Case No: 2415513/2018

EMPLOYMENT TRIBUNALS

Claimant: Mrs M West

Respondents: Funky Owl Pub (Holdings) Limited (1)
Mike Coupe (2)

Heard at: Liverpool **On:** 17 July 2019

Before: Employment Judge Wardle
Mrs A Ramsden
Mr Makhaba

Representation
Claimant: In person
First Respondent: Mr S Tate - Director
Second Respondent: Not in attendance

JUDGMENT

The unanimous judgment of the Tribunal is that the claimant's complaints of direct and indirect discrimination on the grounds of her age, of unlawful deductions from wages, of unpaid accrued holiday and in respect of the respondent's failure to provide her with a statement of employment particulars are well-founded and that in the circumstances of the second respondent being removed on our own initiative as a party to these proceedings the first respondent is ordered to pay her the sum of £3187.36 as detailed below in satisfaction of these successful complaints.

REASONS

1. By her claim form the claimant has brought complaints of unlawful age discrimination under sections 13 and 19 of the Equality Act 2010 ("EqA"), unlawful deduction of wages, unpaid accrued holiday and failure to provide a written statement of employment particulars.

2. By a response filed on behalf of Funky Owl Holdings by Adam Smith, one of two named Directors, alongside Sam Tate, of the company Funky Owl Pubs (Holdings) Limited the first respondent has denied the complaints. There was no suggestion made in the company's ET3 or in subsequent correspondence that Mr Smith had with the tribunal explaining why the company failed to attend a preliminary hearing for case management purposes held on 10 January 2019 that Funky Owl Pub (Holdings) Limited as recorded in the Case Management Order as the first respondent was not the correct respondent to these proceedings. Despite this tacit acceptance that it was Mr Tate emailed the tribunal the day previous to the hearing, which had been listed for three days to say that the wrong business had been brought to court and that the claimant had never worked for "holdings" and that the payslips, which she has backed this up.

3. A response was sent to him to say that it was too late for detailed correspondence and that he could raise a preliminary point at the start of the hearing. He was late arriving for the hearing and in his absence consideration was given to the issue of the correct respondent with reference to the payslips that the claimant had produced as part of her hearing bundle. In this connection it was noted that these payslips had only been produced to her after her employment had ended and that whilst they had the name of a company called Funky Owl (RHM) Ltd on them, of which Mr Tate is the sole Director they referred to a pub called the Fox, for which the claimant never worked. In addition the correspondence address given in the ET3 for service was the address used by Mr Tate in his capacity as a director of Funky Owl Pub (Holdings) Limited and not the one used by him for Funky Owl (RHM) Limited. We also noted that the payslips contained an odd National Insurance Number, which the claimant later confirmed bore no resemblance to her own, which suggested to us that they had been prepared after her employment had ended and could not be relied upon as evidencing that Funky Owl (RHM) Ltd had been the claimant's employer. We did not accept therefore that the proceedings had been incorrectly brought against Funky Owl Pub (Holdings) Limited and when we informed him that we planned to proceed with the hearing he withdrew indicating that he would be appealing our decision.

4. The Tribunal proceeded to hear evidence from the claimant based on a written document she had prepared dated 8 February 2019, which was supplemented by oral responses to questions posed to her by us. We also had a statement made on her behalf by Ms Alison Savage, who was not called to give evidence. The weight we attached to it was that which would be normally attached to a statement where the maker has not been subject to cross-examination. We also had before us documents in the form of a bundle, which we marked as “C1”.

5. Having heard and considered the evidence we found the following facts.

Facts

6. The claimant was employed as a Bar Person by the first respondent at a pub called the Red House in Maghull, Liverpool. Her employment began on 17

February 2018 and her last day of work was on 10 June 2018, when the pub closed for refurbishment.

7. She had previously worked at the pub under different management since June 2016. On her evidence the first respondent took over the pub in January 2018 and promptly closed it for 10 days before re-opening, at which time she approached the new manageress, Mrs Emily Harrison, to ask if she could return, which saw her starting with the first respondent on 18 February 2018, working approximately 30 hours per week at an hourly rate of £7.50 (the National Living Wage) usually over five days. Accepting her evidence no written statement of particulars of employment was given to her during the course of her employment with the first respondent.

8. She says that from this time she repeatedly asked Mrs Harrison for payslips as she could not work out her pay, which was paid directly into her bank, contrary it was noted to the statement on the payslips that she was paid cash, on the Friday following the end of her working week and that she did request them for her on several occasions but with no luck. She also says that Mr Harrison left the pub in April 2018 and Mike Coupe took over as manager and that she continued to ask for payslips but to no avail, in evidence of which she produced numerous messages that she sent to Mr Coupe and Mr Tate dating from 13 May 2018 to 26 September 2018 seeking their provision.

9. The claimant kept a record of the hours she worked each week in a notebook, which she produced at the hearing. When eventually she was supplied with her payslips in November 2018, the earliest of which was dated 16 March 2018 after she had commenced proceedings she compared her record with the hours shown on the payslips and found a number of weeks, where she had been paid for less hours than she had actually worked. These were set out in her schedule of loss, which had been served on the first respondent. We accepted her evidence that she had been underpaid in respect of 38 hours as detailed in the schedule and that the relevant hourly rate for these hours was £7.83 (the applicable National Living Wage) and that she was owed £297.54.

10. In regard to accrued holiday we accepted her evidence that she had taken none during the course of her employment and given that there was no payment of holiday pay in the payslips provided to her we calculated using the GOV.UK website for the period of her employment between 18 February 2018 and 10 June 2018 in circumstances where we had arrived at an average of 30.58 hours per week worked by her over the final 12 weeks of her employment based on her payslips as adjusted for the hours they had failed to include and her doing five days a week that she had accrued an entitlement to 53 hours statutory paid leave, which at £7.83 per hour equated to £414.99.

11. On 10 June 2018 the pub was closed by the first respondent for a total refurbishment. This was the last day that she was provided with work by the first respondent in circumstances where it, having not issued the claimant with a statement of employment particulars, had no contractual right to withhold remuneration if there was no work available.

12. On the claimant's evidence, which we accepted, during the course of the refurbishment a large poster was put up outside the pub advertising for staff between the ages of 18 and 25 years and adverts of the same nature were placed on an employment website called Indeed and on Facebook. In regard to this evidence corroboration was provided by Alyson Savage's statement. By its ET3 the first respondent denied placing the advertisement and in the alternative, contended that the manager at the material time, Mr Coupe, did not have authority to advertise on his personal account, which was why he was joined on the claimant's application as a second respondent, although it is now understood that he no longer remains employed by the first respondent.

13. The Red House had a WhatsApp group for its employees which the claimant was part of. During the refurbishment the claimant messaged Mr Coupe about progress and was told by him on Wednesday 4 July 2018 that though they did not have a definite date he believed that the work was set to finish on Friday 7 July 2018. On this date she messaged him further asking if he had done the hours for the following week, which saw him responding that he would ring her the next day, which he failed to do. The claimant subsequently discovered that she had been removed from the Red House WhatsApp group and messaged Mr Coupe on 12 July 2018 to ask what was going on, in response to which Mr Coupe informed her that they had formed a new one for the Fox, which was the new name of the pub. The claimant promptly asked if she could be added to the new group and was told by him that if any shifts came up for her he would add her. In response the claimant stated that she had not been earning money for 5 weeks and asked him not to try to get her to resign because she wouldn't and that she would go for unfair dismissal on ageism and the fact that she had not had wage slips since February and that whilst she was not threatening she thought it was a disgrace how she was being treated and that she was not going to let Mr Tate away with it, to which Mr Coupe replied good luck with that you have just ruined any chance of ever working here again. Several further messages were exchanged that evening, which saw the claimant asking Mr Coupe to arrange for her holiday pay to be paid and for her payslips to be sent to her, which Mr Coupe declined to assist with saying that they were Mr Tate's domain.

14. Following ACAS Early Conciliation between 16 August 2018 and 10 September 2018 a claim to the Employment Tribunals was presented by the claimant on 8 October 2018, which was responded to by the first respondent on 5 December 2018.

Law

15. The relevant law for the purposes of the discrimination complaints is to be found in the Equality Act 2010 ("EqA"). Section 4 lists ‘age’ as one of the protected characteristics and section 5(1) provides in relation to it that (a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular age group and (b) a reference to persons who share a protected characteristic is a reference to persons of the same

age group. Pursuant to section 5(2) an 'age group' is a group of persons defined by reference to age, whether to a particular age or to a range of ages meaning that whenever the EqA refers to the protected characteristic of age it means a person belonging to a particular age group

16. Section 13(1) defines direct discrimination as follows: ‘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.’ It therefore involves the requirement for a real or hypothetical comparator to whom the relevant protected characteristic does not apply and for the purposes of the comparison, pursuant to section 23(1), there must be ‘no material difference between the circumstances relating to each case’. It continues to be possible for employers to justify direct age discrimination as section 13(2) provides that 'if the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.' Section 136(2) and (3) dealing with the burden of proof provides that, if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred, unless A shows that he or she did not contravene the provision.

17. Section 19(1) defines indirect discrimination as occurring when a person (A) applies to another (B) a provision, criterion or practice (PCP) that is discriminatory in relation to a relevant protected characteristic of B's. Pursuant to section 19(2) a PCP has this effect if the following four criteria are met: (a) A applies, or would apply, the PCP to persons with whom B does not share the relevant protected characteristic; (b) the PCP puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share the characteristic; (c) the PCP puts, or would put, B at that disadvantage and (d) A cannot show that the PCP is a proportionate means of achieving a legitimate aim.

18. Under section 109(1) 'anything done by a person (A) in the course of A' s employment must be treated as also done by the employer'. By section 109(3) it does not matter whether that thing is done with the employer's knowledge, although the employer has a defence under section 109(4) if it can show that it took all reasonable steps to prevent A from doing that thing or from doing anything of that description.

19. The relevant law for the purposes of the unlawful deduction complaint is to be found in the Employment Rights Act 1996 ("ERA"). Section 13(1) dealing with the right of workers not to suffer unauthorised deductions states that 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. Section 23(1) makes provision for a worker to present a complaint to an employment tribunal that his employer has made a deduction from his wages in contravention of section 13.

20. The relevant law for the purposes of the claimant's complaint relating to her unpaid accrued statutory leave entitlement is to be found in the Working Time Regulations 1998 ("WTR"). Pursuant to regulations 13(1) and 13A(1) workers are entitled to a fixed amount of statutory annual leave in each leave year, which is capped at 28 days.

21. In regard to the complaint relating to the non-provision of a statement of employment particulars section 1(1) of the 1996 Act establishes the right of an employee to be given such a statement by his employer not later than two months after the beginning of his employment. Section 11(1) makes provision for a reference to an employment tribunal in the event of no statement being given and section 38 of the Employment Act 2002 provides that tribunals must award compensation to an employee where, upon a successful claim being made under any of the tribunal jurisdictions listed in Schedule 5 to the Act, it becomes evident that that the employer was in breach of his duty to provide a written statement of initial employment particulars.

Conclusions

22. Applying the law to the facts as found the Tribunal considered first of all the claimant's complaint of direct discrimination on the grounds of age. Direct discrimination occurs when a person treats another less favourably than they treat or would treat others because of a protected characteristic. In the circumstances here of the first respondent advertising for staff between the ages of 18 and 25 to work in the refurbished pub to be called the Fox by a poster outside the premises and on an employment website and social media we concluded that it had by its advertisement demonstrated an intention to discriminate against older workers by excluding them from consideration for the positions, of which age group the claimant, who was 64 at the material time, belonged and in the absence of any evidence to support a justification defence we further concluded that the claimant had been treated less favourably than others because of her age and that her complaint of direct discrimination is well-founded.

23. Turning to her indirect discrimination complaint, for this form of discriminatory treatment to occur four requirements must be met: (i) the employer applies a provision, criterion or practice (PCP) equally to everyone within the relevant group including a particular worker (ii) the PCP puts, or would put, people who share the worker's protected characteristic at a particular disadvantage when compared with people who do not have that characteristic (iii) the PCP puts, or would put, the worker at that disadvantage and (iv) the employer cannot show that the PCP is a proportionate means of achieving a legitimate aim. In the instant case we found that the first respondent had applied a PCP by its requirement that prospective applicants for bar positions had to be aged between 18 and 25; that this PCP put people sharing the claimant's protected characteristic of age as an older worker at a particular disadvantage in being denied the opportunity to apply for the posts compared with workers of the younger age group identified in the advertisement; that the PCP put the claimant at that disadvantage and that the respondent had not shown that the PCP was a proportionate means of achieving a legitimate aim and we

therefore concluded that her indirect discrimination complaint is well founded.

24. In regard to liability for these two successful discrimination complaints having regard to the provision made by section 109(1) EqA that employers are liable for acts of discrimination carried out by their employees in the course of their employment and the absence of evidence that the first respondent took all reasonable steps to prevent the publication of the offending advertisement we decided on our own initiative to remove Mr Coupe as a party to these proceedings.

25. In terms of remedy for this unlawful discriminatory treatment in line with the claimant's schedule of loss we awarded her £800 in damages for injury to feelings.

26. In regard to her complaint in respect of unlawful deductions from her wages we concluded as set out in paragraph 9 above that she had been underpaid for 38 hours and applying an hourly rate of £7.83 we awarded her the sum of £297.54 and we also concluded that she had suffered a further deduction for the five weeks commencing 11 June 2018, where she had not been paid at all in circumstances where the first respondent, having not issued her with a statement of employment particulars, had no contractual right to withhold remuneration if there was no work available and using the same hourly rate and an average working week of 30.58 hours we awarded her an additional sum of £1197.20.

27. In regard to her complaint in respect of unpaid accrued statutory leave we concluded as set out in paragraph 10 above that she had earned an entitlement to 53 hours of paid statutory leave and applying an hourly rate of £7.83 we awarded her the sum of £414.99.

28. In regard to her reference concerning the non-provision of a written statement of employment particulars we concluded that this was well-founded and we awarded her two weeks pay in the sum of £477.63.

29. The first respondent is ordered to pay the claimant the total of these awards in the sum of £3187.36 (£800.00 + £297.54 + £1197.20 + £414.99 + £477.63).

30/07/2019

Employment Judge Wardle

JUDGMENT, REASONS & BOOKLET SENT TO THE PARTIES ON

9 August 2019

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number(s): **2415513/2018**

Name of case(s): **Mrs M West** v **Funky Owl Pub (Holdings) Limited**
Mike Coupe

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: 9 August 2019

"the calculation day" is: **10 August 2019**

"the stipulated rate of interest" is: **8%**

MISS H KRUSZYNA
For the Employment Tribunal Office

INTEREST ON TRIBUNAL AWARDS

GUIDANCE NOTE

1. This guidance note should be read in conjunction with the booklet, 'The Judgment' which can be found on our website at **www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426**

If you do not have access to the internet, paper copies can be obtained by telephoning the tribunal office dealing with the claim.

2. The Employment Tribunals (Interest) Order 1990 provides for interest to be paid on employment tribunal awards (excluding sums representing costs or expenses) if they remain wholly or partly unpaid more than 14 days after the date on which the Tribunal's judgment is recorded as having been sent to the parties, which is known as "the relevant decision day".

3. The date from which interest starts to accrue is the day immediately following the relevant decision day and is called "the calculation day". The dates of both the relevant decision day and the calculation day that apply in your case are recorded on the Notice attached to the judgment. If you have received a judgment and subsequently request reasons (see 'The Judgment' booklet) the date of the relevant judgment day will remain unchanged.

4. "Interest" means simple interest accruing from day to day on such part of the sum of money awarded by the tribunal for the time being remaining unpaid. Interest does not accrue on deductions such as Tax and/or National Insurance Contributions that are to be paid to the appropriate authorities. Neither does interest accrue on any sums which the Secretary of State has claimed in a recoupment notice (see 'The Judgment' booklet).

5. Where the sum awarded is varied upon a review of the judgment by the Employment Tribunal or upon appeal to the Employment Appeal Tribunal or a higher appellate court, then interest will accrue in the same way (from "the calculation day"), but on the award as varied by the higher court and not on the sum originally awarded by the Tribunal.

6. 'The Judgment' booklet explains how employment tribunal awards are enforced. The interest element of an award is enforced in the same way.