



EMPLOYMENT TRIBUNALS

Claimant

Respondents

Mr E Okot

v

OCS UK & I Limited

Heard at: London Central Employment Tribunal (CVP)

On: 8 & 9 February 2024

Before: Employment Judge Brown

**Members: Mr I McLaughlin
Mr S Pearlman**

Appearances

For the Claimant: Mr Benedicct Komakech Obalobuk, Solicitor
For the Respondent: Mr J Wynne, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

- 1. The Respondent did not discriminate against the Claimant because of race when it dismissed him or in the way it allocated work.**
- 2. The Claimant's claim for notice pay is not well-founded.**
- 3. The Claimant's claim for unpaid wages is not well-founded.**
- 4. The Claimants claims are dismissed.**

REASONS

The Case and this Hearing

- 1. By a claim form presented on 23 September 2022 the Claimant presented complaints of race discrimination and failure to pay notice pay, redundancy pay and wages/sick pay against the Respondent, his former employer.**
- 2. At the start of this hearing it was agreed that the correct name of the Respondent is now OCS UK & I Limited (it was formerly Atalian Servest Limited). The Tribunal ordered that the name of the Respondent was changed accordingly.**

3. On 9 October 2023, at a Private Case Management Preliminary Hearing, EJ Professor Neal set out the Claimant's complaints as follows:
 - 3.1. Breach of contract: It is alleged that notice pay of one week's wages (due both under the contract of employment and reflecting the statutory minimum notice pay due to the Claimant) has not been paid by the Respondent;
 - 3.2. Unlawful Deduction from Wages: It is alleged that the Respondent has failed to make payment of wages due (which may include some elements of Statutory Sick Pay) for a period commencing in January 2022 and ending on the effective date of termination (28 June 2022);
 - 3.3. Unlawful Discrimination by reference to the protected characteristic of race: It is alleged that the Claimant has been subject to direct discrimination (Section 13 Equality Act 2010). The Claimant describes himself for the purposes of these proceedings as "Black African". He seeks to compare himself with a hypothetical comparator which he describes as "An Indian and/or Goan colleague in comparable circumstances". There are two acts complained of – namely, (1) allocation of less favourable work tasks; and (2) dismissal.
4. EJ Neal recorded it was confirmed that no complaint had been presented alleging (a) Unfair Dismissal; (b) Entitlement to a Redundancy Payment; or (c) Harassment by reference to the protected characteristic of race.
5. EJ Neal set out that it was agreed that the issues in the claims were as follows:
 - (1) Breach of Contract
 - 1.1 What was the Claimant's notice period?
 - 1.2 Was the Claimant paid for that notice period?
 - 1.3 If not, was the respondent entitled to dismiss without notice?
 - (2) Unlawful Deduction from Wages (Wrongful dismissal/Notice pay)

Did the Respondent make unauthorised deductions from the Claimant's wages and if so how much was deducted?
 - (3) Direct Race Discrimination (Equality Act 2010 section 13)
 - 2.1 Did the Respondent do the following things:
 - 2.1.1 Allocate cleaning duties to the Claimant on a different basis from their allocation of cleaning duties to Indian and/or Goan colleagues?
 - 2.1.2 Dismiss the Claimant?
 - 2.2 If so, was that less favourable treatment?
 - 2.3 If so, was it because of race?
 - 2.4 If so, did the Respondent's treatment amount to a detriment?
6. At the start of this Final Hearing, the Tribunal confirmed with the parties that EJ Neal had accurately recorded the claims and issues.
7. The Tribunal was provided with a Bundle of documents. It read relevant documents, as indicated by the parties, in the Bundle. The Tribunal read witness statements from the Claimant and, for the Respondent, from Denise Dempsey, Station and Compliance Manager, and Caitano Rosario, who was a Contract Coordinator between the Respondent and Great

Western Railways at the relevant time. It read a skeleton argument provided by the Respondent.

8. Both parties made submissions. The Tribunal gave an oral Judgment.
9. Findings of Fact
10. The Claimant is a black person of African ethnic origin. He is an asylum seeker in the UK.
11. The Respondent has a contract with Great Western Railway (GWR) to clean their trains at Paddington station.
12. The Claimant applied for a job with the Respondent as a cleaning operative.
13. The Respondent has a Right Check App which it uses to carry out checks on its employees' right to work. Caitano Rosario, a Contract Coordinator Co-ordinator at the time, carries out these "right to work" checks for staff. He uses the Right Check App on his phone to complete the staff member's details and upload photographs of their documents. Those details are then sent to HR Support, who notify him if anything is wrong, or needs updating.
14. The Claimant started working for the Respondent on a temporary basis as a Cleaning Operative in November 2021. Caitano Rosario was his line manager and carried out initial right to work checks, p50. The Claimant provided an Application Registration Card (ARC) which was valid until 22 January 2022, p 54. HR Support confirmed that this was approved.
15. The Claimant's contract provided, at paragraph 12,

"12. Termination and notice period: You may terminate your employment during your probationary period by giving us one weeks' notice and thereafter by giving four weeks' notice. We can terminate your employment in the first two years of continuous employment by giving one week's notice in writing. After that time, we can terminate your employment by giving written notice of one week for each complete year of continuous employment, up to a maximum of 12 weeks' notice after 12 years or more. Fixed term contracts shall terminate on the "End Date" without further notice being required.

12.1 We may at our discretion terminate your employment without notice and make a payment of basic pay in lieu of notice.

12.2 We shall be entitled to dismiss you at any time without notice or payment in lieu of notice in the event of gross misconduct or if you commit a serious breach of your obligations as an employee or if you cease to be entitled to work in the UK."
16. The Claimant's cleaning operative job involved carrying out heavy cleans on trains, called a periodic heavy clean, at night. The trains would arrive at 23.00. Before then, cleaning operatives would clean barriers at Paddington station. Cleaning the trains includes vacuuming, cleaning carpets with machines, cleaning the toilets, cleaning the roof of the train carriage and any surfaces that can be touched, including luggage racks and seats.
17. There was a dispute of fact as to whether the Claimant was given more work to do than cleaning operatives of Indian -Goan national origin/ethnicity. He told the Tribunal that he was expected to help Indian-Goans but they were not expected to help them.
18. The Tribunal accepted Mr Rosario's evidence that cleaning tasks on the trains would be allocated each evening and that the team leader would be share out tasks amongst the team.

If one task took longer to complete, other team members would be expected to help out, to ensure that all tasks were complete. The Tribunal accepted his evidence that he would visit the train teams during the night and check with the team leader how the work was going and that no one ever expressed any unhappiness about the tasks they were carrying out.

19. The team members worked together. Each team would finish at same time and have its breaks together.
20. The Tribunal accepted Mr Rosario's evidence that he was informed by HR Support that the Claimant's ARC card was due to expire and the Claimant needed to renew it. It accepted his evidence that Mr Rosario told the Claimant repeatedly that he would need to update his ARC because it would expire on 22 January 2022.
21. On 19 January 2022 the Claimant sent a letter by recorded post to the Home Office, asking for his ARC to be extended because his asylum claim had not yet been resolved, p75. He did not give the Respondent a copy of that letter at the time.
22. The Respondent asked the Claimant to stand down from his duties from 22 January 2022.
23. It did not offer him work, nor pay him for work, after that date.
24. Mr Rosario told the Claimant that the Respondent would wait until 1 April 2022 for the Claimant to provide his renewed right to work documents from the Home Office, or proof of his renewal application, p103-104, p110. He told him that, if he did not provide the documents by then, the Claimant's employment would be terminated. The Claimant did not provide any documents before 1 April 2022.
25. The Claimant told the Tribunal that he had provided Mr Rosario with a link to a Home Office website, in order for the Respondent to check his work status. The Claimant did not tell the Tribunal how the website operated. He did not provide evidence to show that, if the Respondent had used this Home Office link, it would have shown that he had the right to work in the UK after 22 January 2022.
26. He told the Tribunal that he did not have a Home Office "share code" for the Respondent to check his right to work, because only people with Biometric Residence Permit ("BRP") have a share code and he does not have a BRP.
27. On 28 February HR Support emailed Mr Rosario saying, "Good day Caitano, ... This email is in regards to the right to work document of the employee Emmanuel Okot which had expired on 22.01.2022. Kindly provide one of the below mentioned sent through via Rightcheck as soon as possible otherwise Emmanuel Okot will be stopped from working. Biometric residence permit or, share code, or Proof of application EU settlement. ... "p97.
28. Mr Rosario emailed HR on 28 February 2022 saying, "Emmanuel Okot is not working at the moment he was told to stand down at work from Jan 22nd . He has been told to get his RTW document, as soon he bring them will send it through via Right check." P96.
29. Mr Rosario told the Tribunal, and the Tribunal accepted, that the Respondent always requires its employees to provide hard copy documents showing their right to work.
30. On 11 April 2022 Denise Dempsey, Station and Compliance Manager, completed a leaver Form in respect of the Claimant. She said that the Claimant had been given notice on 4 April 2022 and that his leaving date was 11 April 2022. She said that his reason for leaving was "Right to work documentation not provided." p114.

31. Ms Dempsey told the Tribunal, and the Tribunal accepted, that she believed that HR support would then send the relevant documents to the Claimant.
32. The Respondent did not send the Claimant any written notice of termination of his employment at that time. The Tribunal observed that that was unfortunate and perhaps led to the Claimant being uncertain about his employment status.
33. On 9 June 2022 the Claimant prepared a letter before action for a Judicial Review challenge to the Home Office regarding its failure to provide him with a new ARC card, p76. In the document he said, "... nobody can accommodate and/or employ me (because I do not have any proof of my right to remain and work in the UK." P79.
34. Unfortunately for the Claimant, the Home Office did not issue him with a new ARC card until 14 June 2022. It was valid from 14 June 2022 until 14 June 2024.
35. He visited the Respondent's offices in Paddington on 28 June 2022. Ms Dempsey was in a meeting, so he called her by telephone. The Claimant told Ms Dempsey that he had his documents. Ms Dempsey was in a meeting and was busy when the Claimant called, but she still took time to speak to him on the phone. She told him that it was now too late because he had already been dismissed. She repeated several times that he had already been made a leaver because he had not produced his right to work documentation.
36. There was a dispute about whether Ms Dempsey shouted at the Claimant, or was dismissive of him, during this phone call. The Claimant told the Tribunal that he had wanted to speak to Ms Dempsey face to face, but she had refused. In evidence, Ms Dempsey denied that she had shouted.
37. The Tribunal decided that Ms Dempsey had processed a leaver form for the Claimant on 11 April 2022 and that she believed that his employment had ended at that time.
38. It decided that Ms Dempsey was forceful with the Claimant because he was insistent that he wanted to speak to her face to face, but she believed that his employment had ended some time previously. However, it decided that she did not shout and was not dismissive.
39. The Respondent conceded, for the purpose of these proceedings, that it dismissed the Claimant on 28 June 2022.
40. In submissions, the Respondent did not contend that it would have been a criminal offence under *s21 Immigration, Asylum and Nationality Act 2006* to continue to employ the Claimant after 22 January 2022. It contended that it could not be known, on the evidence, whether it would have been a criminal offence to continue to employ the Claimant.

Law

Race Discrimination

41. By *s39(2) Equality Act 2010*, an employer must not discriminate against an employee by dismissing him.
42. Direct discrimination is defined in *s13(1) EqA 2010*:

"(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."

43. Race is a protected characteristic, *s4 EqA 2010*.
44. In case of direct discrimination, on the comparison made between the employee and others, "there must be no material difference relating to each case," *s23 EqA 2010*.

Causation

45. If the Tribunal is satisfied that the protected characteristic/act is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it had a significant influence, per Lord Nicholls in *Nagarajan v London Regional Transport* [1999] IRLR 572, 576. "Significant" means more than trivial, *Igen v Wong, Villalba v Merrill Lynch & Co Inc* [2006] IRLR 437, EAT.

Detriment

46. In order for a disadvantage to qualify as a "detriment", it must arise in the employment field, in that ET must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work. An unjustified sense of grievance cannot amount to "detriment". However, to establish a detriment, it is not necessary to demonstrate some physical or economic consequence, *Shamoon v Chief Constable of RUC* [2003] UKHL 11.
47. The shifting burden of proof applies to claims under the *Equality Act 2010*, *s136 EqA 2010*.

Wages and Contracts

48. *s13 Employment Rights Act 1996* a worker has the right not to suffer unauthorized deductions from wages. By *s27 ERA 1996* "wages" is defined. By *s27(1)*, "In this Part "wages", in relation to a worker, means any sums payable to the worker in connection with his employment, including: a) any fee, bonus, commission, holiday pay or other emolument referable to his employment whether payable under his contract or otherwise. ...".
49. In *Miles v Wakefield Metropolitan District Council* [1987] IRLR 193, [1987] ICR 368, HL, Lord Templeman said, "In a contract of employment wages and work go together. The employer pays for work and the worker works for his wages. If the employer declines to pay, the worker need not work. If the worker declines to work, the employer need not pay. In an action by a worker to recover his pay he must allege and be ready to prove that he worked or was willing to work."
50. In considering the question of whether an employee was "willing and able" to work, even if they did not work, Lord Oliver drew a distinction in *Miles v Wakefield* [1987] IRLR 193, HL, between a 'voluntary' and 'involuntary' inability to work, whilst Lord Brightman used the expression 'unavoidable impediment' when considering the issue.
51. In *Burns v Santander UK plc* [2011] IRLR 639, EAT, the EAT decided that the Claimant had conducted himself in such a way that, according to the criminal court, he should be deprived of his freedom and therefore deprived of his right to attend work. That amounted to an avoidable impediment. Accordingly, 'it was to be implied that he was not entitled to his wages for the relevant period'.
52. By *s86 Employment Rights Act 1996*, an employee has a right to be given minimum notice. The right is one week's notice for each year of continuous employment.

53. By *Employment Tribunals (Extension of Jurisdiction) England & Wales Order 1994* the Employment Tribunal has jurisdiction with regard to contractual claims arising or outstanding at the termination of the employment of an employee.
54. Where an employee has committed a repudiatory breach of contract, the employer can accept the repudiation, resulting in summary dismissal.
55. The degree of misconduct necessary in order for the employee's behaviour to amount to a repudiatory breach is a question of fact for the Tribunal to decide. In *Briscoe v Lubrizol Ltd* [2002] IRLR 607, the Court of Appeal approved the test set out in *Neary v Dean of Westminster* [1999] IRLR 288, ECJ, where the Special Commissioner held that the conduct, "must so undermine the trust and confidence which is inherent in the particular contract of employment that the employer should no longer be required to retain the employee in his employment."
56. An employer faced with a repudiatory breach of contract can either affirm the contract and treat it as continuing, or accept the repudiation, which results in immediate, summary dismissal.

Discussion and Decision

57. The Tribunal took into account all the facts and the law before coming to its decision.
58. It addressed, first, the Claimant's unlawful deductions from wages and notice pay complaints.
- Wages*
59. The Claimant's claim for unlawful deductions from wages is a that "the Respondent has failed to make payment of wages due (which may include some elements of Statutory Sick Pay) for a period commencing in January 2022 and ending on the effective date of termination (28 June 2022)."
60. The Tribunal decided that the Respondent had stopped the Claimant from working after 22 January 2022 because he had not provided the Respondent with proof of his right to work. His ARC, confirming his right to work, had expired on that date. He did not produce any other document, before he attended the Respondent's offices on 28 June 2022, to prove that he had the right to work. The Tribunal did not find that the Claimant had provided the Respondent with any link to a Home Office website which might have confirmed his right to work.
61. In an action by a worker to recover his pay, he must allege and be ready to prove that he worked or was willing to work, *Miles v Wakefield* [1987] IRLR 193, HL,
62. The Tribunal had to decide whether the Claimant's failure to provide proof of his right to work was a 'voluntary' and 'involuntary' inability to work, or an 'unavoidable impediment'.
63. The Tribunal decided that the provision of the documents showing that he had a right to work was something for which the Claimant, alone, was responsible. It accepted the Mr Rosario told the Claimant repeatedly that he would need to update his ARC because it would expire on 22 January 2022.
64. It was not until 19 January 2022 that the Claimant sent a letter by recorded post to the Home Office, asking for his ARC to be extended, p75.

65. The Tribunal did not accept that a Home Office website would have confirmed the Claimant's right to work. The Claimant did not demonstrate to the Tribunal that this would have been the case.
66. The Tribunal decided that the Claimant did not act until very late to renew his ARC card. Three days' notice to the Home Office was highly unlikely to be sufficient time for the Home Office to process his request. The Claimant ought to have acted much earlier – he could not have had any reasonable expectation that his request would have been processed within days, let alone weeks. The Claimant's failure to apply earlier was an avoidable impediment to his being able to work for the Respondent. The Claimant knew that he was required to produce documents which demonstrated his right to work, but he took wholly inadequate steps to do so.
67. Accordingly, the Claimant could not show that he was willing and able to work from 22 January 2022. He never produced any documents showing his right to work between 22 January 2022 and 28 June 2022.
68. The Respondent did not make unlawful deductions from the Claimant's wages between 22 January 2022 and 28 June 2022.

Notice Pay

69. Regarding notice pay, the Respondent contended that the Claimant's failure to produce documents showing his right to work constituted a repudiatory breach of contract.
70. The Tribunal decided that an employee's failure to produce documents showing his entitlement to work fundamentally undermines an employer's trust and confidence in the employment contract. It so undermines the trust and confidence which is inherent in the contract of employment that the employer should no longer be required to retain the employee in employment. Without such documentation, an employer cannot know whether it is committing a criminal offence in continuing to employ the employee. That strikes at the heart of the contract.
71. The Claimant did, therefore, commit a repudiatory breach of contract.
72. The Respondent believed that it was no longer required to retain the Claimant in employment after April 2022, by which time it had given him ample opportunity to present the documents; Ms Dempsey told him this on 28 June 2022. The Respondent conceded that she therefore dismissed him on 28 June 2022.
73. Accordingly, the Respondent did not accept the Claimant's repudiatory breach until 28 June 2022. The Tribunal considered whether the considerable delay between the breach and the dismissal indicated that the Respondent had affirmed the contract.
74. However, delay, on its own, does not necessarily indicate affirmation. The Claimant was neither working, nor was the Respondent paying the Claimant, between January 2022 and 28 June 2022. In those circumstances, the Tribunal decided that that Respondent had not indicated that, notwithstanding the breach, it intended to continue with the contract. The contract was not being performed by either party between January 2022 and 28 June 2022.
75. The Tribunal decided that the Respondent had not affirmed the contract after the Claimant's repudiatory breach and that the Respondent was therefore entitled to accept the breach and bring the contract to an immediate end on 28 June 2022.

76. The Claimant was not entitled to any notice pay when the contract came to an immediate end on 28 June 2022.

Alleged Race Discrimination

77. The Tribunal accepted the Respondent's evidence that it always sought hard copy documents regarding the right to work in the UK from its employees.

78. It found that Ms Dempsey correctly believed, in April 2022, that the Claimant had not produced proof of the right to work in the UK. That was the reason that Ms Dempsey processed a leaver form for him in April 2022. She believed that he had been dismissed as of that date. When the Claimant attended the offices on 28 June 2022, Ms Dempsey told him that he had been dismissed because she believed that he had been in April 2022, after he had not produced his proof of his right to work in the UK.

79. The Tribunal found that Ms Dempsey would have treated any comparator, who was not Black African, in exactly the same way as she treated the Claimant. He had not shown that he was entitled to work in the UK; the Respondent could not know that it was legal to employ him after 22 January 2022. His failure to produce his "right to work" documentation was the sole reason for his dismissal. This was nothing to do with his race. There was no discrimination. Anyone who failed to produce documents showing their right to work in the UK would have been treated in the same way by the Respondent.

80. The Tribunal did not accept the Claimant's contention that he had been given more, or more difficult, tasks than his Indian-Goan colleagues. It found that cleaning duties were shared out among team members and that team members were expected to help others to ensure that all cleaning tasks were completed on time. Team members took breaks together and worked at the same time. No team members, including the Claimant, ever indicated that they were unhappy with the work allocation.

81. The Respondent did not treat the Claimant less favourably regarding work allocation than any of his colleagues, including his Indian-Goan colleagues. It did not discriminate against him.

Conclusion

82. While the Tribunal has sympathy for the Claimant in relation to the losses he suffered while waiting for proof of his right to work in the UK, his legal claims against the Respondent fail.

Employment Judge **Brown**

Date: 9 February 2024

SENT to the PARTIES ON

20 February 2024

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FOR THE TRIBUNAL OFFICE