EMPLOYMENT TRIBUNALS

Claimant: Svetoslav Mitev

Respondent: Mitie Ltd

Heard at: Croydon

On: 17-20 September 2024

Before: Employment Judge Liz Ord
Tribunal Member Elizabeth Whitlam
Tribunal Member Kieron Murphy

Representation:

Claimant: In person
Respondent: Kevin Harris (Counsel)

RESERVED JUDGMENT

1. The Claimant's complaint of ordinary unfair dismissal is not well founded and is dismissed.

2. The Claimant's complaint of automatic unfair dismissal on the grounds of protected disclosures is not well founded and is dismissed.

3. The Claimant's complaint of detriment due to protected disclosures is not well founded and is dismissed.

4. The Claimant's complaint of direct race discrimination is not well founded and is dismissed.

5. The Claimant's complaint of harassment related to race is not well founded and is dismissed.

6. The Claimant's complaint of victimisation is not well founded and is dismissed.

7. The Claimant's complaint of unauthorised deductions from wages is not well founded and is dismissed.

REASONS

The Complaints and Issues

1. The claimant's complaints are:

   1.1. Ordinary unfair dismissal;
   1.2. Automatic unfair dismissal on the grounds of protected disclosure;
   1.3. Detriment due to protected disclosure;
   1.4. Direct race discrimination;
   1.5. Harassment related to race;
   1.6. Victimisation;
   1.7. Unauthorised deductions from wages.

2. The issues for the tribunal are set out in the attached Annex. They were determined at a previous case management hearing, although an indirect discrimination claim and a harassment allegation relating to Brexit were later struck out. Two small amendments (as shown in the list) were agreed at the full merits hearing.

Evidence

3. The Tribunal had before it an updated bundle of documents of 750 pages, a supplementary bundle of 12 pages, various additional documents provided by the parties at the hearing, a cast list and chronology, and a witness statement bundle of 36 pages.

4. We heard evidence given on affirmation by the Claimant and the Respondent's witnesses, who were Howard Dicks (Account Manager), Darren Pulman (Head of Assurance and Strategic Accounts), Donna Sturgess (Strategic Account Manager) and Cecil Weintrop (Strategic Account Manager).

The Law

Unfair Dismissal

5. **Section 98 of the Employment Rights Act 1996** (ERA) provides, so far as is relevant:

> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it-

a) …..

b) Relates to the conduct of the employee

(3) …

(4) whether the dismissal is fair or unfair

a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

b) shall be determined in accordance with equity and the substantial merits of the case.

6. **British Home Stores Ltd. Burchell** [1980] ICR 303 held that "First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in in all the circumstances of the case."

7. In **J Sainsbury plc v. Hitt** [2003] ICR 111, the Court of Appeal said that, in applying the test of reasonableness, the tribunal must not substitute its own view for that of the employer. It is only where the employer's decision is so unreasonable as to fall outside the range of reasonable responses that the tribunal can interfere.

8. The test to be applied in determining reasonableness is whether the employer's decision to dismiss fell within the range of reasonable responses available to it – **(1) Post Office v Foley (2) HSBC Bank plc v Madden** [2000] ICR 1283, CA.

9. Under **section 103A ERA** employees have a right to claim that a dismissal was automatically unfair if it was because of the making of a protected disclosure. The section states:

   "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."

   Protected disclosure detriment

   Protected disclosures

10. **Section 43A ERA** provides that a 'protected disclosure' means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H. Section 43C deals with disclosures made to an employer.

11. **Section 43B ERA** provides:

"(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—

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
(c) …
(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) …

(f) … that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

12. In **Williams v Michelle Brown AM** UKEAT/0044/19/OO HHJ Auerbach considered the questions that arise in determining whether a qualifying disclosure has been made:

" It is worth restating, as the authorities have done many times, that this definition breaks down into a number of elements. First, there must be a disclosure of information. Secondly, the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held.

Detriment

13. **Section 47B ERA** provides:

(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."

14. The concept of a detriment must be construed widely, and the threshold for establishing a detriment is low (**The Edinburgh Mela Ltd v Purnell** UKEAT/0041/19).

15. In considering whether the detriment is done on the ground that the worker has made a protected disclosure, the test is whether the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower (**NHS Manchester v Fecitt** [2012] IRLR 64).

Race Discrimination and Victimisation

16. The relevant legislation is contained in the **Equality Act 2010** (EqA)

17. **Section 4 EqA** – The protected characteristics

The following characteristics are protected characteristics:

…

Race

…

18. **Section 13 EqA** - **Direct discrimination**

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

There are two parts to consider, namely, whether the employer:

- Treated the person less favourably than it treated others, and
- Treated the person in that way because of a protected characteristic.

19. **Section 23 EqA -** Comparison by reference to circumstances - provides:

(1) "On a comparison of cases for the purposes of section 13, 14 or 19, there must be no material difference between the circumstances relating to each case."

20. "All the characteristics of the complainant, which are relevant to the way his case was dealt with must also be found in the comparator"; per Lord Hope in **MacDonald v MoD** [2003] ICR 937, HL

21. **Section 26 EqA** – **Harassment**

(1) A person (A) harasses another (B) if –
   (a) A engages in unwanted conduct related to a relevant protected characteristic, and
   (b) The conduct has the purpose or effect of –
      i. Violating B's dignity, or
      ii. Creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) …
(3) …
(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account-

   (a) the perception of B;
   (b) the other circumstances of the case;
   (c) whether it is reasonable for the conduct to have that effect.

22. **Section 27 EqA – Victimisation**

(1) A person (A) victimises another person (B) if A subjects B to a detriment because –
   (a) B does a protected act, or
   (b) A believes that B has done, or may do, a protected act

(2) Each of the following is a protected act –

(a) Bringing proceedings under this Act;

(b) Giving evidence or information in connection with proceedings under this Act;

(c) Doing any other thing for the purposes of or in connection with this Act;

(d) Making an allegation (whether or not express) that A or another person has contravened this Act.

23. **Section 13(1) ERA - Unauthorised deduction from wages**:

" An employer shall not make a deduction from wages of a worker employed by him unless –

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction."

24. **Section 13(3) ERA** says:

"Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion."

Findings of Fact

25. The Respondent is a large facilities management and professional services provider. The Claimant worked for the Respondent as a Security Officer from 14 May 2009. He was dismissed for gross misconduct by letter dated 30 May 2022. At all material times he worked at the Shard in London on the Shard Quarter contract.

Covid letter

26. In November or December 2020, an undated and unsigned letter (461-462) was sent to the Respondent's CEO, Phil Bentley, by persons unknown, complaining about Covid health and safety matters. It said that management disregarded Government guidelines, employees did not work in a bubble and were told to work on all shifts and in all positions, and that senior management kept quiet about the sickness on site instead of notifying employees so they could get themselves tested to prevent further spreading.

27. The letter was not written, signed or sent by the Claimant. He did not contribute to writing it, and he was not implicated in it in any way. There was no suggestion that Mr Bentley or anyone else from the Respondent thought the Claimant was involved, and it is entirely unclear from the evidence

whether the Claimant had anything to do with it at all. This letter is the alleged **first protected disclosure** (issue 3.1.1.1)

Right to work

28. The Claimant is Bulgarian by nationality. Employers are required under section 25 Immigration Act 2016 to check that their employees have the right to work in the UK. As a result of Brexit, European Citizens working in the UK were required to obtain Settled or Pre-Settled Status in order to continue working in the UK with a few exceptions. A grant of indefinite leave to remain (ILR) was an exception to this requirement.

29. The Respondent told the Claimant to apply for the appropriate status under the EU Settlement Scheme, namely, Settled or Pre-Settled Status

30. The Claimant refused, saying he had ILR in the UK, which was granted in May 2008. Therefore, he argued he did not need to apply for Settled or Pre-Settled Status.

31. He emailed the Respondent on 15 April 2021 sending them a copy of a Home Office document showing his ILR status. However, this document did not have the Home Office Crest on it and was stamped “file copy”. The Respondent did not believe it fulfilled the legal requirements. Therefore, the Respondent did not accept it as sufficient proof of ILR.

32. Xavier Ayre (a non-HR manager) was tasked with the job of obtaining the correct documentation from employees to ensure they could legally continue to be employed by the Respondent. Despite the Claimant’s assertions that it was unnecessary, she continued to ask him to apply for Settled or Pre-Settled Status. The Claimant continued to refuse, saying he did not need to because he had ILR. Ms Ayre made the same repeat requests to all EU employees who had not yet completed the application.

33. A number of emails went back and forth between the Claimant and Ms Ayre as she tried to obtain the correct documents to demonstrate the Claimant’s right to work. All emails from the Respondent in this regard were polite, and it was clear from the email chains that they were being sent for a legitimate purpose, namely, to ensure he had the right to work in the UK (see email chains re ILR 353-370).

Grievances

34. The Claimant was unhappy with the Respondent continuing to ask him to apply for Settled or Pre-Settled Status. Consequently, he raised a grievance by email on 21 June 2021 against both the Respondent and Ms Ayre regarding the handling of his right to work status. In it he alleged that he was being subjected to discrimination, harassment, bullying and victimisation.

35. Howard Dicks (Contract Manager) was appointed to investigate the grievance. A grievance hearing took place on 13 August 2021 (meeting notes at 403-7).

36. The grievance outcome letter of 7 September 2021 (417-423) found that there had been no discrimination, harassment, bullying or victimisation. It explained

that the Respondent had simply been trying to meet government requirements and Ms Ayre was only doing her job by trying to ensure that the Claimant had the right to work in the UK.

37. Specifically, it explained (under the heading "My summary of this evidence" at 422) that the Respondent had sent the Claimant's document to John Craig (HR Manager and subject matter expert on Rights to Work). This was the first time Mr Craig had seen it. Having examined it, he advised that he could accept it as ILR evidence on the basis that the Claimant was employed by the Respondent as an EU national prior to the UK's exit from the EU. However, he went on to say that the Claimant needed to understand that it was most unlikely that the document would be accepted by another employer, were he to move companies.

38. On the basis of the above, the grievance was not upheld.

39. The Claimant appealed. Peter Rumbold (Head of Operations) was appointed to hear the appeal and an appeal meeting was held on 12 October 2021 (minutes at 465-467).

40. The Claimant made a second grievance, which was interconnected with the first. The investigation meeting for the second grievance was also heard by Peter Rumbold on 12 October 2021 (minutes at 469-470) after the first grievance appeal hearing.

41. The Claimant alleges that he made his **second protected disclosure** at the 12 October meeting (see issue 3.1.1.2). He said this related to poor working conditions and a lack of Covid safety, including at social events (specifically a boat party).

42. There is nothing of this nature recorded within the minutes of the appeal grievance meeting.

43. The minutes of the second grievance investigation meeting record the Claimant starting with a complaint about not receiving a bonus of £126 and the money being spent on a boat party. He also raised issues about the behaviour of senior Shard management after the boat party and being short staffed on site. The Claimant went on to talk about nepotism at the Shard. The subject of whistleblowing was discussed and Mr Rumbold asked whether the Claimant had raised his concerns with management, to which the Claimant replied there was no point. There is nothing in the minutes about Covid. The minutes of both meetings were sent to the Claimant to review.

44. However, in Mr Rumbold's witness statement (at paragraphs 5.2 and 5.4) he acknowledged that the Claimant briefly mentioned the matters set out in his second alleged protected disclosure (as per issue 3.1.1.2) at the 12 October meeting. We find that the Claimant raised these issues.

45. On 21 October 2021, the Claimant sent an email to Mr Rumbold (473) with a cut and paste email chain that included concerns raised about Covid testing, and social events. This forms the **third alleged protected disclosure** (issue 3.1.1.3).

46. Due to work capacity issues, the second grievance was passed from Mr Rumbold to Darren Pulman (Head of Assurance for Strategic Accounts) to complete. Mr Pulman investigated all remaining issues and sent the Claimant a detailed outcome letter on 17 December 2021, dismissing his grievance (683-693).

47. On 26 December 2021 the Claimant emailed Mr Pulman setting out the details of his grievances (letter submitted as additional document at the hearing). This is the **fourth alleged protected disclosure** (issue 3.1.1.4). (See paragraph 55 below for further details).

48. With respect to the first grievance appeal, Mr Rumbold sent the Claimant the grievance appeal outcome letter dated 5 January 2022 (704-9) dismissing the appeal. He explained the Respondent's obligations in ensuring its employees had the right to work and that, in the Claimant's case, a concession had been made in accepting his ILR status. He nonetheless pointed out that there remained a risk of his permit not being accepted under the right to work legislation should he change employer. He explained that the Respondent had reached out in exactly the same way to over 10,000 EU staff (707).

Disciplinary

Security incident

49. The Shard is designated as "Critical National Infrastructure" and at risk of terrorist attack. For that reason security measures are particularly tight.

50. On 28 October 2021 there was an incident whereby the Claimant opened the security gates to the building, let the bollards (Hostile Vehicle Mitigation) down, and walked away from the gate area with nobody in attendance. No vehicle entered or exited during this time. This is not denied, although there are conflicting accounts about how long the gate was left open.

51. The Respondent has Standard Operating Procedures (SOPs) which include precise instructions on how the gate and the lowering of the bollards is to be done (742). It is not disputed that the Claimant breached the relevant SOP. The Claimant had received a copy of the SOP and had signed to confirm that he was fully conversant with it, understood it, and agreed to fully uphold the procedures within it (750).

52. The Claimant's evidence was that the SOP was unworkable and was not followed. However, he never raised any problems about the SOP with management.

53. As a result of the incident, the Claimant was invited to an investigation meeting, chaired by Russell Ali (Back of House Manager), which took place on 22 November 2021 (minutes at 677). During the meeting the Claimant viewed CCTV footage of the incident (679). He explained that he was in a long conversation with a colleague and must have forgotten that the gate was open (679). It was put to him that the gate was left open for approximately 60 seconds with no one in attendance, and that the SOP stated that the gate should only be opened when a vehicle is entering or exiting.

54. On 7 December 2021 Jack Plaice (Duty Manager) emailed the Claimant inviting him to a disciplinary meeting on 14 December 2021. He also sent him the investigation documents consisting of the meeting invite letter, witness statements, investigatory minutes, and disciplinary procedure (503). The Claimant was told that the CCTV footage and the Back of House SOP would be available to him during the meeting. This meeting did not take place as scheduled.

Letter to client

55. On 26 December 2021 at 16:40:07 the Claimant emailed Darren Pulman (email submitted at the hearing as an additional document). This is the correspondence mentioned at paragraph 47 above. In it, he complained about Lorraine Mansfield being appointed to hear his grievance appeal, and indicated he would make comments in writing, as appealing would not make any difference. With that, he set out all his grievances and commented on each one. The comments were very critical of the Respondent and certain members of its staff, including managers.

56. At 16.40.18 the Claimant received an automatic reply from Mr Pulman saying he was on annual leave and giving alternative contact details for urgent matters (email submitted at the hearing as an additional document).

57. The same day at 17:00:07 the Claimant emailed the Respondent's Client directly telling them that there were problems with the Respondent's senior management and copying all the grievances he had sent to Mr Pulman 20 minutes beforehand (508-513).

58. This came to the Respondent's attention and the Claimant was verbally suspended on full pay on 29 December 2021 (reference to this in investigatory minutes 528).

59. Martin Howes (Senior Business Partner) was appointed to investigate and tried to arrange an investigatory meeting with the Claimant. However, due to the Claimant's sickness absence (see below) the meeting did not take place until 11 February 2022. The Claimant did not agree the minutes and sent an amended version to the Respondent on 14 April 2022 (email 527).

60. It is not disputed that, at the meeting, the contents of the letter were discussed and the Claimant was given an opportunity to explain his various grievances set out in it. Certain quotes from the letter were put to the Claimant for comment. These included: "Mitie is the worst company of all ...inability to service the contract…"; "…management disregarded the guidelines for Covid-19…"; "This corrupted practice to endanger employees' lives was repeated…"; "…endangering people's life is a criminal offence" (minutes 528-532).

61. At the end of the hearing, Mr Howes informed the Claimant that the matter would be moved on to a disciplinary hearing and that he would remain suspended (532).

62. Donna Sturgess was appointed disciplinary officer and on 11 May 2022 she invited the Claimant to a disciplinary hearing (invite letter 710). The invite letter covered both the security matter and the letter to the client. It enclosed

the relevant documentation, apart from the Back of House SOP and CCTV footage, which was made available at the hearing. The hearing took place on 19 May 2022 (minutes at 541-551).

63. With regards the security allegation, the Claimant admitted that he did not conduct the process as per the SOP. He said he saw a vehicle, which he thought was departing, and lowered the blockers and opened the gate. He said he went outside to make sure it was clear, as vehicles sometimes park outside the loading bay. He got into an argument with a colleague about a parked vehicle and tried to ensure that the colleague followed correct procedures.

64. When Ms Sturgess suggested to the Claimant that he failed to follow procedures he said that nobody got into the building and he did not leave the gates open intentionally. He nonetheless admitted leaving them open with the bollards down and with nobody in attendance.

65. Turning to the letter to the client, Ms Sturgess asked why the Claimant had sent his grievance to the client. He replied that there had been a delay in receiving the outcome, and he had made it known that his deadline for a response was 22 December. He also felt the Respondent would not address his concerns, and he was not satisfied with Lorraine Mansfield (Strategic Account Director) being the person to whom he was to appeal (547-8).

66. Following this hearing, Ms Sturgess wrote to the Claimant on 30 May 2022 summarily dismissing him for gross misconduct, although it is recorded that his last day of employment was 27 May 2022. The reasons set out in the letter were for bringing the Respondent into disrepute, resulting in a loss of trust and confidence in the Claimant, and for breach of security and negligence of duties by leaving the loading bay gates open for about 4.5 minutes (534-6). The letter confirmed that, in reaching this decision, the Respondent took account of the Claimant's length of service and whether any alternative sanction was possible. However, given the seriousness of the misconduct, the correct decision was summary dismissal.

67. The Claimant appealed on 3 June (552-555) He said it was not him that brought the Respondent into disrepute, but the Respondent itself. He said he had exhausted the internal process and there was no improvement. He set out again some of his grievances. With respect to the security breach, he repeated some of what he said at the disciplinary hearing and stated that the SOP sometimes did not reflect the way staff operated. He argued that the timing of 4.5 minutes included the time taken by his colleague in opening the other gate whilst trying to park a vehicle. He also said the gates were being operated manually that night.

68. The appeal was heard by Cecil Weintrop (Strategic Account Manager) on 26 July 2022 (minutes at 562-76).

69. With respect to the letter and the grievance matters, Mr Weintrop explained to the Claimant why the Respondent was not breaching any health and safety guidelines with respect to Covid. Mr Weintrop referred to the Respondent's handbook given to all employees, which contained details of the process for whistleblowing and the helpline "Speakup"(567).

70. As for the security breach, the Claimant said the bollards were sometimes down for hours and that staff did not work to the SOP (572). He said the gates were open on this occasion for 60 seconds.

71. Mr Weintrop upheld the dismissal by letter of 28 July 2022 (735).

Sick Pay

72. On 30 December 2021 the Claimant tested positive for Covid and was notified of this on 31 December (516). He went on sick leave from 31 December, although he was also under suspension at this time. He was off sick until 11 February 2022

73. He complained on 21 January 2022 about not getting paid for his sick leave (524). The Claimant was already being paid his full salary whilst on suspension. However, following his complaint, he was also paid Statutory Sick Pay. The pay slip of 18 February 2022 shows both his salary and sick pay being paid (SB 11 – SSP & Occ. Absence).

74. When the Respondent realised that the Claimant had been paid twice in error, the sick pay was deducted from his salary.

Discussion and Conclusions

Unfair dismissal

75. The Claimant does not deny that he did the acts.

76. With respect to the gates/bollards, the SOP needed to be strictly followed because of the status of the Shard and the risk of attack. Regardless of whether the gates were open for 4.5 minutes or 60 seconds, with the bollards down and nobody in attendance, this was a breach of security procedure and a risk.

77. If the Claimant seriously believed the SOP was unworkable, he should have raised this with management. He never did, despite raising several other issues he was concerned about. It was only when going through his disciplinary that he sought to mention it in defence.

78. With respect to the 26 December letter to the client, this was sent only 20 minutes after sending the same grievances to Darren Pulman. The Claimant had received the automatic response from Mr Pulman within seconds, saying he was on holiday. Therefore he knew that Mr Pulman could not immediately respond. He gave Mr Pulman no opportunity to answer his concerns before complaining about the Respondent to the client in a highly critical way (see paragraph 60 above).

79. Furthermore, the Claimant did not follow whistleblowing procedure and did not use the Respondent's Speakup helpline, which was available to him to voice such concerns.

80. The Claimant did not exhaust the Respondent's grievance procedures. Instead, he sent very damning allegations to the Respondent's client, which

had the potential to bring the Respondent into disrepute and to damage the relationship with the client.

81. There has been no suggestion that the disciplinary procedure was unfair and we do not find any unfairness in this regard.

82. In summary, the Claimant admitted to two serious allegations of misconduct without any significant mitigating circumstances. The Respondent genuinely believed that the Claimant had done these acts and this was the reason for dismissing him for gross misconduct. We conclude that, for the reasons we have given, this dismissal was within the range of reasonable responses.

Automatic unfair dismissal on the grounds of protected disclosure

83. The Claimant was not dismissed because of any protected disclosure. He was dismissed for gross misconduct for the reasons given above.

Protected disclosures

Alleged first protected disclosure (issue 3.1.1.1)

84. This is a letter that was not written, signed or sent by the Claimant. There is no evidence that he had any involvement in it and he is not implicated in it in any way.

85. We conclude that the letter had nothing to do with the Claimant and he did not make this disclosure. It is not a protected disclosure that he can rely upon.

Alleged second protected disclosure (issue 3.1.1.2)

86. The Claimant raised issues regarding a lack of Covid Safety and poor working conditions during the 12 October 2021 meeting.

87. This is information, which the Claimant raised with his employer. We find he made it in the public interest, reasonably believing that it tended to show non-compliance with a legal obligation, and the likely endangering of staff health and safety.

88. Consequently, we find it was a protected disclosure.

Alleged third protected disclosure (issue 3.1.1.3)

89. The email to Peter Rumbold of 21 October 2021 contained similar information to that raised at the 12 October meeting.

90. This is information, which the Claimant raised with his employer. We find he made it in the public interest, reasonably believing that it tended to show non-compliance with a legal obligation, and the likely endangering of staff health and safety.

91. Consequently, we find it was a protected disclosure.

Alleged fourth protected disclosure (issue 3.1.1.4)

92. The email to Darren Pulman of 26 December 2021 contained matters similar to the 21 October 2021 e-mail.

93. This is information, which the Claimant raised with his employer. We find he made it in the public interest, reasonably believing that it tended to show non-compliance with a legal obligation, and the likely endangering of staff health and safety.

94. Consequently, we find it was a protected disclosure.

Was there detriment due to any of the above protected disclosures?

95. The Claimant claims that he was suspended from work, disciplined and not paid company sick pay because of making protected disclosures.

96. We find that none of these allegations have been proved. The Claimant was suspended and disciplined because of his misconduct and he was not paid sick pay because he was already receiving full pay whilst on suspension.

97. Consequently, he was not put to any detriment because of his protected disclosures.

Direct race discrimination

98. As a result of Brexit, European Citizens working in the UK were required to obtain Settled or Pre-Settled Status in order to continue working in the UK with a few exceptions.

99. The Respondent required all employees, who were in the same position as the Claimant, namely EU nationals working for the Respondent, to complete the voluntary application for Settled or Pre-Settled Status.

100. Xavier Ayre was tasked with the job of obtaining the correct documentation from EU employees to ensure they could legally continue to be employed by the Respondent. She made repeat requests to all employees who had not yet completed the form.

101. The fact that the Respondent eventually accepted a copy of the Claimant's ILR document is of no consequence. This was a concession, which the Respondent explained, would be unlikely to be repeated if the Claimant moved companies.

102. Therefore, the Claimant was not treated less favourably than other employees who were EU citizens. British citizens did not fall under the same immigration legislation or government requirements with respect to Brexit, and therefore, they are not suitable comparators.

Harassment related to race

103. Whilst repeat requests to complete the application for Settled or Pre-Settled Status may have been conduct the Claimant did not want, it was done for legal reasons and not with any purpose of violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.

104. If it had that effect, it was unreasonable for it to have done so. The Claimant knew that the Respondent was under a legal duty to properly ensure that all EU citizens, of which the Claimant was one, had the right to work in the UK. The Respondent was being a responsible employer by doing this.

Victimisation

105. The list of issues lists three alleged protected acts. We were not taken to any evidence of these acts during the hearing. In any event, they do not assist the Claimant.

106. The Respondent engaged with the Claimant over his right to work in the UK because of government requirements resulting from Brexit. There is no other reason for this engagement and it was not because of any protected acts.

Unauthorised deductions from wages

107. The Claimant was erroneously paid twice during his period of sickness. He was already being paid his full salary whilst on suspension and was not entitled to sick pay in addition.

108. The Respondent was therefore entitled to deduct the overpayment of sick pay. Consequently, there was no unauthorized deduction from wages.

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Employment Judge Liz Ord

Date 26 October 2024

Notes

Public access to employment tribunal decisions
Judgements 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.

LIST OF ISSUES

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1. Unfair dismissal

1.1 What was the reason or principal reason for dismissal?

1.2 Was the reason or principal reason for dismissal that the claimant made one or more protected disclosures?
If so, the claimant will be regarded as unfairly dismissed.

1.3 The respondent says the reason was conduct. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.

1.4 If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:

1.4.1 there were reasonable grounds for that belief;
1.4.2 at the time the belief was formed the respondent had carried out a reasonable investigation;
1.4.3 the respondent otherwise acted in a procedurally fair manner;
1.4.4 dismissal was within the range of reasonable responses.

2. Remedy for unfair dismissal

2.1 The claimant does not wish to be reinstated to his previous employment or re-engaged by the respondent.

2.2 If there is a compensatory award, how much should it be? The Tribunal will decide:

2.2.1 What financial losses has the dismissal caused the claimant?
The claimant says £8886.80.

2.2.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

2.2.3 If not, for what period of loss should the claimant be compensated?

2.2.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

2.2.5 If so, should the claimant's compensation be reduced? By how much?

2.2.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

2.2.7 Did the respondent or the claimant unreasonably fail to comply with it?

2.2.8 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

2.2.9 If the claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct?

2.2.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

2.2.11 Does the statutory cap of fifty-two weeks' pay apply?

2.3 What basic award is payable to the claimant, if any?

2.4 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

3. Protected disclosure

3.1 Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:

3.1.1 What did the claimant say or write? When? To whom? The claimant says he made disclosures on these occasions:

3.1.1.1 Along with approximately 15 colleagues he sent a letter to the respondent at the end of November or in early December 2021 complaining about the lack of Covid safety at the Shard;

3.1.1.2 In a meeting on 12 October 2021 with Peter Rumbold, he complained about poor working conditions at the Shard and a general lack of Covid safety, including at social events (specifically a boat party) and as a consequence of those social events organised by the respondent for its staff;

3.1.1.3 In an email to Mr Rumbold on 21~~0~~ October 2021 containing similar information to that discussed on 12 October 2021;

3.1.1.4 In an email to Darren Pullman on 26 December 2021 complaining about Covid and health and safety breaches.

3.1.2 Did he disclose information?

3.1.3 Did he believe the disclosure of information was made in the public interest?

3.1.4 Was that belief reasonable?

3.1.5 Did he believe it tended to show that:

3.1.5.1 a criminal offence had been, was being or was likely to be committed;

3.1.5.2 a person had failed, was failing or was likely to fail to comply with any legal obligation;

3.1.5.3 the health or safety of any individual had been, was being or was likely to be endangered;

3.1.5.4 information tending to show any of these things had been, was being or was likely to be deliberately concealed.

3.1.6 Was that belief reasonable?

3.2 If the claimant made a qualifying disclosure, it was a protected disclosure because it was made to the claimant's employer.

If so, it was a protected disclosure.

4. Detriment (Employment Rights Act 1996 section 48)

4.1 Did the respondent do the following things:

4.1.1 Suspend the claimant on 11 February 2022;

4.1.2 Discipline the claimant;

4.1.3 ~~Dismiss the claimant~~

4.1.4 Fail to pay the claimant company sick pay in 2021/2022?

4.2 By doing so, did it subject the claimant to detriment?

4.3 If so, was it done on the ground that he made one or more protected disclosures?

5. Remedy for Protected Disclosure Detriment

5.1 What financial losses has the detrimental treatment caused the claimant?

5.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

5.3 If not, for what period of loss should the claimant be compensated?

5.4 What injury to feelings has the detrimental treatment caused the claimant and how much compensation should be awarded for that?

5.5 Has the detrimental treatment caused the claimant personal injury and how much compensation should be awarded for that?

5.6 Is it just and equitable to award the claimant other compensation?

5.7 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

5.8 Did the respondent or the claimant unreasonably fail to comply with it?

5.9 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

5.10 Did the claimant cause or contribute to the detrimental treatment by their own actions and if so would it be just and equitable to reduce the claimant's compensation? By what proportion?

5.11 Was the protected disclosure made in good faith?

5.12 If not, is it just and equitable to reduce the claimant's compensation? By what proportion, up to 25%?

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

6.1 The claimant is a Bulgarian national and an EU citizen.

6.2 Did the respondent do the following things:

6.2.1 Repeatedly request documentation concerning the claimant's right to live and work in the UK and

6.2.2 require him to complete a voluntary application process to do with these rights that was unnecessary.

6.3 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 he was treated worse than someone else would have been treated.
The claimant says he was treated worse than British citizens who were employees of the respondent.

6.4 If so, was it because of his race?

6.5 Did the respondent's treatment amount to a detriment?

8. Harassment related to race (Equality Act 2010 section 26)

8.1 Did the respondent do the following things:

8.1.1 Repeatedly request documentation from the claimant concerning his right to live and work in the UK

8.1.2 Request that the claimant complete a voluntary registration process to demonstrate his right to live and work in the UK

8.2 If so, was that unwanted conduct?

8.3 Did it relate to race?

8.4 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

8.5 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

9. Victimisation (Equality Act 2010 section 27)

9.1 Did the claimant do a protected act as follows:

9.1.1 Complain about the less favourable treatment of EU citizens by the respondent in an email dated 26 May 2021;

9.1.2 Raise a grievance with Jasmine Hodson on 21 June 2021;

9.1.3 Complain about the less favourable treatment of EU citizens by the respondent in an email dated 23 June 2021.

9.2 Did the respondent do the following things:

9.2.1 Engage with the claimant further by emails and contact concerning his right to live and work in the UK

9.3 By doing so, did it subject the claimant to detriment?

9.4 If so, was it because the claimant did a protected act?

9.5 Was it because the respondent believed the claimant had done, or might do, a protected act?

10. Remedy for discrimination or victimisation

10.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

10.2 What financial losses has the discrimination caused the claimant?

10.3 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

10.4 If not, for what period of loss should the claimant be compensated?

10.5 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

10.6 Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

10.7 Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

10.8 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

10.9 Did the respondent or the claimant unreasonably fail to comply with it?

10.10 If so is it just and equitable to increase or decrease any award payable to the claimant?

10.11 By what proportion, up to 25%?

10.12 Should interest be awarded? How much?

11. Unauthorised deductions

11.1 Did the respondent make unauthorised deductions from the claimant's wages and if so how much was deducted?