did the Respondent do the following:

6.2.1 fail to pay the Claimant his contractual pay between march and August 2020?

6.2.2 did the Respondent fail to pay the Claimant his bonus throughout his employment?

6.2.3 did the Respondent fail to pay the Claimant overtime throughout his employment?

6.3 Was that a breach of contract?

8 Schedule 5 Employment Act 2002 cases

8.1 When these proceedings were begun, was the respondent in breach of its duty to give the claimant a written statement of employment particulars or of a change to those particulars?

8.2 If the claim succeeds, are there exceptional circumstances that would make it unjust or inequitable to make the minimum award of two weeks' pay under section 38 of the Employment Act 2002? If not, the Tribunal must award two weeks' pay and may award four weeks' pay.

8.3 Would it be just and equitable to award four weeks' pay?

13 It was confirmed by the Claimant during the hearing that the only pay claim he proceeded with (as referred to in paragraphs 5.1 and 6.2 above) was in relation to his bonus. The Claimant confirmed that he pursued a claim for a bonus payment he says should have been paid to him for the period 21 May 2020 to August 2020.

The Facts

14 The Claimant is of Albanian origin and his primary language is Albanian. The Claimant was employed by the Respondent as a semi skilled machine operator / labourer from 19 May 2014. Whilst the written particulars of employment refer to dates in 2015 and 2016 [69, 71], the Tribunal was satisfied that it was more likely than not that the Claimant was employed by the Respondent from 2014. In reaching this finding, the Tribunal referred to the following matters:

14.1 It was agreed by the parties that the Claimant had suffered a personal injury to his ankle whilst employed by the Respondent in 2015. This was the subject of a successful claim.

14.2 The Tribunal noted that the Claimant had signed a letter, whilst employed, dated 8 January 2015 which referred to the possibility of people being temporarily laid off because of a low demand of orders [111].

14.3 The evidence about the commencement of the Claimant's employment included in the Respondent's witnesses' statements was incorrect. Both the Respondent witnesses' statements state that the employment began from 19 May 2021, which is obviously after the Claimant signed to confirm he was resigning in March 2021 (see paragraph 4 of Mr Jeffries statement and paragraph 1 of Mr Kurszewski's statement).

14.4 The Claimant was also issued with a handbook. The record of this refers to the Claimant being issued with Issue 3 [72]. Issue 3 is not contained in the bundle but from page 74 we understand that issue 3 was produced in February 2016.

15 The Claimant was issued with a Statement of Main Terms of Employment and signed to confirm receipt of this on 4 January 2016 [69-71]. Within that Statement were the following provisions:

Hours of Work
Your normal hours of work are recorded as 39 hours per week, Monday to Friday with a 15 minute paid break in the morning, a 30 minute unpaid break at lunch. You may also be required to work additional hours (Monday to Friday and Saturday) when authorised and as necessitated by the needs of the business.

Remuneration
Your wage is currently £7.59 per hour payable weekly in arrears by credit transfer as detailed on your pay statement. For additional hours worked, you will be paid at 1.5 x your basic rate of pay. Your wage will be reviewed along with your performance following three months of continuous employment.
[69]

16 The Respondent is a stockist and fabricator of concrete reinforcement bars, mesh and accessories. The Claimant worked in the Respondent's factory in Chatham ('the factory') which is part of a nationwide network of 13 manufacturing centres providing building and civil engineering services. Within the Respondent's ET3 [21], it is confirmed that the Respondent employs 350 people in Great Britain and 70 people at the Chatham site. The factory operated a two shift system – a day and a night shift. Approximately 35 employees worked on the day shift with 13 employees allocated to office duties and 7 lorry drivers. The remaining employees were on the night shift.

17 The relevant managers at the site included Brian Clark, Supervisor / Foreman, Adam Kurszewski, the then Health, Safety, Quality and Environment Manager and Ian Jeffries, Director.

18 The Claimant and other employees were required to clock in and out when working. The information from the clocking in and out was then downloaded onto a pay sheet and, in turn, put into a spreadsheet. That document was sent to the Bootle depot, where the payment of the wages was organised. As confirmed by the Respondent's witnesses, the pay sheet and spreadsheet could be changed manually by those with access to it. This included Mr Jefrries and Mr Kurszewski.

19 The employees were required to work 39 hours per week and some Saturdays and Sundays. Overtime was regarded as mandatory.

20 Whilst hearing this case and when considering its findings on issues such as the payment of bonus, the booking of annual leave and the training of employees, the Tribunal regarded the absence of appropriate documentary evidence from the Respondent to be

remarkable. For example, the Tribunal was not provided with any documentary evidence setting out policies relating to the payment of a bonus, records showing requests for and confirmation of annual leave and training records. To have no holiday records of any sort, no training records of any sort, no copies of holiday request forms, no copies of annual diaries showing bookings for annual leave and having only incomplete payslips provided for the Claimant was extremely surprising, particularly if account is taken of the size of the Respondent's undertaking. It was known from the Case Summary produced in March 2023 that the issue of pay for the period March to August 2020 was relevant however the Respondent did not even provide a breakdown of payments made to the Claimant during that period and what entitlement there might have been to bonus payments during that time.

21 On balance, the Tribunal concluded that the Respondent business fails to keep proper records relating to its employees.

22 As at March 2020, the Respondent's workforce included a number of employees with different nationalities. The Claimant referred to himself being an Albanian, that he had fellow Albanians working alongside him and there were other nationalities, for example, a polish employee. This finding is also supported by the list of the workforce showing a number of different nationalities [160-161].

23 It is also relevant to note that in March 2020, the Claimant was beginning to encounter some difficult personal issues including health issues and difficulties with his personal finances.

24 On a date in March 2020, after the commencement of the Covid-19 pandemic, the Claimant attended for work feeling unwell. Having heard evidence about this incident from three witnesses the Tribunal is satisfied, on the balance of probabilities of the following matters:

24.1 Upon arriving at work on the material day, the Claimant made it known that he had some symptoms of ill health and he was coughing.

24.2 The Claimant was required to speak with Mr Jeffries who was extremely concerned that the Claimant had arrived for work when he might have Covid-19.

24.3 During a conversation between the Claimant and Mr Jeffries, Mr Jeffries lost his temper. The meeting became extremely heated, with Mr Jeffries shouting and swearing at the Claimant.

24.4 The conversation was witnessed by Mr Kurzsewski, Mr Clark and a couple of other employees.

24.5 Mr Jeffries also made comments that the Claimant was motivated by money, that the Claimant might be faking his ill health, that it was

disgusting that he had attended work and was coughing and that the Claimant's conduct risked destroying the company and 'shutting me down'. In reaching these findings the Tribunal took into account the fact that Mr Jeffries felt the need to telephone and apologise later that day (see below); his conduct was such that it prompted him to do so on the same day. The Tribunal was satisfied that Mr Jeffries behaviour was therefore far outside of the boundaries of a more typical robust workplace exchange.

25 The Tribunal was not satisfied that Mr Jeffries made the last comment identified by the Claimant at paragraph 1.2.3.5 of the List of Issues. The Tribunal did not find that Mr Jeffries had said during this heated exchange that the Claimant and other Albanians are 'murderers, thugs and involved in prostitution'.

26 In reaching these findings the Tribunal reminded itself that the heated conversation was, of course, not in the Claimant's first language. The Tribunal also noted that the Claimant accepted an apology Mr Jeffries made later (see further, below). The Tribunal concluded that the Claimant was content to accept the apology because, whilst some hurtful comments were made, the comments were not as extreme as those suggested in paragraph 1.2.3.5.

27 Following the exchange with Mr Jeffries, the Claimant went to hospital. Following that, the Claimant then forwarded details of what the doctor had said, to Mr Jeffries. In short, the Claimant was diagnosed with tonsillitis. Later that day, Mr Jeffries telephoned the Claimant to apologise for losing his temper and for the language he had used in the exchange. That conversation lasted for around 15 minutes with the Claimant accepting Mr Jeffries' apology.

28 The Claimant remained off work, unwell and this absence continued on 27 March 2020. The relevance of this date is that it is the date of a letter from Mr Jeffries to the Claimant. The letter refers to a discussion held on that day and the fact that the Claimant was being placed on furlough with effect from 30 March 2020. The letter goes on to detail that the Claimant will receive 80% of his salary package subject to the stated maximum [128].

29 It is of some concern that Mr Jeffries signed this letter in what must have been the full knowledge that the Claimant had not been at work on that day and had not taken part in the discussion referenced.

30 It is equally of concern that the Respondent accepts that the Claimant was never actually put on furlough but that no further letter was sent to the Claimant to confirm what the position was or how he might be affected financially.

31 The Tribunal accepts Mr Jeffries account that at around this time it was then decided that the factory in Chatham would not close, although a

number of the Respondent's other factories did. The plan changed, with all employees on the factory floor continuing to work in their usual role, save for two or three employees who would be temporarily laid off.

32 Consistent with the Respondent's poor record keeping, no records were apparently kept concerning Mr Jeffries choice of which employees were to be laid off. There was no written criteria applied but rather what seemed to the Tribunal to be a highly discretionary selection made on who Mr Jeffries considered to be the best or top operators. This finding was supported by the evidence from Mr Kuszewski that he didn't know why certain employees had been laid off and Mr Jeffries' evidence that he was unable to remember the details of who he laid off other than the Claimant. It is clear, of course, that the Claimant was laid off and that he was not given any clear information about this decision and its effect on his pay.

33 The Tribunal did not find that Mr Jeffries selected employees for being laid off based upon their nationality. The Claimant himself referred to another affected employee as being Polish.

34 In the event the Claimant was laid off for three weeks (weeks commencing 5, 12 and 19 April 2020) and suffered a loss of income. The extent of the loss of income is unknown as the payslips for weeks commencing 12 and 19 April 2020 were not included within the bundle [185].

35 It was at around this time that the Claimant was also subject to an individual voluntary arrangement ('IVA') due to his personal financial situation. The Claimant had been advised that whilst being subject to this arrangement, it would be advantageous for him to limit the amount he was earning. He therefore advised the Respondent that for the months of April, May, June and July 2020, he was unable to work overtime.

36 In the weeks that followed, the Claimant was confused about the monthly pay he was receiving. He wanted some information about why he was being paid the amounts he was receiving and why it appeared that certain monies were being withheld in addition to the limitation he, himself, had put on what he was able to earn during this period.

37 The Tribunal is satisfied that the Claimant attempted to contact personnel within the Respondent company to discuss this issue. This included telephoning the Respondent's head office to try and receive a full explanation concerning his pay. An email sent to Mr Michael Shattock on 13 July 2020 referred to this contact as follows,

'The man that work at Chatham has called again regarding his wages – he wants to know why they were stopped.

He want to complain about Ian as he will not speak with him.' [131]

38 Following Mr Shattock making direct contact with Mr Jeffries, Mr Jeffries held a meeting with the Claimant on 14 July 2020. Notes of that meeting appear in the bundle [132]. During the meeting the Claimant raised the issue that he had been laid off '*about 10 weeks ago'* [132]. According to the notes of the meeting, there then followed a discussion about the Claimant being put on furlough. Mr Jeffries is recorded as saying,

'During Furlough were you withheld any money?' [133]

That was an odd thing for Mr Jeffries to say because he knew that the Claimant had not been put on furlough. Such a question would obviously not assist with clarifying the Claimant's situation to him or the question of why he had been paid certain amounts. At no stage during the meeting was an explanation provided to the Claimant about his lay-off and how this and his request not to work overtime had affected his pay.

39 Later during the meeting Mr Jefferies stated that he would put in writing '*exactly why you are not being paid any bonus…*' [134]. As a matter of fact, and as agreed by Mr Jeffries in his evidence to the Tribunal, that written explanation was never provided to the Claimant.

40 The meeting came to an end with a suggestion from Mr Jeffries that the Claimant set out in writing his financial situation and the reason he was unable to work certain hours and a proposal. Mr Jeffries stated that he would then pass that communication onto the legal team who could give advice [134-135].

41 The Claimant provided a letter as requested [130]. However, no response to this letter was provided by the Respondent. The Tribunal notes in the letter from the Claimant that he refers to not wanting to work overtime from 27 March 2020.

42 In the event, in the week after the meeting on 14 July 2020, the Claimant began to work overtime.

43 With regards to the bonus payments made by the Respondent, as already noted, there was no written bonus policy or written rules for when a bonus was paid. Furthermore, there were no written records provided documenting why a bonus was or was not awarded.

44 The Tribunal made the following findings:

44.1 The payment of a bonus was entirely a matter of managerial discretion; Factors relevant to the exercise of that discretion included:

a) The amount of material produced within the week and the hours worked that week. A calculation would be made as to the amount of tonnage produced and the hours and overtime worked.

b) Whether an employee had refused to work overtime.

c) Whether an employee had taken any time off work.

44.2 Various descriptions were made of the bonus payment which added to the lack of clarity as to when an employee would be entitled to a bonus. For example, in one of the documents produced by the Respondent there is reference to 'Supervisor bonus', 'All bonuses', Portion of target and attendance bonus', 'Full production bonus' and 'Target bonus [166];

44.3 The bonus payments, when made, were made on a weekly basis.

45 The Claimant chose not to work overtime from March 2020 until after the meeting in July 2020.

46 In August 2020 the Claimant took some annual leave and travelled to Albania. On or around 27 August 2020 he returned to the UK. Messages between the Claimant and Mr Jeffries were exchanged on 31 August 2020. The Claimant was reporting that he had done a Covid test which was negative and he asked whether he was allowed to return to work the following day [138]. By a message sent later that day at 12.36 Mr Jeffries stated,

'The government website says you must self isolate for 14 days, so no work for 2 weeks' [140]

The Claimant responded,

'Yes for me is not problem….' [140]

47 The Tribunal was satisfied, and found as a fact, that Mr Jeffries had checked the government website at that time and understood that Albania was in a zone which required a person to isolate for two weeks upon their return to the UK. This finding was supported by the text set out above and a further text within that conversation which read '*Just reading it…*' [140]. The Tribunal found that it was more likely than not that Mr Jeffries had sent this text because he was reading and consulting the government website and, accordingly, the Claimant was not allowed to return to work for two weeks because of the information included on the website. It was not a decision that the Respondent took against the Claimant on personal grounds.

48 Whilst the Claimant has entirely disputed that Albania was in a red zone requiring this level of restriction upon return to the UK, the Tribunal was not provided with any documentary evidence to support this assertion.

In support of his contention that the Respondent was preventing him personally from coming back to work rather than it being a government rule in respect of travel to Albania, the Claimant has referred to his colleague, Sajmir Tafilaj, who the Claimant asserts also went to Albania but returned to work immediately upon his return. However the Tribunal accepted Mr Jeffries evidence that Mr Tafilaj had reported that he had stayed in the UK during this annual leave and therefore no similar restrictions were applicable to his return to work.

49 Around 22 December 2020, the Claimant became unwell with Covid. From some of the additional material seen by the Tribunal, it is clear that the Claimant did his Covid test on 4 January 2021 and that he received a text result of that test on 5 January 2021. The Claimant sent photographs to Mr Jeffries of the record of test and the result on 4 January 2021 at 8.33 am and on 5 January 2021.

50 At around this time the Claimant also had a telephone conversation with Mr Jeffries and told him he was positive. The Claimant says that Mr Jeffries said that he should come back to work and that he made a comment about Albanian people wanting longer holidays. The Claimant also said that Mr Jeffries accused him of faking his Covid test result.

51 On balance, the Tribunal did not accept the Claimant's account of this telephone conversation. The Tribunal concluded that it would be entirely inconsistent with Mr Jeffries attitude to the pandemic, as demonstrated in the incident in March 2020, if he had demanded the Claimant attend for work notwithstanding a positive Covid test. Furthermore, in the event, it is clear that the Claimant did not attend for work and only returned around 17 January 2021, after testing negative. There would also be no basis for suggesting that the Claimant was faking the test result when there were text communications to confirm both the taking of the test and the results.

52 The Respondent's system for booking annual leave was that an employee would be required to complete a holiday request form which was handed to an appropriate manager and then holiday would be approved on a first come, first saved basis, with the business not being able to accommodate more than two employees away for the same period of time.

53 In or around January 2021, the Claimant made a request for some annual leave. He did this by completing a holiday request form that he obtained from Brian Clark, completing it and handing it back to Mr Clark. Shortly thereafter, the Claimant was told that the form had been lost and so he completed a second form. It was after he completed the second form that he was notified by Mr Clark that his request had been refused. The Claimant was told that others had booked leave at that time.

54 The Claimant had never had a request for leave refused. His personal circumstances were such that he was very focused on taking a holiday

during the period requested. He was restricted in the time he was able to go on holiday with family and he had already made the relevant travel bookings and bought travel tickets. A few weeks after his request for leave had been refused, the Claimant discussed the issue in a face to face conversation with Mr Jeffries. Mr Jeffries told the Claimant that he could not take his holiday on the dates requested.

55 It was stated in broad terms by the Respondent's witnesses that the Claimant's request for annual leave was refused because two other people had already booked off the days the Claimant was requesting. The Tribunal has not been provided with copies of any relevant holiday request forms or logs of annual leave requests made, granted and the dates of those. In short, there is absolutely no documentary evidence to support the contention that other employees had already been allocated leave on the relevant dates and the Respondents witnesses did not provide details on this point during their oral evidence, for example, the names of the employees already given leave and the dates when their requests had been made and approved.

56 It was in response to Mr Jeffries refusal to approve the Claimant's request for annual leave that the Claimant said he would resign his employment, with his last day at work being 31 July 2021.

57 Following this, Mr Jeffries asked Mr Kursezwski to prepare a letter to confirm the Claimant's resignation. This was produced dated 12 March 2021 [155] and it was presented to the Claimant who signed it, as requested.

58 On 25 May 2021 the Claimant had an accident at work. This was following his resignation but before his final day at work for the Respondent. The Claimant asserted that Mr Jeffries had said that he was 'faking it' in respect of injuries sustained in the accident. In explaining this assertion, the Claimant told the Tribunal that Mr Kursewski had told the Claimant that that was what Mr Jeffries had said to him.

59 The Tribunal accepted Mr Kursewski's account in respect of this matter that this was not a comment made by Mr Jeffries to him and, in fact, at the time when he was discussing the accident with the Claimant, he had not actually spoken with Mr Jeffries about it and so would not have been able to pass on a comment made by him. The Tribunal also accepts Mr Kurszewski's evidence that CCTV footage established that the Claimant had not been using the correct walkway at the time of the accident and this led to him slipping and sustaining an injury.

Legal Summary

Unfair Dismissal

60 A termination of the contract of employment by the employee will constitute a dismissal within the Employment Rights Act 1996 if he or she is entitled to so terminate it because of the employer's conduct. This is known as a 'constructive dismissal'.

61 In order for the employee to be able to claim constructive dismissal, four conditions must be met. Firstly, there must be a breach of contract by the employer. This may be either an actual breach or an anticipatory breach.

62 As the Court of Appeal made clear in Western Excavating (ECC) Ltd v Sharp [1978] ICR 221 it is not enough for the employee to leave merely because the employer has acted unreasonably; its conduct must amount to a breach of the contract of employment.

63 The Tribunal must reach its own conclusion on the question of whether there has been a breach of contract.

64 In the case of Malik v Bank of Credit and Commerce International SA [1997] IRLR 462, [1997] ICR 606. The House of Lords held as follows:

"The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

65 Further guidance on this issue was given by the EAT in Leeds Dental Team Ltd v Rose [2014] IRLR 8, *EAT*. As Judge Burke put it:

"The test does not require a Tribunal to make a factual finding as to what the actual intention of the employer was; the employer's subjective intention is irrelevant. If the employer acts in such a way, considered objectively, that his conduct is likely to destroy or seriously damage the relationship of trust and confidence, then he is taken to have the objective intention spoken of…"

66 The other conditions to be satisfied are as follows:

i) The breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidents which justify his leaving.

ii) He must leave in response to the breach and not for some other, unconnected reason.

iii) He must not delay too long in terminating the contract in response to the employer's breach, otherwise he may be deemed to have waived the breach and agreed to vary the contract.

67 There is no fixed time within which the employee must terminate the contract and so a delay per se will not amount to affirmation in law, albeit it will often be an important factor: Chindove v William Morrison Supermarkets Ltd UKEAT/0201/13 (26 June 2014, unreported). A reasonable period is allowed. It depends upon all the circumstances including the employee's length of service, the nature of the breach, and whether the employee has protested at the change.

68 The key point is that it remains a question of fact and degree for the tribunal. Giving longer notice in itself constitutes offering continued performance, which can look like affirmation, but it may then be necessary to consider *why* the extra notice was given. An employee is not debarred from claiming constructive dismissal merely by giving longer notice than the contract requires.

69 If an employee leaves his employment in circumstances where the conditions for constructive dismissal are not met, he will be held to have resigned and there will be no dismissal within the meaning of the legislation at all.

Direct Discrimination

70 The Equality Act 2010 defines direct discrimination generally as less favourable treatment 'because of a protected characteristic', (section 13).

71 It has been stated that there are two elements in direct discrimination: (1) the less favourable treatment, and (2) the reason for that treatment.

72 The issue, then, is one of less favourable, not merely different, treatment. Whether it is capable of amounting to 'less favourable treatment' is a question for the tribunal to decide:

73 Establishing less favourable treatment will not be sufficient: for the claim of direct discrimination to be made out, the conduct complained of must be on the prohibited ground. This is expressed in the Equality Act 2010 as ‘because of’.

74 In other words, the reasons for the conduct in issue must be determined and in order for a claim to succeed, it needs to be because of the prohibited ground in issue.

Unauthorised Deduction from Earnings

75 No deductions from a worker’s wages may be made unless it is required or permitted by a statutory or contractual provision or the worker has given his prior written consent to the deduction (ss.13(1), 15(1) ERA 1996). It is extremely important that deductions are not made in breach of this provision and any sums wrongfully deducted may be ordered to be repaid.

Tribunal's Conclusions

76 In reaching its conclusions, the Tribunal considered each of the issues which required determination in light of the findings of fact.

Unfair Dismissal

77 With regards to the issues set out in paragraph 1.2 of the List of Issues [63], the Tribunal has found that there was an incident in March 2020 during which Mr Jeffries lost his temper, shouted at and swore at the Claimant. As stated, he later apologised for this incident.

78 The Tribunal has also found that the Respondent failed to pay the Claimant a bonus payment to which he was entitled from the end of July 2020 until the end of August 2020.

79 Further, the Tribunal has found that the Respondent failed to fully and properly consider and decide upon the Claimant's request for annual leave in 2021.

80 Next, the Tribunal had to consider whether any of these matters amounted to conduct by the Respondent which breached the implied term of trust and confidence. Following careful consideration, the Tribunal was satisfied that the Respondent's conduct in respect of the Claimant's request for leave did amount to a fundamental breach of the implied term of trust and confidence but that the other matters did not.

81 The Claimant was a long standing employee of the Respondent and it is to be expected that, as his employer, the Respondent had a broad understanding of the Claimant's circumstances including his personal financial issues. The Claimant was entitled to expect that the Respondent would fully consider the request which would include an examination of any other requests which had been made for the same period of leave and identifying if there was an option of the Claimant being granted his leave request. On the evidence presented, the Tribunal was not satisfied that the Respondent properly considered it.

82 In the circumstances, the Tribunal concluded the Respondent's conduct amounted to a breach of the implied term and that the breach was a fundamental or repudiatory breach. The Respondent refused the Claimant's request for leave in a capricious and unfair way. In addition to pay, an employee's rights to annual leave are a central and fundamental part of the contract of employment. By this conduct the Respondent acted entirely in breach of its obligations in this regard.

83 The Claimant did resign in response to the breach. His resignation came immediately in response to Mr Jeffries confirming that the leave request was refused.

84 On balance, whilst the Claimant gave a lengthy notice period, the Tribunal did not consider that this meant that the Claimant had waived or affirmed the Respondent's breach. Whilst such a delay could look like affirmation, the Tribunal has considered why the notice was given. It was given in circumstances where the Claimant made it abundantly clear how he viewed the refusal of his leave request (in this way, he could be deemed to have worked under protest) and his circumstances were such that he needed to continue earning money.

85 Accordingly, the Tribunal's conclusion is that the Claimant was constructively dismissed. The principal reason for his resignation was the Respondent's fundamental breach of contract in failing to properly consider his request for annual leave. There was no potentially fair reason for the dismissal and the Respondent did not act reasonably in all the circumstances. In fact, it is noted that the Respondent did not actually present an alternative case that if the Claimant was dismissed, it was for a potentially fair reason and was a fair dismissal.

86 The Tribunal finds that the claim of constructive unfair dismissal is well founded and it succeeds.

Race Discrimination

87 The Tribunal has made findings that the Respondent did three things as alleged in the claim of constructive unfair dismissal – those are the incident in March 2020, the failure to pay a bonus payment for a period of approximately 4 weeks and a refusal to properly consider a request for leave.

88 The Tribunal was not satisfied that any comments were made, as alleged by the Claimant, about the Claimant being Albanian or general comments about Albanian people or the Respondent's Albanian employees.

89 Furthermore, with regards to the issue set out in paragraph 3.2.2 of the issues [66], the Tribunal was not satisfied that Mr Jeffries made a comment about the Claimant 'faking it' in respect of the accident at work which occurred on 25 May 2021.

90 On the basis of those findings, the Tribunal is required to consider whether the matters it has found proven, amounted to less favourable treatment and if so, whether the treatment was because of race.

91 The Tribunal was not satisfied that the protected characteristic relied upon, namely that of race, was the cause of the treatment found or that it had a significant influence upon the cause of the treatment.

92 When considering the question of why the Claimant received the treatment he did, the Tribunal was not satisfied that it was on racial grounds. Mr Jeffries conduct in March 2020 was caused by the extreme

concern raised by the pandemic and how that affected everyone and the business. It does not state matters too highly to say that people were in fear of their lives and it is the Tribunal's conclusion that it was this highly charged environment which was the likely cause of Mr Jeffries outburst and inappropriate behaviour. The issues of failing to pay bonus and failing to properly consider a request for annual leave were considered by the Tribunal as examples of the poor, capricious and highly discretionary managerial environment in place at the Respondent company. The lack of availability of a clear written policy for these matters encouraged an environment of managers making individual decisions based on subjective reasoning and adopting a generally inconsistent approach. However there was no evidence to suggest that the reason for this approach was the grounds of race.

93 The Tribunal was not satisfied that the Claimant was treated less favourably than a hypothetical employee of British nationality would have been treated and it was not satisfied that the grounds for the treatment complained of was race.

94 Accordingly the claim of race discrimination is not well founded and it is dismissed.

Unauthorised deductions

95 Whilst the Claimant has referred to a time period of March until August 2020, it is clear that the Claimant removed himself from working overtime until after 14 July 2020 meeting because he wanted to limit his earnings due to being in an IVA arrangement.

96 From the week ending 23 July 2020 until the week ending 20 August 2020 (a five week period), the Tribunal is satisfied that the Claimant worked overtime and that he was entitled to a bonus payment for these weeks on that basis and because the team met any required production targets. In reaching this conclusion, again the Tribunal noted no evidence to suggest that targets had been missed during this time (either oral evidence or documentary evidence). Accordingly bonus payments should have been paid for the weekly pay shown on the payslips at pages 199 – 203. The claim for an unauthorised deduction from earnings is therefore well founded and succeeds.

97 It has been challenging for the Tribunal to determine the level of the bonus withheld. Again, this is primarily due to the vagaries of the bonus system and the lack of clear oral evidence on this matter and any documentary evidence. In the circumstances, the Tribunal considered it was appropriate to review bonus payments made to the Claimant for earlier weeks. Reviewing the payslips for a ten week period (covering a number of weeks in January, February and March 2020) [173-182], the total amount of bonus paid was £1,469.28 or, an average of £147.00 per week and it is this weekly figure which the Tribunal quantifies as the

Claimant's loss per week, for the five week period 23 July 2020 until 20 August 2020.

Remedy

98 As stated in the paragraph 97, the Tribunal was satisfied that the Claimant's claim for an unauthorised deduction from earnings succeeded. This was calculated in the total sum of £735.00.

99 On 17 April 2024 the Tribunal was required to consider the remaining remedy issues. As set out above, the Claimant resigned from his employment in March 2021 and gave notice that his last day at work would be 31 July 2021. The Claimant did not make any attempts to search for a replacement job during that period of time.

100 On 1 August 2021 he travelled to Albania on a planned holiday with his son. In the event he returned to the UK on 31 August 2021 or 1 September 2021. This included a further two weeks away in addition to the fortnights holiday originally planned by the Claimant whilst he was in the Respondent's employ.

101 During September 2021 the Tribunal is satisfied, on the balance of probabilities, that the Claimant worked for approximately 1 week at a friend's car wash without payment. The Tribunal noted the witness statement from Mr Clark which referred to him seeing the Claimant at the car wash on 'multiple occasions' [32]. However Mr Clark has not been called as a witness today and there are no particulars included in the statement as to the dates he saw the Claimant or over what period of time he had these encounters. Furthermore, the Claimant has given evidence that he did help for a short period of time on a voluntary basis and this evidence was not challenged by Mr Williams when he cross examined the Claimant on behalf of the Respondent.

102 Accordingly the Tribunal has accepted the Claimant's evidence on this point, on the balance of probabilities.

103 From September – December 2021 the Claimant claimed Universal Credit. This required him to attend the jobcentre for 1 hour on a fortnightly basis. From October 2021 the Claimant moved to stay with his brother in Hitchin. At that time, he drove on a fortnightly basis back to Kent to attend the jobcentre and see his son.

104 From September – December 2021 the Claimant has stated that he applied for 1 job which was in the Amazon warehouse. His application was unsuccessful due to poor English language skills. There is no evidence that he applied for any other jobs, registered with job agencies or made any attempts personally to attend prospective employers to enquire about opportunities.

105 The Claimant told the Tribunal in his oral evidence that when he was living with his brother from October 2021 he was very depressed and was abusing drugs and alcohol and that he was gambling. The Tribunal is obviously aware that these were habits that the Claimant indulged in, in 2020. The Tribunal accepts that, on the balance of probabilities, the Claimant was abusing drugs and alcohol at this stage but the Tribunal is entirely satisfied that this was not to a level which significantly affected his function. The Claimant was still able to plan his journeys to Kent, make arrangements to see his son, ensure he kept appointments at the job centre, take part in the application process for the Amazon position and drive which, of course, required him to maintain his car. He was also fit to attend an interview in early December 2021, as referred to in the following paragraph.

106 The Claimant was contacted in December 2021 by an old acquaintance who had also previously worked for the Respondent. He now works for a different company. He notified the Claimant of a job opportunity to begin on 3 January and the Claimant duly applied. He attended a business meeting in December 2021 in Kent and was offered the job. The Claimant continues to work in this job to date and is paid at a higher rate from what he earnt with the Respondent.

Conclusions on Remedy

107 The Tribunal was satisfied that the Claimant should receive a basic award in the sum of £5,168. This figure was agreed by the parties.

108 With regards to the compensatory award, the Tribunal made the following findings:

Loss of statutory rights: £300

109 The Tribunal was satisfied that the sum of £300 was appropriate for loss of statutory rights. The Claimant was constructively dismissed and the Tribunal did not make findings of contributory fault such that any deduction would be appropriate.

Loss of earnings: £2792.83

110 The Respondent submitted that the weekly gross earnings figure was £844.80. Using the appropriate table in 'Facts and Figures', this produced an annual net salary of £33,514 and a monthly net salary of £2792.83.

111 Having given careful thought to the evidence presented and following its findings of fact, the Tribunal concluded that it was reasonable for the Claimant to have begun the foundations of a job search during the last months of his employment with the Respondent. In May, June and July 2021 the Claimant was very clear that he would be leaving the Respondents employ on 31 July 2021 and that he would be away on

holiday for the first two weeks of August. He has confirmed, and the Tribunal accepted his evidence, that he took absolutely no steps or positive actions to investigate, research or apply for other roles. This was more relevant during the later weeks of that period as it was to be expected that any future employer would have wanted the Claimant to start in a new job promptly.

112 In the event, the Claimant chose to extend his holiday through the rest of August rather than to return to the UK as originally planned.

113 The Tribunal was satisfied that it was reasonable to expect the Claimant to have conducted a thorough job search from mid – August 2021 onwards, possibly with some initial research in June and July 2021 and that, if he had done so, he would have been likely to secure a new job to start at the beginning of September 2021. Accordingly, the Tribunal has concluded that not securing the replacement job until a start on 3 January 2022 was a failure to mitigate on the Claimant's part.

114 The loss of earnings to be awarded is therefore for the month of August. It was reasonable for the Claimant to take his planned annual leave and to spend the last two weeks of that month securing a new position, paying the same or more than his role with the Respondent.

115 There is no evidence that the Respondent paid the Claimant during his two week holiday and therefore the correct figure for loss of earnings for August is £2,792.83

Summary

116 The total compensation payable is £8995.83. This is comprised £735.00 (unauthorised deduction from earnings), £5,168.00 (basic award) and £3,092.83 (compensatory award).

117 Recoupment does not apply as the period of loss of earnings awarded was not one during which benefits were claimed.

Employment Judge Harrington
24 July 2024

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