



MK

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Mr E Radkevics

Respondent

1. QCD Automotive Ltd

.2 Mr R Mojumder

and

Held by CVP on 16, and In Chambers, 17 February 2021

Representation

Claimant:

Mrs Radkevica, wife

Respondent:

Mr N Henry,
Representative

Members

Mr G Page

Ms A Bray

Employment Judge Kurrein

Statement on behalf of the Senior President of Tribunals

This has been a remote hearing that has not objected to by the parties. A face to face hearing was not held because it was not practicable and all issues could be determined in a telephone hearing.

JUDGMENT

- 1 The claims of discrimination against the Respondents are not well founded and are dismissed.
- 2 The First Respondent has unfairly dismissed the Claimant and is ordered to compensate him as follows:-
 - 2.1 a basic award in in the sum of, £1,465.98
 - 2.2 a compensatory award in the sum of £27,706.92
- 3 The Recoupment Regulations 1996 apply to the compensatory aware and for that purpose:
 - 3.1 The prescribed period is from 13 August 2019 to 17 February 2021

- 3.2 The prescribed element is £27,035.86
- 3.3 The total award exceeds the prescribed element by £6,086.19
- 4 The First Respondent has wrongfully dismissed the Claimant and is ordered to compensate him in the net sum of £1,206.57.
- 5 The First Respondent has made unauthorised deductions from the Claimant's wages and is ordered to compensate him in the net sum of £788.04
- 6 The First Respondent is ordered to make an upper award to the Claimant under S.38 Employment Act 2002 in the sum of £1,954.54

REASONS

The Claims and Issues

- 1 On 5 December 2019, having completed early conciliation, the Claimant presented a claim to the tribunal alleging unfair dismissal, race discrimination, unauthorised deductions, breach of contract and a failure to provide a written statement of terms and conditions of employment.
- 2 On 5 December 2019 the Respondents presented responses in which they denied those claims and asserted that the Claimant had been self-employed until April 2019.
- 3 At a preliminary hearing on 29 April 2020, at which both parties were professionally represented, EJ Cassel gave directions which set out the issues in the following terms:-

JURISDICTION

1. Did the Claimant have the necessary period of continuous employment on the effective date of termination under section 108(1) of the Employment Rights Act 1996 ('ERA')?

UNFAIR DISMISSAL

2. Was the Claimant dismissed by the Respondent within the meaning of section 95 of the ERA?
3. Was the Claimant dismissed for a fair reason under s. 98 (2) of ERA 1996? If so:
 - a. In the circumstances, taking into account the size and administrative resources of the Respondent, and having regard to equity and the substantial merits of the case, has the Respondent acted reasonably in treating it as a sufficient reason for dismissing the Claimant? Section 98(4) ERA.
 - b. Was the decision to dismiss within the range of reasonable responses of a reasonable employer? And
 - c. In dismissing the Claimant, did the Respondent adopt a fair procedure?
4. If the answer to point 2 above is no, has the Claimant terminated the contract under which he was employed in circumstances in which he is entitled to terminate

it without notice by reason of the employer's conduct in accordance with Section 95(1)(c) ERA?

5. Has there been a repudiatory breach on the part of the employer? If so;

a. What is the alleged breach?

b. If there was a breach, was it fundamental?

6. Did the Claimant resign in response to the alleged breach?

7. If appropriate, did the Claimant comply with the Acas Code of Practice on Disciplinary and Grievance procedures?

8. If appropriate, did the Respondent comply with the ACAS Code of Practice on Disciplinary and Grievance procedure?

AUTOMATIC UNFAIR DISMISSAL CONTRARY TO S.104 OF THE EMPLOYMENT RIGHTS ACT 1996

9. Did the Claimant make a reasonably clear allegation that the First Respondent had infringed a right of his which is a relevant statutory right?

10. Was that allegation made in good faith?

11. Does the allegation that the First Respondent had been paying his staff and the Claimant incorrectly fall within section 104(4)(a) of the Employment Rights Act 1996 namely - "any right conferred by this Act for which the remedy for its infringement is by way of a complaint or reference to an employment tribunal"?

12. If so, was the reason or the principal reason for the Claimant's dismissal because the Claimant made the allegation about a relevant statutory right?

HARASSMENT RELATED TO RACE

13. Did the following amount to unwanted conduct:

a. Making a comment that the Claimant was not "born in Milton Keynes" like the Second Respondent and therefore the Second Respondent would ensure the Claimant struggled to obtain future work in the area.

14. Was that unwanted conduct related to race? The Claimant claims the comment relates to his nationality and/or national origins in accordance with s.9 of the Equality Act 2010. The Respondents contend that Milton Keynes is a town, not a country, race or nation.

15. If so did that unwanted conduct have the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant as set out in s.26 of the Equality Act 2010?

16. If so, was it reasonable for the conduct to have that effect taking into account the perception of the Claimant and the other circumstances of the case?

17. Is the Claimant's claim made in time against the second Respondent? Does the Early Conciliation certificate cover the claim of discrimination? If not, would it be just and equitable to extend time?

WRONGFUL DISMISSAL

18. If the Claimant was dismissed, did the Respondent have a contractual entitlement to pay the Claimant his notice pay?

19. If so, did failure to pay notice amount to a breach of contract?

UNLAWFUL DEDUCTION FROM WAGES

20. Was the Claimant entitled to wages from 1 August 2019 to 9 August 2019?

21. If so, did the First Respondent pay the Claimant the wages he was entitled to?

22. What was the Claimant's contractual salary?

23. Did the Respondent pay a shortfall of £12.34 every month to the Claimant?

FAILURE TO PROVIDE A WRITTEN STATEMENT OF PARTICULARS CONTRARY TO S.1 AND S.4 OF THE EMPLOYMENT RIGHTS ACT 1996.

24. Did the Respondent provide the Claimant with a written statement of particulars in accordance with and compliant with s.1 and s.4 ERA 1996?

25. If not, is the Claimant eligible to an award for this failure?

FAILURE TO PROVIDE AN ITEMISED PAY STATEMENT IN ACCORDANCE WITH S.8 OF THE EMPLOYMENT RIGHTS ACT 1996

26. Did the Respondent provide the Claimant with a written itemised pay statement in accordance with S.8 of the Employment Rights Act 1996?

27. Did the Claimant therefore suffer deductions which were not notified in the 13 weeks prior to issue of his claim in accordance with s.12(4) of the Employment Rights Act 1996?

The Evidence

4 We heard the evidence of the Claimant, who had the benefit of a Russian interpreter, on his own behalf. We heard the evidence of the second Respondent and that of the first Respondent's HR person, Mrs Pillay, on behalf of both Respondents. We read the documents to which we were referred in a bundle of some 200 pages and heard the parties' submissions. We make the following findings of fact.

Findings of Fact

5 The Claimant was born on 29 June 1982 and was a Latvian national. He was awarded settled status in the UK on 22 August 2019. He has been very ably represented by his wife.

6 The Claimant is an experienced vehicle repair technician and registered with the Indeed employment website to find work. On 26 May 2016 the Respondent placed an advert on that website for a vehicle painter/sprayer.

7 The advert set out that the position was full time, permanent, with working hours Monday to Friday 8:00 am to 6:00 pm.

8 The Claimant applied to the agency for that post and was advised by the second Respondent, on 12 July 2016, that he would like him to attend for interview. It was anticipated the Claimant would be given a tour of the site, be introduced to staff members, be given a trial repair and there would be an end of interview discussion.

9 The Claimant attended site as requested and met the second Respondent. He was offered employment with a salary paid monthly of £15,000 plus a

contractual bonus of £200 per week. The Claimant started work on 1 August 2016 and carried out his duties as dictated by the second Respondent or the workshop manager, Sean.

- 1 In about November 2016 the Claimant was given a letter on the Respondents headed note paper dated 18 July 2016 headed "**Offer of employment**". It confirmed that he would be "employed" at the first Respondent's offices at Milton Keynes, his hours of work were as above and his start date was 1 August 2016. His pay was confirmed. It stated that he would report to the first Respondent and purported to enclose a written statement of main terms and conditions of employment. We accepted that it did not do so. The letter went on to set out terms in respect of Holidays and Termination. The letter was written in the name of the second Respondent but not signed. The Claimant signed it on 28 November 2016.
- 2 It was the second Respondent's evidence that he took no part in the Claimant's recruitment, which had been carried out by one of his then co-directors, Mr Palumbo. It also emerged, initially in cross examination of the Claimant and subsequently in examination in chief, with leave, of the second Respondent, that he contended that he had not been involved with this recruitment process because he had been overseas at the time. When questioned by the tribunal as to where he had been he replied "Bangladesh" and went on to say that he had been there throughout August and September.
- 3 Whilst we cannot determine whether or not the second Respondent was in Bangladesh at that time we thought it unnecessary to do so: he was clearly present in the UK and capable of having interviewed and engaged the Claimant in July 2016.
- 4 We also thought the second Respondent's evidence as to his having not been involved was undermined by his assertion that the evidence in his statement as to the Claimant's request for about £1,000 per month to be paid monthly to cover his fuel and other expenses was incorrect, and that the weekly payments made to the Claimant were in fact for that purpose. We also could not understand how the second Respondent could have such detailed knowledge of that arrangement unless he had been a part of it, particularly as it continued throughout the Claimant's engagement.
- 5 We also rejected the second Respondent's evidence that it did not pay a weekly bonus to its staff. This was a clear provision set out in the letter given to the Claimant in November 2016. We also note, in passing, that the Respondents' suggestion to the Claimant in cross examination that he had fabricated that letter was withdrawn, and there was no suggestion of any impropriety on the part of the Claimant in respect of it.
- 6 In this context we did not find the evidence of Mrs Pillay at all helpful: she was not employed until 2019 and could have no knowledge of what processes were adopted by the first or second Respondent prior to that time other than by what she was told.
- 7 We also rejected the suggestion made in cross examination of the Claimant, and possibly supported by the second Respondent's evidence, that the

- Claimant had specifically asked for a sum per month to be paid to him which was almost identical every month , most commonly £1107.35 but occasionally varying by a few pence. We thought the suggestion that a self-employed vehicle repair technician would ask for payment of such an odd sum to be quite extraordinary.
- 8 The Claimant worked the 45 hour week that he had contracted for and took Holidays when permission was granted. He was paid for those Holidays. Permission was not always granted, particularly if other staff had already booked holiday for the same time.
 - 9 We accepted the Claimant's evidence that throughout his engagement he was concerned at not receiving pay slips. Although he was paid in cash for the first month, thereafter transfers were made to his bank account on a weekly and monthly basis. The monthly sum, as noted above, was almost identical throughout. The weekly sum varied on occasions, but was most commonly £170.
 - 10 In the course of the hearing it was suggested to the Claimant in cross examination, more than once, that he had been working professionally for others whilst engaged to work for the Respondent. It was not suggested that he did not work the full 45 hour week he had contracted for, other than to take pre-booked holiday (of which the Respondent claimed to have detailed records) rather, it was suggested that he took time off on a sporadic basis in order to do so. We accepted his evidence that that was not the case and the only time he had done work for anyone other than the Respondents professionally had been at the suggestion of the second Respondent.
 - 11 In any event, there was no restrictive covenant that prevented the Claimant from working for others in his own time whilst engaged by the first Respondent.
 - 12 The Claimant did ask the second Respondent to be provided with pay slips from time to time. In April 2019 the Second Respondent agreed to provide the Claimant with pay slips and has accepted that the Claimant was an employee from this date forward. However, the Claimant was not provided with pay slips at the end of each month.
 - 13 We accepted the Claimant made further requests for pay slips specifically in connexion with his application for settled status in mid-2019, when he thought he had to provide evidence of five years of pay. That was not, in fact, the case but it appears to have led to the events with which we are centrally concerned.
 - 14 The second Respondent arranged for the Claimant to see his and the first Respondent's accountants, Doshi & Co, and the Claimant was given a note indicating that he should expect to receive his unique tax payer reference number from HMRC in the post.
 - 15 In late July the Claimant went online to look at his Income Tax and National Insurance records. He found, much to his dismay, that the relevant payments had not been paid.
 - 16 On 9 August 2019 the Claimant asked some of his colleagues whether they were receiving pay slips and had been paying tax. It appeared that some of

- them shared his concerns. He and his colleagues stopped working whilst discussing this issue and were approached by Sean and told that they would be invited to the office and it would all be sorted out.
- 17 The Claimant was the last person to be invited into the office, where Sean and the second Respondent were present. We accepted the Claimant's evidence that the second Respondent was extremely angry because, he asserted, the Claimant should have raised the matter with him before talking to his colleagues. The Claimant told him that he had done so but had never received his pay slips. We accepted the Claimant's evidence that the second Respondent went on in a raised and angry voice to challenge the Claimant's wish to continue working for the second Respondent, to which the Claimant replied in the affirmative, and the second Respondent said words to the effect that as he had been born in Milton Keynes and knew everyone in the area in the repair business the Claimant would not get another such job.
- 18 We accepted the Claimant's evidence that it appeared to him that the second Respondent was goading him to leave and was trying to get him to resign, but he did not do so, or suggest that he would. The Claimant was then told that he should leave the office and he returned to his work. He went back to the office, as requested, at about 6:00 pm when he saw the second Respondent and an accountant from Doshi & Co who gave him 4 pay slips, which only showed his £1,237.66 gross pay, a form from HMRC by which the Claimant could appoint a person to act as his agent for tax purposes, and a letter.
- 19 The letter was on the first Respondent's headed note paper and purported to record that his "employment" would be terminated effective 9 August 2019 "due to mutual agreement".
- 20 The second Respondent was still angry and told the Claimant that he would be sacked if he did not sign the form and letter. The Claimant declined to do so and said that he would be seeking advice as to whether he should sign the form and letter before doing so. The Claimant took the documents home and discussed them with his wife and a consultant who had assisted him with his application for settled status. Following that advice the Claimant believed the first Respondent had not paid tax and National Insurance that had been deducted from his pay to HMRC and the second Respondent was asking him to sign these documents to try and extricate himself from the situation with the assistance of Doshi & Co.
- 21 As a consequence of these events the Claimant felt quite unable to continue to work for the Respondents. He had lost all trust in them. He returned to work on 12 August 2019 and told the second Respondent that he was leaving because of the way he had been treated. He asked for his personal documents and was asked to return the following day. When he did so he was asked to return later. On that later occasion he saw the second Respondent and Mrs Pillay, who again tried to persuade him to sign the letter concerning mutual termination. Mrs Pillay also started to complete an exit interview form. We thought the Claimant's evidence on this issue to be corroborated by the alteration to the exit interview form of his start date from 2018 to 2016 as requested by the Claimant.

- 22 The Claimant subsequently received a letter on the first Respondent's headed paper signed by Mrs Pillay, dated 12 August 2019, and purporting to record that the Claimant had "verbally resigned" from his position on 9 August 2019.
- 23 On 14 August 2019 the Claimant received is P45 in the post which recorded his last working day as 31 July 2019. We accepted that was incorrect and that the Claimant had not been paid for the days he worked in August 2019.
- 24 From August to December 2019 the Claimant was seeking alternative employment and attended two interviews. He also did some work as a mobile mechanic and made a slight profit. He was also in receipt of Universal Credit. His earnings and attempts to mitigate his loss were not challenged.

Parties' Submissions

- 25 We heard oral submissions on behalf of each of the parties. It is neither necessary nor proportionate to set them out here.

The Law

- 26 The relevant statutory provisions and principles of law that we have to apply in this case are helpfully set out in the record prepared by EJ Casel.

Further Findings and Conclusions

- 27 We repeat and take into account all our above findings of fact. We make the following further findings in respect of the issues we have to determine.

Employment Status

- 28 We are unanimous in finding that the Claimant was an employee within S.230 Employment Rights Act 1996. The Respondent advertised for an employee, it engaged the Claimant as an employee and he was treated as an employee throughout his engagement. In particular: -
- 28.1 He worked full time for the Respondents and under their direction and control.
- 28.2 He was wholly integrated into the Respondents' business.
- 28.3 He was required to seek permission for holidays, for which he was paid.
- 28.4 He took no financial risk whatsoever.
- 28.5 All the tools he required were provided by the Respondents.
- 28.6 He was paid a fixed salary from which deductions were purportedly made for tax and NI.

Jurisdiction

- 29 The Claimant was employed for just more than three full years. We have jurisdiction to hear his complaint of ordinary unfair dismissal.

Dismissal

- 30 The Claimant was dismissed by the first Respondent in circumstances where the Claimant was entitled to resign, as he did on 12 August 2019, and treat himself as dismissed because of the Respondents' repudiatory conduct in

breaching the implied term relating to trust and confidence. That term was breached by the Respondents' conduct in:-

- 30.1 Not paying the deductions taken from the Claimant's pay for tax and National Insurance to HMRC
- 30.2 Not providing the Claimant with pay slips
- 30.3 Threatening the Claimant with dismissal if he did not sign documents that were untruthful.
- 30.4 Goaded the Claimant to resign
- 31 The Claimant did not waive that breach or affirm the contract and resigned promptly in response to the conduct of the Respondents.

Unfair dismissal

- 32 The onus is on the Respondent to establish, on the balance of probabilities, that the dismissal was for a potentially fair reason. We are unanimous in finding that the Respondent has failed to discharge that burden. We inevitably find that this was an unfair dismissal.

Automatic unfair dismissal

- 33 On the basis of the evidence we have heard we are satisfied that the Respondents treated the Claimant as he did because he had complained to them of their failure to supply him with the pay slips to which he was entitled under the Employment Rights Act 1996.
- 34 The Claimant raised that issue in good faith and was dismissed because he did so.
- 35 We have no hesitation in finding this was an automatically unfair dismissal contrary to S.104 Employment Rights Act 1996.

Wrongful dismissal

- 36 The Claimant had been employed for three years and was entitled to a minimum of three weeks notice. He was not given that notice or paid in lieu of it. He is entitled to be compensated for that breach of contract in the sum of £1,206.57, equal to 3 weeks net pay.

Race discrimination

- 37 The onus was on the Claimant to establish, on the balance of probabilities, evidence from which we could infer, absent an explanation from the Respondent, that the conduct he complained of could have related to his nationality.
- 38 The case was pleaded in precise terms ,
"Making a comment that the Claimant was not "born in Milton Keynes" like the Second Respondent and therefore the Second Respondent would ensure the Claimant struggled to obtain future work in the area"

And

“The Claimant claims the comment relates to his nationality and/or national origins in accordance with s.9 of the Equality Act 2010. The Respondents contend that Milton Keynes is a town, not a country, race or nation.”

39 The Claimants evidence did not support that pleaded case. It fell far short, simply alleging,

“Mr Mojumder said he knew about me wanting to work elsewhere and he was “born in Milton Keynes” he knew everyone there and that he would ensure I never found another job”

40 He did not give evidence that he understood it to relate to his race or that of the Second Respondent, far less that that an inference could be drawn to that effect.

41 It is out unanimous conclusion that the evidence is quite unable to support the inference necessary to found this claim. It is not well-founded and must be dismissed.

Unauthorised deductions

42 The Claimant was entitled to a gross salary of £15,000 per annum, or £1,250 a month. The pay slips provided to the Claimant, very belatedly, in August 2019, showed gross monthly pay of £1237.66.

43 Although no evidence was given to that effect it was suggested in the course of cross examination and submissions that that sum came about by working backwards from what the Claimant had been paid (supposedly gross and at his request) of £1,107.35 per month.

44 We have already rejected the suggestion that the Claimant asked to be paid £1107.35 per month. He was offered and accepted employment with a salary of £15,000 per annum with weekly bonuses of £200.

45 We have concluded that the Claimant has been subjected to unauthorised deductions throughout his employment at a rate of £12.34 a month and should be compensated in the sum of £444.24.

46 We also accepted that the Claimant had not been paid for the 6 days work he carried out in August 2019, and should be compensated in the net sum of £343.80.

Terms and Conditions

47 We accepted that the Claimant was not provided with a statement of terms and conditions of employment. The letters he was provided with in June and November 2016 were deficient in many respects.

48 This was a serious failure that lasted for several years and lies at the root of these claims.

49 In all the circumstances of the case it is appropriate to make a higher award of four weeks gross pay, being £1,954.54.

Unfair dismissal remedy

50 We make a declaration that the Claimant has been unfairly dismissed.

51	We make a basic award in his favour of three weeks gross pay, £1,465.98	
52	We have calculated the compensatory award on the basis of the Claimant's unchallenged figures. It is not appropriate to make an award for future loss.	
52.1	net loss of earnings	£27,035.86
52.2	loss of pension payments	£371.06
52.3	loss of statutory rights	£300.00
53	Total	£27,706.92

ACAS uplift

54 We are satisfied that while unfair dismissal proceedings are relevant proceedings within schedule A2 of TULRCA 1992 these were not disciplinary proceedings and that no uplift is appropriate in the circumstances of this case.

Employment Judge Kurrein

Sent to the parties and
entered in the Register on 15 :03 :21

THY
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For the Tribunal

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