



EMPLOYMENT TRIBUNALS

Claimant: Mr. I. Ehiorobo

Respondent: Royal Mail Group Ltd.

Heard at: London South via CVP

On 08 January 2024 to 12 January 2024 November

Before: Employment Judge T.R. Smith

Ms. B. Leverton

Mr. R. Singh

Representation

Claimant: In person

Respondent: Mr. Chaudhry, (solicitor advocate)

Preamble

1.The tribunal had agreed with the parties that it would give an oral judgement at 2 pm on 12 January 2024. At approximately 11.30am on the 12th, the claimant contacted the tribunal to indicate he had to go to hospital due to an emergency situation involving a relative.

2.In the circumstances the tribunal considered that it was unfair if the respondent heard the tribunal's judgement prior to the claimant. For that reason, the tribunal have given full written reasons.

Judgment

The claimant's complaint of direct race discrimination is not well-founded and is dismissed.

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

The claimant's complaint of an unlawful deduction from wages namely £11178.63 is well-founded and the tribunal declares accordingly. However pursuant to section 25 (3) of the Employment Rights Act 1996 (ERA 96) no order is made as the sums have now been paid.

The claimant has not established he suffered a financial loss attributable to the unlawful deduction from wages. The tribunal has therefore declined to make an order under section 24 (2) ERA 96.

The issues.

3.The claimant brings the following complaints: –

- A complaint of direct race discrimination - section 13 Equality Act 2010 (“EQA 10”)
- A complaint of racial harassment - section 26 EQA 10
- A complaint of unauthorised deduction from wages - section 13 ERA 96.

4.The issues to be determined were helpfully set out in the order of Employment Judge Nash dated 27 April 2022 in the following terms:

“1. Time limits

1.1 Given the date the claim form was presented and the dates of early conciliation, some complaints may not have been brought in time.

1.2 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

1.2.2 If not, was there conduct extending over a period?

1.2.3 *If so, was the claim made to the Tribunal within three months (plus, early conciliation extension) of the end of that period?*

1.2.4 *If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:*

1.2.4.1 *Why were the complaints not made to the Tribunal in time?*

1.2.4.2 *In any event, is it just and equitable in all the circumstances to extend time?*

1.3 *Were the unauthorised deductions made within the time limit in S23 of the Employment Rights Act 1996? The Tribunal will decide:*

1.3.1 *Was the claim made to the Tribunal within three months (plus early conciliation extension) of the date of payment of the wages from which the deduction was made?*

1.3.2 *If not, was there a series of deductions and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?*

1.3.3 *If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?*

1.3.4 *If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?*

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

2.1 *The claimant is Nigerian and he compares himself with people who are not Nigerian.*

2.2 *Did the respondent do the following things:*

2.2.1 *Failure to contact the Home Office Employer Checking Service before making the decision to dismiss.*

2.2.2 Dismissing the claimant on 15.9.20 including the procedure leading to dismissal

2.2.3 Failure to pay backdated wages and wages due on time and

correctly

2.2.4 Failure to pay a Christmas bonus

2.2.5 Informing colleagues that the claimant was being removed from the country due to his immigration status.

2.3 Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated.

The claimant says he was treated worse than Mr. Nesmar Mohammed – who is Algerian - and also relies on a hypothetical comparator.

2.4 If so, was it because of his Nigerian nationality?

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

3.1 Did the respondent do the following things:

3.1.1 Informing colleagues that the claimant was being removed from the country due to his immigration status.

3.2 If so, was that unwanted conduct?

3.3 Did it relate to his Nigerian nationality?

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

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

4.Unauthorised deductions

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

4.2 The claimant relies on the following deductions:

4.2.1 £290.95 deducted on 14.1.21.

4.2.2 A Christmas bonus in December 2020.

4.2.3 Wages for 1.9.20 to 15.9.20

4.2.4 The claimant was not paid on time for 14.12.20 to 29.1.21. He was later paid for this period. He claims losses attributable to the failure to pay under S.24(2) Employment Rights Act 1996 which provides that a tribunal may order the employer to compensate the worker for any financial loss sustained as a result of the unlawful deduction. This may include bank charges or interest incurred. It does not, however, include non-financial loss, such as injury to feelings and upset.

5.Following discussions with the parties the tribunal obtained further clarification upon the above issues: -

- the respondent was only taking time points in respect of issues 2.2.1 and 2.2.2. The tribunal explained to the claimant that he would need to give evidence on the time points.
- The claimant conceded that all sums had now been paid to him although an issue remained as regards a deduction from his salary of £290.95. He was uncertain whether this sum had subsequently been paid to him and he put the respondent to proof the same.

- The respondent contended that all sums have been paid to the claimant but conceded a failure to pay when such sums were due, but put the claimant to proof of any loss under section 24 (2) ERA 96.
- The tribunal noted that the claimants statement referred to unfair dismissal. The claimant had not indicated in his claim form or when discussing the claims and issues with Employment Judge Nash he was pursuing any such complaint. However, the tribunal did not invite the claimant to consider making an application to amend because it considered that in a case, such as this, where an employee had been dismissed and then reinstated, the contract of employment was revived so as to treat the claimant as never having been dismissed and thus depriving the tribunal of jurisdiction, see **Roberts -v- West Coast Trains Ltd 2005 ICR 254.**

6.The tribunal explained to the parties that harassment and direct discrimination were mutually exclusive because the kind of conduct that could amount to harassment was usually the kind of conduct that amounted to a detriment for the purposes of bringing a direct discrimination claim. Section 212 EQA 10 made it clear that the concept of detriment does not include conduct that amounts to harassment

7.The net effect of the legislative framework is that a person who claims to have been harassed is obliged to bring a Section 26 harassment claim rather than a Section 13 direct discrimination claim, although they could be brought in the alternative.

8.It was agreed due to time constraints that the tribunal would address the issue of liability but would limit its findings in respect of remedy to the unauthorised deduction from wages complaint. The remedy for any proven complaints of discrimination would be addressed at a separate hearing.

Evidence

9.The tribunal initially had before it a bundle consisting of 262 pages.

10.On 10 January the tribunal agreed to admit further documents from the claimant, an e-mail trail from 05 to 10 January 2021 which the tribunal marked 263.

11.It also agreed to admit further pay documentation from the respondent namely: -

- A pay breakdown, 264

- A pay slip for 04 September 2020, 265
- A pay slip for 11 September 2020, 266
- A pay slip for 13 March 2021, 267

12.A reference in this judgement to a page number is a reference to a page in the bundle.

13.The tribunal had before it statements, on behalf of the claimant, from:

- The claimant himself
- Mr. Kamalijeet Khurana
- Mr. Asheton Wright (this statement was submitted late but Mr. Chaudhry confirmed that he was not prejudiced. The tribunal determined to exercise its discretion and to allow its admission into evidence).
- Mr. Ali Zak

14.The tribunal had before it statements, on behalf of the respondent, from:

- Mr. Paul Cardno.
- Mrs. Anna Walsh

15.The tribunal has not sought to resolve each and every factual dispute, only those necessary to resolve the agreed issues.

16.It is necessary to explain, to avoid confusion, that in the documentation the claimant was referred to by the name of "Aaron" rather than his birth name of "Igbinoba"

Background

17.Much of the background information was not disputed.

18.The claimant is of Nigerian nationality.

19.He is a migrant worker. As a migrant worker he requires permission from the Home Office to live and work in the United Kingdom.

20.He started work with the respondent on 22 May 2018.

21.He received written particulars of employment (136/151).

22.The written particulars provided that the respondent had a right to deduct any overpayment of salary (146/147).

23.The written particulars also provided *“it is a condition of your employment that you have the right to work in the UK. You must comply with immigration legislation”* (148) and that the respondent had the right to undertake employment checks both at the start and during the employment.

24.He was employed by the respondent as a post man working at the Croydon Mail Processing Unit (MPU). It was a busy office employing approximately 300 postal operatives.

25.Mr. Cardno was, at the relevant time, the distribution office manager based at MPU. He was aware, at all material times, that the claimant was Nigerian.

26.The busiest time of the year for the respondent is from November to early January of each year. During this period postal operatives are not permitted to take annual leave due to the volume of work.

27.In 2020 there were significant challenges for the respondent due to Covid 19, which impacted upon both staffing numbers, and also the fact that some employees in administrative tasks had to work from home.

28.Before continuing with the chronology, it is helpful to record a brief summary of the relevant provisions and terminology used in respect of the right to work for migrant workers

Migrant workers and the law

29.The tribunal was assisted by reference to the Home Office Employer’s Guide. (93 to 132)

30. Under the provisions of the Immigration Asylum and Nationality Act 2006 there are specific provisions found in sections 15 to 26 dealing with the consequences for an employer who employs a person, not lawfully entitled to work in the United Kingdom

31. Under section 15 the Secretary of State may issue a penalty notice to the employer who employs a person who has no leave to enter or remain in the United Kingdom or whose leave is invalid, has ceased to have effect or does not entitle them to work in the United Kingdom

32. The employer is liable for a penalty (up to £20,000) but is excused from payment if it is complied with what are known as "*prescribed requirements*"

33. Put simply the "*prescribed requirements*" require an employer to carry out specific checks and keep copies of the same. They are set out in the Immigration (Restrictions on Employment) Order 2007.

34. As part of the employer's validation process it may be required to make enquiries with the Home Office Employer Checking Service (ECS).

35. In order for an employer to employ an employee it requires a positive verification notice (PVN) from the Home Office in certain limited specified circumstances (113). An employer must wait at least 14 days after an application by an employee or potential employee has been made before undertaking a PVN due to the time it takes the Home Office to register such applications (114). A PVN will only be issued if there has been an in-time application made (113 and 119)

36. It is only possible to carry out online checking with consent and an employee must share a time limited code with the employer.

37. In addition to a possible civil penalty, a person who employs a person who is subject to immigration control, knowing that he is either in the United Kingdom unlawfully or is not lawfully entitled to work in United Kingdom is guilty of an offence and liable on conviction to imprisonment (up to 5 years imprisonment) and/or an unlimited fine, section 21 Immigration Asylum and Nationality Act 2006.

38. It is helpful to explain the difference between and in-time and out of time visa renewal application. The legal framework is found in section 3C of the Immigration Act 1971. The Home Office guidance is also of assistance (120)

39. If a person makes an application to extend their visa, before the visa has expired, they are entitled to remain until the application is processed, even if processing takes place after the expiration of the original visa. An employer is protected from liability while an in-time application is being processed. Thus, an employee whose work visa is about to run out who applies for renewal can continue to be lawfully employed whilst the application is being processed.

40. With an out of time visa renewal this concession does not apply. There is no extension of time and an employer cannot continue to employ such an employee without attracting liability.

41. Under the Home Office guidance an ECS check cannot be made unless there is an in-time visa application or there is an appeal or administrative review against a Home Office decision that is outstanding (119).

Right to work and dismissal

42. The claimant's Nigerian passport expired in December 2019.

43. The claimant did not notice this had occurred.

44. On 08 April 2020 Ms. Tracy Young of the respondent's security vetting team wrote to the respondent's management team at MPU to inform them that the claimant's right to work in the United Kingdom was due to expire.

45. Soon after, the claimant was told he needed to renew his visa.

46. The claimant encountered a difficulty because in order to renew his visa he first needed to renew his passport, and could not do so, as the Nigerian Commission was closed due to the national Covid lockdown.

47. On 10 May 2020 the claimant's right to work in the United Kingdom expired.

48. However, due to the exceptional circumstances of Covid, the Home Office agreed that the claimant could have an extension of time for lodging his visa application, ultimately up to 31 August 2020.

49. On 30 July 2020 the claimant informed Mr. Cardno of the difficulties with his visa because of problems renewing his Nigerian passport.

50. On 26 August 2020 the claimant received his renewed Nigerian passport. The claimant therefore had time to make an in-time application to renew his visa. He did not. The claimant said he could not complete the form in only five days despite the fact that he previously completed such an application. The tribunal did not accept the claimant's evidence on this point. It considered he could have completed the form in time. The tribunal found the real impediment to lodging the application promptly was a lack of funds as he prioritised sending money to relatives in the USA.

51. On 30 August, the claimant contacted the Home Office and asked for a one month extension to make his visa application (157/158).

52. On the same day the claimant told Mr. Cardno that he'd applied for a one month extension because he couldn't afford to pay the visa fee

53. At no stage prior to dismissal did the claimant produce a document granting him an extension of one month in a response to his application of 30 August 2020.

54. On 01 September 2020 Mr. Cardno placed the claimant on unpaid leave and urged him to contact relatives and friends to see whether they could offer him financial assistance. He pointed the claimant towards the Rowland Hill fund. The tribunal found that the reason Mr. Cardno put the claimant on unpaid leave was he believed the claimant could not be lawfully employed. He hoped by placing the claimant on unpaid leave he could avoid having to dismiss the claimant whilst the claimant resolved his visa difficulties.

55. He was subsequently advised that the claimant had to be terminated because he was not allowed to remain on the payroll, even if unpaid.

56. It was as a result of that advice that Mr. Cardno told the claimant on or about 04 September 2020 that on legal advice he would have to be dismissed as he had no valid visa.

57. On 07 September 2020 the claimant paid the immigration health service charge to the UK Home Office (193), a pre-requisite to obtaining the renewal of his visa.

58. The claimant's employment with the respondent was terminated on **15** September 2020 (164). The reason given was *"unfortunately, you have failed to provide satisfactory evidence of your continuing right to work and reside in the UK, or that you have made a valid and in time application to extend your right to work and remain in the UK... I now hold a reasonable belief that you do not have the legal right to work in this country. I am therefore writing to confirm my decision to dismiss you on this basis. Your last day of employment will be 15.09.2020 and you will be paid up to this date"*

59.The tribunal accepted the letter accurately reflected Mr. Cardno's reason for dismissing the claimant.

60.The claimant's workload, known as duty 11 needed to be covered following his dismissal.

61.The round was allocated to Mr. Randolph Bridger on a temporary basis.

62.Mr. Bridger asked why he had to cover the duty and was told by Mr. Cardno that it was because there was a problem with the claimant's visa paperwork.

63.Mr. Ali said he was told by a postal worker that the claimant had been sacked and deported. This was prior to the claimant's appeal. This tied in with the evidence of Mr. Wright who said it was about in October 2020 when he spoke to the claimant about similar rumours.

64.It is likely that the information came from Mr. Bridger, given he was covering duty 11. The tribunal considered Mr. Bridger, who would have known the claimant had been sacked, and having been told the claimant had visa problems, assumed that the claimant was in the process of, or had been deported.

65.The claimant knew that there were comments circulating, before his appeal.

The appeal.

66.On 17 September 2020 the claimant appealed (165).

67.He referred to his exemplary service and stated *"there were obvious personal challenges that resulted to my late submission of application [sic] to the Home Office for the renewal of my residency and work permit in the UK by a week.... The company failed to provide me with expert support and advise [sic]. In hindsight, I would have expected the company's immigration team to contact me advising me on what specifically I needed to have done to seek further extension in view of the personal challenges I've already discussed with management..."*

68.He said he had a biometric/document submission appointment on 09 November 2020 and expected a favourable outcome.

69.The claimant did not raise the issue of direct race discrimination or harassment at the appeal.

70.An appeal meeting was arranged, which ultimately proceeded on 29 October 2020.

71.Present was Mrs. Walsh, the claimant and his union representative Mr. Macleod.

72.Mrs. Walsh was aware that the claimant was Nigerian.

73.Notes were taken of the meeting (172 to 190) and the tribunal was satisfied that they were a reasonable summary of the principal matters discussed having regard to the fact that the claimant had countersigned them and that they were not disputed before the tribunal.

74.The appeal was by way of a re-hearing.

75.The tribunal considered it significant that during the appeal the claimant accepted that he had been consistently told the reason for his dismissal was due to the nonrenewal of his visa which meant it would be unlawful to employ him after the 31 August. His union representative stated the claimant did not have a visa but believed the claimant would obtain a visa so that he could be re-employed (175) and asked for his job to be kept open in the interim (176)

76.During the appeal process the claimant provided a PVN dated 22 September 2020, that is after the claimant's visa expired, which appeared to have been an application by Carroliton Suares of Babasco Travels Ltd. It showed that the claimant had a right to work and thus a visa.

77.Mrs. Walsh was concerned in respect of this document because an ECS check could only be made by an employer. The claimant said he obtained some advice and this was the document produced. He did not suggest he was working for Babasco Travels Ltd.

78.This document contradicted what the claimant's union had said about the claimant's visa and also the fact the claimant had informed the respondent his visa document appointment was not till 09 November 2020.

79. Mrs. Walsh decided to adjourn to carry out investigations. The tribunal considered that she was entitled to do so given that Home Office guidance provided, in essence that while an employer is not obliged to carry out an expert investigation as to the authenticity of documentation, if on the face of matters it was reasonably apparent a document could be false, an employer should make further enquiries (107).

80. The appeal concluded on the basis that Mrs. Walsh would carry out further enquiries and in particular would examine what the claimant regarded as his two principal grounds of appeal. The first was whether the respondent should have carried out a check before dismissing him and secondly whether the personal hardship of the claimant (i.e. he had insufficient funds to pay for the visa) should have been taken into account prior to dismissal. The claimant had the opportunity to correct the issues when he received the notes. He did not. He did not, for example, suggest he was subject to direct discrimination or harassment.

81. The respondent undertook an ECS check on 11 November 2020 and the following month, 11 December 2020 were advised the claimant had a right to work. This was new evidence. However, Mrs. Walsh concluded that the claimant was properly dismissed, because the claimant did not have a right to work in the United Kingdom and had not made an in-time application before 31 August 2020 that was still being processed or subject to appeal after that date.

82. In the circumstances Mrs. Walsh upheld the claimant's appeal (as outlined in her letter of 14 December 2020 and email of the 15, (page 217 to 222) and directed he should be reinstated, with no loss of continuity, and paid back pay from the date of dismissal to the date of re-engagement.

83. She reminded the claimant that he would need to be re-vetted as he had been absent for more than 28 days.

84. The tribunal was satisfied that the respondent operated a procedure such that where an employee was reinstated on appeal, they would be subject to an agreed vetting process if there was a break in employment of more than 28 days (page 91). This policy was applied to every employee irrespective of their nationality.

85. Although the appeal was upheld Mrs. Walsh rejected other matters advanced by the claimant.

86. She rejected the claimant's contention that the respondent should have carried out an ECS check before dismissal. She did so because the evidence before her was that the claimant did not apply for a visa until 07 September 2020. His application was therefore an out of time application. The Home Office guidance provided if an employer was reasonably satisfied an employee had submitted an in-time application the employer could contact the ECS to obtain a positive verification notice. This was not the case here as the application was out of time. The tribunal accepted this evidence and that it was a reasonable conclusion to reach.

87. The claimant further contended that an exception should have been made for him due to personal hardship. Mrs. Walsh concluded the claimant had made a choice to prioritise relatives in the USA over his right to work documentation. She did not accept this ground of appeal and the tribunal accepted that was a reasonable conclusion for her to reach.

Return to work

88. The claimant returned to work on 17 December 2020 and remains employed by the respondent from that date.

89. On or about 17 December 2020 the claimant spoke to Mr. Bridger. Mr. Bridger had been covering his round. He said he was told that the claimant had been deported.

90. The tribunal is satisfied that Mr. Cardno made no such allegation. When the claimant was dismissed, his round needed to be covered. Mr. Cardno hoped the claimant would obtain a visa and return to employment. The tribunal regarded that as credible because when a round becomes available the agreement between the respondent and the Communication Workers Union ("CWU") was that it must be advertised. Here he spoke to the CWU and a local agreement was reached that pending the outcome of the claimant's appeal his round would be covered by Mr. Bridger. Given the action taken by Mr. Cardno, that was wholly inconsistent with him allegedly telling people that the claimant had been deported. It was more consistent with the evidence he gave to the tribunal that what he told Mr. Bridger was that the claimant had a visa problem and couldn't work at that time. The claimant himself in answer to a question from Ms. Leverton resiled somewhat from his original position.

He accepted that Mr. Bridger said he taken over duty 11 because he'd been told the claimant had problems with immigration papers.

91.If Mr. Bridger had said to the claimant what he first alleged and it upset him so much, the tribunal found it surprising that the claimant did not check the position with Mr. Cardno.

92.He also raised no grievance.

The treatment of Mr. Nesmar Mohammed

93.Mr. Mohammed is an Algerian national.

94.The evidence of the claimant was that he'd spoken to Mr. Mohammed and gleaned from him that he had made an application for a visa, there was a problem but he was not dismissed, only suspended.

95.There was a significant difference between the case of the comparator and the claimant in that Mr. Mohammed made an in-time application whereas the claimant made out of time application.

96.The respondent produced two PVNs. As the tribunal have noted they can only be obtained if an in-time application has been made. This further satisfied the tribunal that the evidence that Mr. Mohammed's application was in time was, on balance, correct.

97.The reason why an ECS check was carried out in the case of Mr. Mohammed and not in the case of the claimant was because the former had made an in-time application allowing an ECS check to be made.

98.Mr. Mohammed was not dismissed when his visa expired because he had an intime application with the Home Office and the respondent was entitled to employ him until the application and his appeal had been addressed. That was exactly what happened.

Wages

99.The claimant was paid weekly.

100.Payroll was undertaken in Sheffield with a cut off date of a Tuesday.

101.Weekly staff (and the claimant was classed as weekly staff) were paid on a Friday.

They were paid for that week. Overtime however was paid one week in arrears.

102.If a payday fell on the public bank holiday, normally pay was paid the day before.

103.The claimant last worked on Saturday, 29 August 2020. He did not work again until he was reinstated

104.The claimant accepted (231) that he was then paid on Friday 04 September 2020 when he received £290.95. He was therefore paid for that week although he had only worked the Saturday; Monday 31 August being a bank holiday for which he also should have been paid. It was for this reason that when the claimant's backpay was worked out a deduction of £290.95 was made.

105.The claimant returned to work on 17 December 2020 which was a Thursday. The claimant had therefore missed the payroll cut-off for that week which would have expired on the 15th.

106.The next Friday was 25 December, a public bank holiday. The claimant therefore should be paid on the previous working day Thursday, 24 December. The respondent conceded that the claimant was not paid the full sums due to him until 29 January 2021. Payment was therefore delayed by 36 days.

107.It was clear from the schedule placed before the tribunal (267) that he was due £11,076.63 gross. That was pay from 01 September until all back pay was paid to him. The tribunal is satisfied therefore that the correct payment was made to the claimant (258). There was no non-payment.

108.There was further no unlawful deduction as the sum of £290.95 had to be deducted as otherwise the claimant would have been paid twice.

109.However, the tribunal would add this rider, the documentation initially before the tribunal was opaque. It was only on the third day of the hearing that the respondent produced documentation that assisted the tribunal in better understanding the

situation. The claimant had been asking for a detailed breakdown for some years. Had such a breakdown been provided it may well have been that litigation, or at least part of the litigation could have been avoided. The tribunal empathised with the claimant for the frustration that he felt.

110. Payroll was processed by a department of the respondent in Sheffield. The payroll clerk would have no knowledge of the claimant or his nationality. The only input Mr. Cardno had, was that he asked for a manual over ride to be undertaken, as he had mistakenly placed the claimant on special unpaid leave from 01 to 15 September 2020. In other words, his only involvement was to make an adjustment in the claimant's favour.

111. Every employee on the respondent's payroll, at the level of the claimant, received a Christmas bonus of £100. The Xmas bonus was normally payable on the Friday of the week before Christmas, that would be 18 December 2020

112. The payroll department in Sheffield made payment to everyone who was on the payroll at the time the payroll was processed, being Tuesday 15 December 2020, even if they were absent due to ill-health. The claimant did not receive his Christmas bonus until 12 March 2021.

113. The claimant contended, and the tribunal was prepared to accept, that he had to borrow money from his family in the USA while he was not being paid. He borrowed a total of £2829.12. Although in the claimant's schedule of loss he said he had to pay interest at 5%, this was not in his statement and there was no documentation to support that assertion.

114. At its highest there was some evidence of money transfer charges which totalled \$150. None of these loans were made before the sums due to the claimant on reinstatement should have been paid.

115. The tribunal determined that there were three principle reasons for late payment, on 29 January 2021: –

116. Firstly, the re-vetting caused a delay. It would appear that the respondent did not start the re-vetting process until early January. Without the re-vetting the claimant did not appear on the payroll and hence was not paid

117. Secondly when the claimant was reinstated there was an error where by the correct dates were not inserted to advise payroll of re-instatement. Whilst there was no evidence that Mr. Cardno had any involvement in this error, he fairly accepted, he carried responsibility for any errors made in his office and apologised.

118. Thirdly events took place at the busiest time of year when the respondent was working at peak capacity. The situation was even more difficult than normal due to Covid 19 which resulted in absences and understaffing

119. None of this excuses the late payment to the claimant. He returned to work in difficult conditions for over a month and wasn't paid. He had a family to support. The respondent never considered making an advance forthwith to the claimant of arrears of pay, or a loan.

120. The tribunal does not under estimate the difficulties and distress the claimant was caused. Whilst the initial error was as a result of the claimant not completing his application in time, the claimant has an understandable sense of injustice as to how he was subsequently treated and the respondent may wish to reflect on its position.

Submissions

The claimant.

121.The claimant made no submissions on the law, and no criticism is made of that' as he was a litigant in person.

122.He emphasised the poor treatment he perceived he had received. He emphasised the respondents themselves accepted there were delays in his pay and Christmas bonus.

123.He was critical of the respondent's lack of apology and failure to provide clear evidence, at an early stage, both as regards his pay and the position involving his actual comparator. He stated there was a lack of evidence that Mr. Mohammed had actually had made an in-time application.

124.He said it was not right that he was not paid a Christmas bonus when people working next to him received it.

The respondent

125.Mr. Chaudhry relied upon a written submission with a brief oral expansion. The tribunal means no disrespect by failing to quote from the same. The tribunal had full regard to his submissions.

126.He made reference to only two authorities, **Amnesty International -v- Ahmed [2009] IRLR 884**, and **Gardner -v- Chief Constable of West Yorkshire Police ET/18070832/13**. The latter being a first instance decision which reached the same conclusion as the appellate courts namely that harassment has both a subjective and objective element.

Time

The law

127.The tribunal applied the following legal principles.

128.Section 123 of the EQA 10 states: –

“...Proceedings on a complaint ... may not be brought after the end of –

(a) the period of three months starting with the date of the act to which the complaint relates, or

(b) such other period as the Employment Tribunal thinks just and equitable....

(3) For the purposes of this section –

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it

(4) in the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something-

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.”

129.The tribunal has a wide discretion in determining whether or not it is just and equitable to extend time.

130.Whilst the tribunal in exercising its discretion is not required to adopt the checklist set out in section 33 of the Limitation Act 1980 it may be a useful tool for the tribunal to consider. The tribunal however reminded itself that every case was fact specific.

Discussion and relevant further facts.

131.The claimant presented his claim to the tribunal on 09 February 2021. He had made an application for ACAS conciliation on 27 December 2020 and a certificate was issued on 11 January 2021.

132.The first issue for the tribunal was to ascertain the date of each act of discrimination that was said to be out of time. The respondent relied on issues 2.2.1 and 2.2.2 only. There is now no time issue in respect of the unlawful deduction from wages.

133.Looking at issues 2.2.1 and 2.2.2, the latest, and most favourable date for the claimant was 15 September 2020. Time therefore expired on 14 December 2020. The provisions found in section 140B EQA10 do not assist the claimant as an application for early conciliation must be made within the primary time limit.

134.The claimant therefore presented his claim out of time unless he could show a continuing act.

135.In determining whether there was an act extending over a period of time, as distinct from a succession of unconnected or isolated specific acts the tribunal determined that the focus had to be on the substance of the complaints that the respondent was responsible for and whether it was an ongoing situation or a continuing state of affairs, see **Hendricks -v- Commissioner of Police for the Metropolis 2003 IRLR 96 CA.**

136.The tribunal was not satisfied there was a continuing act. It considered that Mr. Chaudhry's submission that reinstatement on 15 December 2020 was a breakpoint, had merit. There was no ongoing or continuing state of affairs in terms of dismissal from that point. There were a series of unconnected acts.

137.The difficulty the claimant encountered in respect of pay arose from a nondiscriminatory act namely the claimant's reinstatement. There was no common denominator in terms of the pay issues. Mr. Cardno had virtually no control over what was undertaken by the respondent's payroll and re-vetting office based in Sheffield.

138. Similarly, for the reasons the tribunal has already given, the respondent was not responsible for any rumours that may have circulated as to the claimant's ability to remain in the United Kingdom.

139. The claimant had not addressed the issue of time, at all, in his statement. Given the claimant was a litigant in person the tribunal considered, in accordance with the overriding objective, it was appropriate to ask him to explain why he had not lodged a claim promptly.

140. The claimant said he spoke to Mr. Mohammed about his circumstances in about November 2020, well before his return to work.

141. He was aware of all the facts at the time. He accepted that at the time he thought Mr. Cardno should have checked the position with the ECS.

142. He had access to skilled trade union officials as a member of the CWU.

143. He did not contend he was unfamiliar with the role of employment tribunals.

144. There was no suggestion of any physical or mental impediment that delayed him making his application.

145. He had access to the internet at all relevant times and therefore could carry out any reasonable research.

146. No cogent reason was given for the delay. The delay was of just under two months.

147. The tribunal did not consider, given the delay in bringing the claim to hearing, which was not the fault of the parties, that evidence was materially impacted. This was a factor that weighed in the claimant's favour.

148. Whilst the claimant was pursuing an internal grievance procedure, which was a material factor that the tribunal was entitled to take into account in assessing whether to exercise its discretion (**Apelogun-Gabriels -v- London Borough of Lambeth 2002 IRLR 116 CA**) the claimant did not issue his claim immediately after receiving the outcome. He waited almost 2 months. In the circumstances this was not a factor that weighed in the claimant's favour, it pointed in the opposite direction. The tribunal considered it might have been different if, just after the appeal outcome, the claimant had entered into ACAS conciliation and then issued his claim.

149. The tribunal found that the real reason the claimant did not issue earlier was because at the time, whilst knowing the facts, he did not think he had been subject to direct discrimination or harassment.

150. The tribunal found it was what he perceived to be difficulties in respect of his pay following reinstatement that led him to consider tribunal proceedings, not because of any thought he had been directly discriminated against or harassed. The tribunal reached this decision for two reasons.

151. Firstly, the claimant said in cross-examination that had the pay issue been sorted out as soon as he returned he would not have brought tribunal proceedings.

152. Secondly there is not a single reference to race discrimination or harassment made during the appeal meeting or at any stage until the claimant presented his claim form.

153. It was for the claimant to persuade the tribunal to exercise its discretion and the exercise of the discretion is an exception rather than the rule. **Robertson-v-Bexley Community Centre 2003 IRLR 434 CA.** He had not so persuaded the tribunal.

154. If the tribunal was wrong on its determination in respect of the time point, it then went on to consider the merits of all the complaints of direct discrimination.

Direct discrimination The legal framework

155. The burden of proof is set out in section 136 of the Equality Act 2010. It is for the claimant to prove, on the balance of probabilities, facts from which, in the absence of any other explanation, the tribunal could infer an unlawful act of discrimination, see **Royal Mail Group Ltd -v-Efobi 2021 UKSC 33**

156. Direct discrimination is defined in section 13 (1) EQA 10 as follows: –

“(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.”

157. The legislative test is therefore broken down into two elements namely less favourable treatment and the reason for that treatment. In some cases, however, it may be appropriate to ask the latter question first, see, **Shamoon -v-The Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11** as explained in **Stockton-on-Tees Borough Council -v-Aylott [2010] IRLR 994** where it was

suggested that it would often be appropriate to start by identifying the reason for the treatment complained of. If the answer was that the reason was a protected characteristic then a finding of less favourable treatment was likely to follow as a matter of inevitability.

158. The test of what amounts to less favourable treatment is an objective one. The fact that a complainant believes they have been treated less favourably than a comparator does not of itself establish that there has been less favourable treatment: **Burrett v West Birmingham Health Authority [1994] IRLR 7**. It is the equality rather than the quality of the treatment that matters. Unreasonable treatment is not less favourable treatment, see **Glasgow City Council-v- Zahar [1998] ICR 120** and unreasonable behaviour cannot found an inference of discrimination, although a lack of explanation for the unreasonable treatment (as opposed to the unreasonableness of the treatment) might found such an inference: **Bahl -v- Law Society [2004] IRLR 799**.

159. As the statutory definition requires less favourable treatment that in turn requires a comparison to be made.

160. Section 23 EQA10 states:

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

Discussion and relevant further facts.

Contact ECS

161. The claimant has established the respondent did not contact the ECS after his visa expired and before dismissal.

162. The tribunal is satisfied that the reason the respondent did not contact the ECS service prior to dismissing the claimant was because it could not do so under the Home Office guidance.

163. An enquiry could have been made had the claimant made an in-time application but he had not. On his own case his visa application was out of time.

164. The reason why there was no check therefore had nothing to do with the claimant's race.

165. The tribunal is satisfied both Mr. Cardno's and Mrs. Walsh, on their respective understanding of the Home Office guidance and on the basis of the advice they had received, would have acted in an identical manner with a hypothetical comparator.

166. Whilst Mr Mohammed was subject to checks there was a material difference in his circumstances, he had made an in-time application.

167. The claimant has not established, on the balance of probabilities, facts from which, in the absence of any other explanation, the tribunal could infer an unlawful act of discrimination. This aspect of his complaint must be dismissed.

Dismissal

168. Why was the claimant dismissed?

169. The tribunal is satisfied that the reason for the claimant's dismissal was that Mr. Cardno genuinely believed at the date of dismissal, on the basis of the advice he received, that the claimant did not have a right to work, and to continue to employ him would render the respondent open to civil and possible criminal penalties. This is consistent with the contemporaneous letter of dismissal.

170. It was the claimant's lack of a right to work, not because of his race, that led the respondent to dismiss him. Treatment on the ground of immigration status cannot be direct discrimination, **Onu-Akwivu 2014 EWCA Civ 279**.

171. Mr. Cardno would have acted in exactly the same way with a hypothetical comparator, that is a person who was subject to immigration control and made an out of time application to renew their visa.

172. The tribunal was not satisfied that the claimant was treated less favourably than his actual comparator Mr Mohammed. For a valid comparison to be made there must be no material difference between the claimant and the comparator.

173. The tribunal is satisfied there was a material difference namely Mr Mohammed made an in-time application.

174. The claimant did not lead any specific cogent evidence in respect of the procedure prior to dismissal which he contended was discriminatory other than those specific matters that are already in the list of issues.

175. The claimant has not established, on the balance of probabilities, facts from which, in the absence of any other explanation, the tribunal could infer an unlawful act of discrimination. This aspect of his complaint must be dismissed. **Failure to pay wages**

176. The tribunal is satisfied that the claimant, following reinstatement, should have been paid by no later than 24 December 2020.

177. He was not paid until 29 January 2021.

178. What was the reason why he was not paid on time?

179. The claimant can establish unreasonable treatment but he must show on the balance of probabilities facts from which the tribunal could infer, in the absence of any other explanation unlawful discrimination.

180. The claimant has not done so. There is not a scintilla of evidence to contradict the respondent's account that there was general incompetence, Covid issues, a busy time of the year, incorrectly completed paperwork and a lack of urgency as already outlined in the tribunal's judgement

181. The tribunal is satisfied that a hypothetical comparator would have been treated in a similar manner. There was incompetence but that had nothing whatsoever to do with the claimant's race.

Christmas bonus

182. The claimant has established that a Christmas bonus should have been paid to him.

183. Given the claimant only returned to work on 17 December he would have missed the payroll run, which would have been finalised on Tuesday 15 December 2020.

184. He should however have been paid his Christmas bonus at the latest, on Thursday the 24th. It was not so paid.

185. Employees employed at the MPU were paid their Christmas bonus on time.

186. The reason the claimant was not paid was the re-vetting procedure had not been completed and therefore the claimant simply did not appear on the payroll. Thus when

at Sheffield the Christmas bonus was processed the claimant was not on the payroll system so he was not paid it.

187.It was because the claimant wasn't on the payroll system and not due to his race or any discriminatory act or omission in not putting him on the payroll earlier that led to the non-payment of the Christmas bonus **Informing colleagues**

188.This is addressed, later in this judgement under the heading of harassment.

189.As the tribunal had noted harassment and direct discrimination are mutually exclusive because section 212 EQA 10 made it clear that the concept of detriment does not include conduct that amounts to harassment

Harassment

190.The tribunal began by reminding itself of the relevant law.

“(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.....

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

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect. Section 26 of the EQA 2010 defines harassment as follows:

191.In **Richmond Pharmacology Limited v Dhaliwal 2009 IRLR 366** Underhill P. set out three essential elements of a harassment claim namely:

- Did the respondent engage in unwanted conduct?

- Did the conduct have either (a) the purpose or (b) the effect of either (i) violating the claimant's dignity or (ii) creating an offensive environment?
- Was the conduct related to a relevant protected characteristic?

192. This test was clarified and extended in the case of **Pemberton v Inwood 2008 EWCA Civ 564** where the court added that when considering whether the conduct had the prescribed effect the tribunal must take into account the following factors:

" In order to decide whether any conduct falling within sub-paragraph (1)(a) has either of the prescribed effects under sub paragraph (1)(b), a tribunal must consider both.....whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) andwhether it is reasonable for the conduct to be regarded as having that effect (the objective question). It must also...take into account all the other circumstances-subsection (4)(b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so."

Discussion and further facts

193. The claimant has not established on the balance of probabilities that Mr. Cardno told any of his staff that the claimant was being removed due to his immigration status.

194. His only public utterance was the claimant had visa difficulties which was true.

195. The tribunal accepted that staff knowing the claimant had had his round allocated to someone else and knowing that he had visa difficulties may well have come to certain conclusions which in turn explained why some of the witnesses called by the claimant heard rumours that were consistent with the claimant's assertion.

196. However that had nothing whatsoever to do with Mr. Cardno or with the respondent. It was a matter wholly outside the respondent's control and it was not aware of the situation.

197. The claimant took no action to draw the situation to the respondent's attention so it could take any appropriate action. The fact Mr. Cardno only temporarily re-allocated

the claimant's round was wholly consistent with his view the claimant would return, and wholly inconsistent with him saying the claimant had been removed from the UK.

198. Even if the tribunal was wrong on its primary factual finding it still would not have found in favour of the claimant.

199. Its reasoning was as follows: –

200. Firstly the claimant did not subjectively believe the conduct had the purpose or effect of violating his dignity or creating an intimidating hostile, degrading humiliating or offensive environment because he told the tribunal that had his pay been resolved he wouldn't have issued an application to the tribunal. He also said in cross examination that he "*brushed off*" the gossip. The tribunal reminded itself the words found in the statute are serious and it must not regard every slight or unfortunate comment, even if hurtful, as constituting harassment.

201. Secondly a reasonable person would not have found the statement, if made, as having the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, humiliating or offensive environment because they could believe that a person with visa difficulties could face removal from the United Kingdom.

202. If the tribunal was wrong of any of the above reasoning it did not find that the conduct was related to the claimant's protected characteristic of race. It was because of the claimant's immigration and visa status, and not because of the fact he was Nigerian.

Unlawful deduction from wages

203. Section 13 (1) ERA 96 provides: –

(1) 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 workers contract or*

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

204. Section 14 (1) sets out what are known as excepted deductions.

205. Relevant to these proceedings is section 14(1) which provides: –

(1) Section 13 does not apply to a deduction made from a worker's wages made by his employer where the purpose of the deduction is the reimbursement of the employer in respect of –

(a) an overpayment of wages...

206. Section 24 provides:-

(1) where a tribunal finds a complaint under section 23 well founded, it shall make a declaration to that effect and shall order the employer

(a) in the case of a complaint under section 23 (1) (a) to pay to the worker the amount of any deduction made in contravention of section 13.....

(2) where a tribunal makes a declaration under subsection (1), it may order the employer to pay to the worker (in addition to any amount ordered to be paid under that subsection) such amount as the tribunal considers appropriate in all the circumstances to compensate the worker of any financial loss sustained by him which is attributable to the matter complained of"

207. Finally, it is necessary to mention section 25 (3) which provides: –

(3) an employer shall not under section 24 be ordered by a tribunal to pay or repay to a worker any amount in respect of a deduction or payment, or in respect of any combination of deductions or payments, insofar as it appears to the tribunal that he has already paid or repaid any such amount to the worker".

208. The claimant is entitled to a declaration in respect of the none- payment of the Christmas bonus and the none-payment of his arrears of pay. Payment was due for both emoluments on 24 December 2020 but was not paid.

209. In the case of his Christmas bonus, this was eventually paid on 12 March 2021 and in the case of his arrears of salary the full amount was only paid by 29 January 2021.

210. However, the respondent must be given credit for the sums it did pay under section 25 (3) which has the effect of extinguishing any payment due to the claimant.

211. The tribunal did not find there was an unlawful deduction from the claimant in the sum of £290.95. The respondent had a right under the claimant's contract of employment to make a deduction of any overpayment and also had a statutory right under section 14 ERA 96. There was an overpayment hence the deduction made.

212. The tribunal then had to consider whether any award should be made under section 24 (2) ERA 96.

213. The tribunal concluded, with some hesitation, that no such award should be made.

214. Whilst the claimant satisfied the tribunal that he received loans totaling £2829.12 he did not satisfy the tribunal that he had to pay interest at 5%. These appear to have been loans from his family. The burden of proof is on him to show his loss and he has failed to do so.

215. The tribunal considered whether the claimant was entitled to recover the charges on the transfer of the money to the claimant which totaled \$150. Again, with regret, the tribunal concluded it could not because the loans were made prior to the date the respondent should have paid the claimant's arrears of wages but failed to do so. The charges were attributed to a period when there had been no unlawful deduction from wages.

216. In the circumstances the complaint must be dismissed.

Employment Judge T.R. Smith
12 January 2024

Judgment sent to the parties on: 16
January 2024

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