



EMPLOYMENT TRIBUNALS

Claimant: Mr P Wilk

Respondent: Mr A Wackers

FINAL HEARING

Heard at: Watford

On: 24 January 2020

Before: Employment Judge Bartlett (sitting alone)

Appearances

For the claimant: Miss Hands, Consultant

For the respondent: no appearance

JUDGMENT

1. The claimant suffered direct discrimination contrary to section 13 of the Equality Act 2010 as follows:
 - 1.1 He was prevented from speaking his native language;
 - 1.2 He was issued with a final written warning.
2. I find that the claimant suffered harassment contrary to s26 of the Equality Act 2010 as follows:
 - 2.1 He was prevented from speaking his native language;
 - 2.2 He was issued with a final written warning.
3. The claimant was automatically unfairly dismissed contrary to S.104(1)(b) of the Employment Rights Act 1996.
4. The respondent breached the ACAS code.
5. The claimant was not provided with written reasons for dismissal contrary to s92 of the Employment Rights Act 1996.
6. The claimant was not paid holiday pay under Regulation 13 of the Working Time Regulations 1998.

JUDGEMENT ON REMEDY

Unfair Dismissal Award

7. The respondent is ordered to pay the claimant a basic award in the amount of £1,524 gross.
8. The respondent is ordered to pay the claimant a compensatory award of £36,405.78 gross.
9. The respondent is ordered to pay the claimant a total after the uplift of £37,929.78 + £1,896.78 (the 5% uplift) = £39,826.26 gross

Notice Pay

10. The respondent is ordered to pay the claimant 2 weeks notice pay, 2 x £720.36 = £1,440.72 gross.

Holiday Pay

11. The respondent is ordered to pay the claimant £2,265.96 gross in respect of unpaid holiday pay.

Discrimination

12. The respondent is ordered to pay the claimant £9000 as compensation for injury to feelings arising from discrimination he has suffered.

Declaration

13. The tribunal makes a declaration that the claimant suffered discrimination and harassment under the Equality Act 2010.

Reasons

Background

1. The claimant is a Hungarian national employed by the respondent from 2016 until 7 February 2019. The claimant was employed by the respondent as a live-in personal care assistant at all times.
2. The claimant submitted a claim form on 20 March 2019. This was accompanied by an ACAS early conciliation certificate which stated that early conciliation notification was received on 11 February 2019 and the certificate was issued on 11 March 2019.
3. The claim form was sent to the respondent by the tribunal on 9 April 2019. No response was received by the respondent and at no time has any communication been received by the tribunal from the respondent.

4. The case was scheduled for ½ day hearing to determine liability in light of the complex issues it was not considered suitable for a rule 21 default judgement.

Issues

5. The issues were largely set out in the claimant's grounds of claim and were as follows:

During the course of the claimant's employment he has been discriminated against because of his race/nationality by the respondent. Specifically:

1. *The respondent prevented the claimant from speaking his native language because the respondent did not like him speaking it. The respondent confirmed this in a statement dated 29 December 2018.*
2. *Due to the fact that the claimant was not a British national and not familiar with UK employment laws, the respondent took advantage of and discriminated against the claimant by:*
 - 2.1 *Failing to pay him the National Minimum Wage during his entire employment. The claimant was paid an hourly rate of pay of £4.54 for the weeks that he worked 154 hours and £4.16 per hour for the weeks where he worked 168 per week.*
 - 2.2 *Requiring him to work in breach of the Working Time Regulations 1998. Specifically, he was:*
 - 2.2.1 *Made to work excessive hours above the average 48 hours weekly maximum in breach of regulation 4.*
 - 2.2.2 *A night worker and was made to work in excess of an average 8 hours for each 24 hours in breach of regulation 5.*
 - 2.2.3 *Prevented from having sufficient daily rest as he had less than 11 consecutive hours in each 24-hour in breach of regulation 10.*
 - 2.2.4 *Deprived of his entitlement to an uninterrupted rest period of not less than 24 hours in each 7-day period in breach of regulation 11.*
 - 2.2.5 *Deprived of his daily rest breaks in breach of regulation 12.*
3. *Failing to provide the claimant with suitable living conditions. As a live-in carer the claimant was supposed to be provided with a room for his sole use. However, the respondent allowed his mother to use the room as a storage room, reducing the space available to the claimant to the point that he was living out of his suitcase.*
4. *Suspending the claimant on 8 January 2018 for minor allegations that did not warrant his suspension.*

5. *Reporting the claimant to the Police in January 2018 for the same minor allegations where it was clear that no criminal offence had been committed.*
6. *Suspending the claimant for an unreasonable period of time. The claimant was suspended on 8 January 2018 and remained suspended until his dismissal on 7 February 2019.*
7. *Issuing the claimant with a final written warning for allegedly admitting to referring to the respondent as "idiot" or "idiot boy" to a colleague, when the claimant made no such admission.*
8. *Failing to deal with the claimant's appeal against the issue of the final written warning.*
9. *Putting the claimant through a sham redundancy process.*
10. *Unfairly dismissing the claimant on 7 February 2019. On this date the claimant received an email clearly purporting to terminating his employment. No disciplinary process was followed, and it is clear from the content of the email that the reason for the claimant's dismissal was because he had asserted his statutory right to be paid the National Minimum Wage on 28 January 2018. The claimant therefore considers his dismissal to be automatically unfair under s.104(1)(b) of the Employment Rights Act 1996.*
11. *On 7 February 2018, the claimant sent the respondent an email appealing against his dismissal and asking for written reasons for his dismissal. The respondent failed to invite the claimant to an appeal meeting in breach of the Acas Code and also failed to provide the claimant with written reasons for his dismissal.*
12. *Following the claimant's dismissal, the respondent failed to pay him notice pay.*
13. *AND the claimant claims:*
14. *Direct race discrimination.*
15. *Racial harassment.*
16. *Unfair dismissal.*
17. *Breach of contract – notice pay.*
18. *WTR – Holiday pay.*
19. *Failure to provide written reasons of dismissal.*
20. *Breach of the Acas Code.*
14. I sought clarification from Ms Hands on a number of points, in particular:
 - 14.1 if and how the claimant's Working Time Regulations claim was pleaded. She confirmed that it was pleaded as a claim for unpaid holiday pay;

- 14.2 that the discrimination claim was pleaded as a direct discrimination and harassment.
15. I took the reference to “the claimant is not a British national” as identifying the comparator as a non-British national. The discrimination is therefore race in the form of nationality.

The hearing

16. The claimant attended the hearing and had the benefit of an Hungarian interpreter.
17. The claimant adopted his witness statement and was asked some questions by Miss Hands and myself.

Request for further submissions

18. After the hearing I decided that I was unable to decide it fairly on the information before me. This is because the copy of the bundle I received had tens of pages missing and the schedule of loss was based on the claimant working 22 hours a day which I felt did not deal with the decision of the Court of Appeal in **Royal Mencap Society v Tomlinson-Blake [2018] EWCA Civ 1641.**
19. Therefore I requested further submissions on the **Royal Mencap Society v Tomlinson-Blake [2018] EWCA Civ 1641** issue and for a complete copy of the bundle to be provided. These were received by me on 5 March 2020.

The law

The Burden of Proof

20. In **Igen Ltd v Wong** the Court of Appeal approved the guidance given in **Barton v Investec Securities Ltd [2003] IRLR 332** concerning the burden of proof in discrimination cases which is that:

“(1) Pursuant to s 63A of the SDA 1975, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s 41 or s 42 of the SDA 1975 is to be treated as having been committed against the claimant. These are referred to below as “such facts”.

(2) If the claimant does not prove such facts he or she will fail....

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) *It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.*

(11) *To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since “no discrimination whatsoever” is compatible with the Burden of Proof Directive.”*

21. I took into account, amongst others, the case of **Project Management Institute v Latif [2007] IRLR 579, EAT** in which Elias P (referring to the old Code of Practice under the Disability Discrimination Act but which is still relevant today), stated that:

‘In our opinion, the Code is correct. The key point identified therein is that the claimant must not only establish that the duty has arisen, but that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred that there is a breach of that duty. There must be some evidence of some apparently reasonable adjustment which could be made. We do not suggest that in every case the claimant would have to provide the detailed adjustment that would need to be made before the burden would shift. However, we do think that it would be necessary for the respondent to understand the broad nature of the adjustment proposed and be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not’.

Decision

1. *The respondent prevented the claimant from speaking his native language because the respondent did not like him speaking it.*
22. I accept the claimant’s evidence that the respondent complained when the claimant was speaking to his wife, friends or another carer in the Hungarian language. I find that this is direct discrimination because it was unfavourable treatment arising from the claimant’s nationality. In addition I find that this is harassment for similar reasons and because it created a hostile and intimidating working environment. I accept the claimant’s evidence that this was conduct which lasted for the duration of his employment (except during his long period of suspension) and occurred on a number of occasions.
2. *Failing to pay him the National Minimum Wage during his entire employment. The claimant was paid an hourly rate of pay of £4.54 for the weeks that he worked 154 hours and £4.16 per hour for the weeks where he worked 168 per week.*
23. The issue as to whether the claimant was paid the correct monies for the work that he undertook including the National Minimum Wage and whether he

received the breaks to which he was entitled is complicated. The case was not pleaded under the National Minimum Wage Regulations.

24. For the purposes of determining whether or not the claimant was discriminated against I will proceed on the basis that the claimant was not paid the National Minimum Wage.

25. I do not accept that this treatment was because of his nationality. I find that the respondent would have behaved in this way towards any individual regardless of their nationality. The claimant's own evidence was that the respondent and his family treated all carers regardless of nationality badly and that the respondent acted in the way that he did simply because he could. Further, there is nothing personal or related to the claimant as an individual who possesses his characteristics and the protected characteristic which in any way links to an underpayment. In the Employment Tribunal we see many individuals across the whole spectrum of society that are underpaid because an employer can do so and not because of a protected characteristic. I also recognise that there are cases where underpayment is because of a protected characteristic. I am prepared to proceed on the basis that the claimant has discharged the burden of proof. However I find that the evidence establishes that the treatment was in no way connected to the protected characteristic. Therefore I find that these were not acts of direct discrimination or harassment.

3. Requiring him to work in breach of the Working Time Regulations 1998.

Specifically, he was:

- a. Made to work excessive hours above the average 48 hours weekly maximum in breach of regulation 4.
- b. A night worker and was made to work in excess of an average 8 hours for each 24 hours in breach of regulation 5.
- c. Prevented from having sufficient daily rest as he had less than 11 consecutive hours in each 24-hour in breach of regulation 10.
- d. Deprived of his entitlement to an uninterrupted rest period of not less than 24 hours in each 7-day period in breach of regulation 11.
- e. Deprived of his daily rest breaks in breach of regulation 12.

26. I have taken this to be a complaint about the claimant's hours in general rather than a complaint that there have been specific breaches of the Working Time Regulations. This case was not pleaded under the Working Time Regulations save in respect of holiday pay and the references to the breaches of the Working Time Regulations failed to take into account that the claimant was a domestic worker and therefore regulation 19 exempted him from some of its provisions.

27. In response to my request for further submissions on the Court of Appeal decision in **Royal Mencap Society v Tomlinson-Blake [2018] EWCA Civ 1641** which sets out that sleeping time is not working time, the claimant stated

that his case could be distinguished because his contract set out that he was to work 22 hours per day, he did not have designated sleeping time and Ms Tomlinson's first hour after waking was remunerated but the claimant's was not. As set out below I do not accept that the claimant was awake and working for 22 hours or more every day. I find that he had sleeping time and that on occasion this was disturbed.

28. I have approached this issue in the same way that I have approached the national minimum wage issue which is that for the purposes of deciding discrimination, I have taken the claimant's case at its highest.

29. I do not accept that this treatment was because of his nationality. I find that the respondent would have behaved in this way towards any individual regardless of their nationality. The claimant's own evidence was that the respondent and his family treated all carers regardless of nationality badly and that the respondent acted in the way that he did simply because he could. Further, there is nothing personal or related to the claimant as an individual who possesses his characteristics and the protected characteristic which in any way links to an underpayment. In the Employment Tribunal we see many individuals across the whole spectrum of society who do not receive the required breaks because an employer can do so and not because of a protected characteristic. I also recognise that there are cases where a failure to provide the statutory rest periods is because of a protected characteristic. I am prepared to accept that the claimant has discharged the prima facie burden of proof on him. However in the circumstances of this case, I find that the evidence establishes to the correct standard of proof that these failures were for no reason whatsoever connected to the protected characteristic. Therefore I find that these were not acts of direct discrimination or harassment.

4. Failing to provide the claimant with suitable living conditions. As a live-in carer the claimant was supposed to be provided with a room for his sole use. However, the respondent allowed his mother to use the room as a storage room, reducing the space available to the claimant to the point that he was living out of his suitcase.

30. I do not accept that this treatment was because of his nationality. I find that the respondent would have behaved in this way towards any individual regardless of their nationality for the reasons set out above. Therefore these claims are not direct discrimination or harassment.

5. Suspending the claimant on 8 January 2018 for minor allegations that did not warrant his suspension and

6. Suspending the claimant for an unreasonable period of time. The claimant was suspended on 8 January 2018 and remained suspended until his dismissal on 7 February 2019.

31. I have taken these two allegations together because of their similar nature.

32. Written documents in the bundle from the respondent confirmed that the claimant was suspended as alleged. I find that the suspension was a continuing act.

33. I am satisfied that the claimant has discharged the prima facie the burden of proof which lies on him. The suspension was ostentatiously for a serious reason which were complaints about safeguarding raised by the respondent. There is little evidence to support that this was a genuine complaint raised by the respondent. However, there is substantial evidence that by this time the relationship between the claimant and the respondent had broken down, partly due to the complaints the claimant had made about the respondent's attitudes, lifestyle and use of workers. I find that it was the breakdown of the relationship and the claimant's complaints about the respondent which were the reason for the suspension. Therefore I am satisfied to the standard of proof that the respondent's actions were not connected in any sense to the claimant's protected characteristic. I find that these were not acts of direct discrimination or harassment.

7. Reporting the claimant to the Police in January 2018 for the same minor allegations where it was clear that no criminal offence had been committed.

34. I find that the evidence establishes that around this time the relationship between the claimant and the respondent was breaking down. The claimant had made numerous complaints to the direct payments team about the respondent. These complaints were not focused on having been the victim of discrimination instead they were a wide range of complaints about how the household was run and how the respondent lived his life. I also note at this time that the claimant had made complaints about being inadequately remunerated.

35. There is very little evidence in front of me about the reasons for the police complaint and it was eventually not upheld.

36. In these circumstances I find that the claimant has discharged prima facie burden of proof which lies on him and find that it was a breakdown of the relationship and the complaints about remuneration and working time which were the cause of these actions rather than any discriminatory factor. Therefore I find that there was no connection whatsoever to the protected characteristic and I find that it was not direct discrimination or harassment.

8. Issuing the claimant with a final written warning for allegedly admitting to referring to the respondent as "idiot" or "idiot boy" to a colleague, when the claimant made no such admission.

37. I find that the sanction of a final written warning for such comment is without justification. I also considered that the use of the language "idiot" or "idiot boy" is some allusion to the claimant speaking English as a second language and the phraseology he used when speaking. Therefore I find that the claimant has discharged the prima facie burden of proof which lies on him and I find this is an act of direct discrimination.

38. I find that this was an act of harassment because it would reasonably have the effect of creating a hostile and intimidating environment for any individual.

9. Failing to deal with the claimant's appeal against the issue of the final written warning.

39. I find that the claimant has not discharged the prima facie burden of proof which lies on him. I accept that the respondent did not address the claimant's appeal. I find that the respondent was not interested in administrative matters and that issues like the extended suspension arose because he did not turn his mind to the situation. Therefore I do not accept that there is anything more on the face of it than disinterest and ineptitude that has no link to the protected characteristic.

10. Putting the claimant through a sham redundancy process.

40. I find that there was no genuine redundancy because the respondent's care needs remain unchanged. However I do not accept that this is linked to discrimination. Instead I consider that it is because the claimant raised issues about his underpayment and working time. I consider that the respondent would have taken these actions in respect of any individual who raised issues regardless of their nationality.

11. Automatic unfair dismissal

41. I find that the claimant asserted his right to be paid to the national minimum wage on or around 3 January 2018. Shortly after this date the claimant was suspended and then ultimately dismissed. There was some mention of redundancy throughout the paperwork produced by the respondent however I do not accept that there was a genuine redundancy situation. On the balance of probabilities, I find that the claimant was dismissed for asserting his statutory right under S.104(1)(b) of the Employment Rights Act 1996.

42. I find that the claimant was automatically unfairly dismissed.

12. Breach of the ACAS code

43. I find that a dismissal process was followed in relation to the claimant. I note that the respondent employs a very small number of people for his care needs. He has limited resources and he is not a professional or anything more than a micro employer. I find that the respondent failed to respond to the claimant's appeal against redundancy (the reason given at the time for dismissal) at all. I find that this is a breach of the ACAS code.

13. Failure to provide written reasons for dismissal

44. There is no evidence before me that the claimant received written reasons for his dismissal. Therefore I find that the respondent failed to provide written reasons for the dismissal.

14. Breach of the Working Time Regulations in relation to holiday pay

45. There is no evidence before me that the claimant was paid his holiday pay during the period of suspension until his dismissal. I find that there was a breach of the working time regulations in relation to holiday pay.

Summary of my judgement on the liability issues

46. I find that the claimant suffered direct discrimination as follows:
- 46.1 preventing the claimant from speaking his native language;
 - 46.2 issuing the claimant with a final written warning.
47. I find that the claimant suffered harassment as follows:
- 47.1 preventing the claimant from speaking his native language;
 - 47.2 issuing the claimant with a final written warning.
48. I find that the claimant was automatically unfairly dismissed.
49. I find that the respondent breached the ACAS code.
50. I find that the claimant was not provided with written reasons for dismissal.
51. I find that the claimant was not paid holiday pay under the working Time regulations.

Remedy

52. I do not accept that the claimant worked 22 hours a day 7 days a week. I find that the claimant's representatives attempt to distinguish **Royal Mencap Society v Tomlinson-Blake [2018] EWCA Civ 1641** was unpersuasive and they wholly failed to deal with the point of principle which applies equally to this case.
53. I find that the evidence before me sets out that the claimant was working during the ordinary working hours of the household, including several hours before the respondent woke in the mornings (because the respondent woke relatively late).
54. I have carefully read the evidence before me about the activities of the household in which the claimant worked and the evidence about the night-time work that the claimant carried out. It is clear from the evidence that the claimant and the respondent did not have a good relationship. The claimant made numerous complaints about the respondent's conduct and behaviour to the direct payments team at the Council. I have read these carefully and I find that they set out some complaints about isolated and occasional night-time incidents when the claimant was required to carry out more than a basic task of short duration. There was no requirement for the claimant to be awake and working for 22 hours a day. I find that at night he was effectively on-call. I am prepared to accept that each night he worked a maximum of one hour per night carrying out a task of short duration, such as assisting the respondent with his medication. I find that any greater assistance was infrequent and amounted to no more than one extra hour per week.
55. In light of my findings of facts above about the claimant's work. I find that he carried out the following working hours:
- 55.1 Monday to Sunday 8am to 10pm less 1 x 1 hour break and 2 x 30 minute break (12 hours x 7days = 84 hrs pw);

- 55.2 Monday to Sunday one hour at night (1hr x 7 days = 7 hours pw)
- 55.3 one extra hour at night per week (1 hour);
- 55.4 this gives a total of 92 hours pw.

56. The national minimum wage for April 2018 to March 2019 was £7.83. The national minimum wage for April 2019 to March 2020 is £8.21.

57. Therefore at the date of dismissal his gross weekly wage was $92 \times £7.83 = £720.36$ gross

58. His pay would have increased in April 2019 to $92 \times £8.21 = £755.32$ gross

Basic award

59. The claimant schedule of loss sets out a claim of a basic award in the amount of £1,524 gross. At the date of dismissal the claimant was 44 years old. At the date of dismissal he had 2 years of complete service and he reached the statutory weekly cap. Therefore I accept the claimant's calculation.

Compensatory award

60. The claimant schedule of loss sets out double counting of notice pay and a compensatory award, lasting for 50.5 weeks. Therefore I am deducting 2 weeks from the 50.5 weeks to give 48.5 weeks as a duration of the compensatory award.

61. I have made an award of this duration as I accepted the claimant's evidence that he has suffered from mental ill health and I find that this would have extended the time he could reasonably expected to find a new job.

62. $6.5 \times$ gross weekly pay $£720.36 = £4,682.34$

63. $42 \times$ gross weekly pay $£755.32 = £31,723.44$

64. This gives a compensatory award of $£36,405.78$ gross

Uplift the failure to follow the ACAS award

65. I have decided to make an uplift of 5%, this is because the respondent is a small employer. The only individuals he employs are carers and many of the arrangements for them go through the direct payments team. The respondent is not a professional and bearing in mind this situation I consider that a 5% uplift is appropriate.

66. The basic award $£1524$ plus the compensatory award $£36,405.78 = £37,929.78$.

67. 5% of $£37,929.78 = £1,896.48$

68. The total after the uplift is $£37,929.78 + £1,896.48 = £39,826.26$ gross

Notice pay

69. I award the claimant 2 weeks notice pay, $2 \times £720.36 = £1,440.72$ gross

Holiday pay

70. I accept the claimant was not paid 21 days holiday. This is equal to 3 weeks pa.
3 x £755.32 = £2,265.96 gross.

Discrimination

71. I find that the discrimination that the claimant suffered falls at the lower end of the middle vento band which gives an award of £9,000. No uplift for failure to follow the ACAS code applies.

72. I find that the claimant suffered some incidents of discrimination and harassment but that these were not a lengthy and sustained course of conduct over a long period of time. This is why the award falls at the lower end of the middle band.

Failure to provide written reasons for dismissal

73. I award 2 weeks pay = 2 x £755.32 = £1,510.64 gross

Employment Judge Bartlett

Date: 11 March 2020

Sent to the parties on: 14 April 2020

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For the Tribunal:

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