EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Karunaratne	**v**	**Asda Stores Limited**

Heard at: Watford **On**: 19 April 2017

Before: Employment Judge Daniels

Appearances
For the Claimant: Mr S Perera, McKenzie Friend
For the Respondent: Mr S Crawford, Counsel

JUDGMENT

1. The claimant was unfairly dismissed by the respondent.

2. The respondent made unlawful deductions from wages between 4 September 2015 and 10 September 2015.

REASONS

The evidence

1. The Tribunal heard evidence from the Claimant on his own behalf. The Tribunal hard evidence from Ms Nathwani (who conducted the investigation into the matter) and Mr Barot the General Merchandising Trading Manager at Asda's Park Royal store (the dismissing officer) on behalf of the Respondent.

The facts

2. The claimant commenced employment for Asda Stores Limited on 25 April 2013. At the time of his recruitment he had the right of leave to remain and work in the UK until 15 February 2014.

3. The claimant is a Sri Lankan national. When he commenced employment with Asda he provided Asda with his visa. He also signed a declaration on 24 October 2013 confirming that he would abide by the Right to Work policy. The claimant provided Right to Work documentation in line with Asda's policy as the employment continued.

4. Asda conducted an ECS check in June 2013 which confirmed that the claimant had a right to work in the UK (subject to restrictions). A further check was performed in September 2014 which provided for the right to work until 21 March 2015. A further check in March 2015 confirmed that the claimant had a right to work in the UK (subject to restrictions). The ECS positive verification letter confirmed that Asda should carry out the follow-up ECS check on or before 17 September 2015.

5. Asda's Right to Work Policy at page 37 states:

> "Asda has a duty to make basic document checks on every potential new college we intend to employ before they start work. We should also satisfy ourselves that colleagues who have a temporary right to work continue to be eligible to work."

6. The Asda policy also contained detailed guidance on what checks are required and states:

> "It is the People manager's responsibility to obtain the document if a colleague has a temporary right to work, the People Manager must carry out the 3 step check correctly again [obtain documents, check documents, copy document] at the right times during employment (on Visa expiry and also no less often than once every 12 months, which at Asda means 1 February every year)".

7. Page 4 of Asda's Right to Work Policy at page 48 of the bundle states:

> "Managing colleagues whose right to work is close to expiry:
>
> 60 days prior to the expiry of right of work;
>
> (a) Meet with the colleague who is nearing the expiry of their right to work.
>
> (b) Write to the colleague using Tool Kit Letter 1, confirming the colleague's requirement to produce evidence of their application and proof of postage to confirm that they have applied to renew their visa within the correct time.
>
> (c) Where applicable, confirm in writing any intention the colleague has given to end their employment….
>
> 30 days prior to the expiry of right to work:
>
> (a) Meet with a colleague whose nearing the expiry of their right to work.
>
> (b) Write to the colleague using Tool Kit Letter 2, this letter includes
>
> (1) Confirmation of the previous request.
>
> (2) A deadline for when the document must be provided.
>
> (c) The fact that the colleague has not yet provided evidence ie evidence of an outstanding application pending outcome then their continued employment will be reviewed."

8. The Right to Work policy stated that if Asda fails to comply with its obligations to carry out checks on colleagues' right to work status, this could lead to enforcement action by the Home Office including civil fines of up to

£20,000 per illegal worker; criminal prosecution and loss of an employer's sponsorship licence.

9. Asda also has a Colleague Handbook which includes a Right to Work clause at page 83(b). The clause states that "failure to produce the relevant documents may result in your employment being terminated".

10. The Home Office has issued extensive guidance for employers on right to work checks. Points of relevance include as follows:

> "When conducting checks, you are required to contact the Home Office in the following circumstances to verify that someone has the right to work in the UK to establish and retain your statutory excuse:
>
> You are satisfied that you have not been provided with any acceptable documents because the person has an outstanding application with the Home Office which was made before their previous permission XXX expired or has an appeal or administrative review pending against a Home Office decision and therefore cannot provide evidence of their right to work. In the circumstances you need to obtain a positive verification notice in order to obtain a statutory excuse. "If you receive a negative verification notice then you will not have an excuse and may be liable for a civil penalty if they are not permitted to undertake the work".

11. On 18 March 2015 the respondent received an ECS positive verification notice stating:

> "This person has the right to work subject to the restrictions in section 4. The result of this check is valid for 6 months. It expires on 17 September 2015. You should carry out a follow up right to work check on t his person on or before this date.
>
> This positive verification notice will provide you with a time limited statutory excuse against liability for a civil penalty in respect of this person."

12. The letter from the Home Office to the claimant dated 13 July 2015 stated that the case reference number was 019341550. The letter stated:

> "(Thank you for your application. As part of your application you must have your biometrics (scanned fingerprints and photograph) taken."

13. In the appendix to the letter it stated:

> "Do I have the right to work whilst I am awaiting a decision on my application?
> You may continue to work in the United Kingdom if the conditions attached to your previous grant of leave entitled you to work and if your latest application for settlement was made whilst that leave was still extant."

14. The claimant produced proof of posting his biometric enrolment information with the Post Office on or about 21 July 2015.

15. On 27 August 2015 Mr Garry Pottle, Deputy Store Manager of Asda, carried out an Employee Eligibility Check via the Home Office ECS service online. This check was carried out two days after the claimant started a period of sick leave on 25 August 2015.

16. The Respondent had not sent the claimant the 60 day prior letter (Tool Kit Letter 1) or the 30 day prior letter (Tool Kit Letter 2). The claimant was not informed of the check being conducted by ECS and nor did he consent to the check being carried out. In particular, the claimant was not asked for information about this present situation or to confirm the correct reference to use or indeed whether there was any information which would affect his application.

17. The application sent for an ECS by Mr Pottle included the incorrect reference (017794532) which was a reference used for a prior application for right to remain which was now out of date.

18. When Mr Pottle completed the ECS check online on 27 August 2015 he warranted to the Home Office that he had complied with the legal requirement to inform and obtain consent from the employee:

> "I can confirm that the individual has been informed that a work status check may be carried out and has given that permission for their personal information to be shared with the Home Office for these purposes…"

19. This was not the correct position as he had not done so.

20. On 3 September 2015 the Home Office sent a negative report in response to the ECS enquiry. The reason for this negative report was that Mr Pottle had given an out of date reference used from the previous application that had been made in March 2015 by the claimant. The negative verification stated: "An application for leave in the UK has been submitted but this was done so after the expiry of the person's previous leave".

21. Since the previous reference related to ability to work until March 2015 and the claimant had made an application in July 2015, the consequence of the incorrect information being provided to the Home Office was that the Home Office thought that the claimant had made an application after his previous right to work had expired and were not made aware that the claimant had issued a fresh application under a different reference.

22. On 4 September 2015 Ms Lauren Wiseman from HR shared services of the respondent, sent an email querying whether the report could be a false negative report and recommending detailed further investigation of the matter. The email from Laura Wiseman dated 4 September 2015 stated (in a thorough and professional manner):

> "Please advise the colleague that we have received a negative verification notice and what it says (that an application has been submitted but this was done so after the previous leave expired). Also advise the colleague to attend a meeting to discuss the response from the employer checking so we can understand from them why we might have received this response and for them to provide all the evidence they have in relation to their immigration matter to demonstrate they continue to have the right to work…
>
> Can you please forward copies of any evidence provided by the colleague at the formal meeting we can review this and if necessary we could ask the colleague to provide their consent for us to contact the Premium Service if we have any reason to believed based on the evidence we may have received a false negative due to the timing of our request."

23. Ms Nathwani (who at the date of the Hearing was employed as a Customer Trading Manager at Asda Hounslow, but was at the relevant time the Trading Manager at Asda Park Royal) sent a letter to the claimant requiring him to attend a meeting on 5 September 2015 regarding his right to work status. Ms Nathwani asked the claimant to provide evidence of his right to work in the UK as a matter of urgency. She did not send him a copy of the Negative Work Verification or inform him what it said (as advised by Ms Wiseman). She did not inform him of the reference that was used when making the ECS enquiry by Mr Pottle or let him see the record of this enquiry.

24. The claimant was suspended without pay from 4 September 2015 pending the outcome of the investigation into his right to work n the UK. This was confirmed in the letter of 4 September 2015.

25. During the meeting on 5 September 2015 the claimant informed Ms Nathwani that he had recently applied for an "indefinite leave to remain visa" as he had been in the UK for 10 ½ years. If successful he would be granted a permanent right to work in the UK. The claimant provided Ms Nathwani with the original acknowledgement letter sent by the Home Office dated 13 July 2015 which confirmed the receipt of his application and that there was an application ongoing.

26. Despite having received a copy of the letter from the Home Office confirming an application had been made Ms Nathwani focussed on seeking a copy of the original application that had been made (which was in the possession of the Home Office as his new application was being processed). She did not send a copy of the letter from the Home Office to the claimant (confirming his new application had been made) to the Shared Services Team or give detailed consideration to this letter.

27. After the meeting the claimant went straight to his solicitor in order to try and find out what further documentation he could produce. His solicitor stated that he could not release his application to a third party as this was a pending matter with the Home Office. He also suggested that the acknowledgement letter from the Home Office was the most credible documentation that could be provided to show that there was a pending application at the Home Office.

28. The claimant attended a meeting with Ms Nathwani on Monday 7 September 2015 to discuss the matter further. The claimant stated that he believed that he had provided the most credible evidence of an application that was ongoing having shown the original letter from the Home Office to his solicitors which confirmed this in writing. The claimant suggested that Ms Nathwani should conduct a further ECS check and stated that if the Home Office said he did not have the right to work he would resign immediately. During the meeting on 7 September 2015 the claimant handed the respondent evidence of his biometric information (which had been provided within 15 working days from the date of the letter requested by the Home Office). There was no basis for any concern relation to a problem emerging in relation to a failure to provide biometric information. The claimant was not able to provide a biometrics card as his application was

still pending. The claimant also confirmed to Ms Nathwani that he had complied with the deadline for biometric information. Ms Nathwani informed him that she would contact head office and revert.

29. Notes of the meeting on 5 September 2015 were made at page 200 of the bundle. The notes of the meeting were extremely short and were not a reliable record of everything that was said at the meeting.

30. There then followed a phone call between the claimant and Ms Nathwani in the afternoon of 8 September 2015 in which the claimant asked for an update. Ms Nathwani stated that she was waiting for guidance from head office. She did not refer to the fact that a letter had been sent to him requesting attendance at a disciplinary meeting on 10 September 2015. That letter was not sent by recorded delivery.

31. Ms Nathwani did not give the HR Shared Services Department an update at that time (as evidenced by the email from HR on 14 September 2015 asking for an urgent update from her and for the relevant documents which post dated the dismissal of the claimant).

32. In a letter dated 7 September 2015 (not sent by recorded delivery) the claimant was invited to attend an investigation meeting to take place on 10 September 2015. The invitation letter set out the allegation against him that he had failed to provide sufficient documentation to evidence his ongoing right to work in the UK. The letter stated that if the claimant was unable to provide satisfactory evidence of his ongoing right to work in the UK, the outcome of the process could be his dismissal from Asda. The claimant was not contacted by telephone to work out whether he had received the letter sent to him inviting him to a meeting. An email was not sent to him asking whether he was attending the meeting or whether he had received the letter inviting him to the meeting (which had not been sent by recorded delivery or "signed for post").

33. At the relevant time Mr Manish Barot was the General Merchandising Trading Manager at Asda's Park Royal store. In or around 8 September 2015 he was asked by Ms Nathwani to conduct the claimant's hearing in to his right to work status.

34. Ms Nathwani conducted a disciplinary meeting on 10 September 2015 in the absence of the claimant. The claimant did not attend the meeting on 10 September 2015. Mr Barot did not make further enquiries as to his whereabouts (by calling him or emailing him) to ask whether he had received the letter inviting him to the meeting or whether he was coming to the meeting. Ms Nathwani simply asked a colleague (Trupti Ahir) to attend the meeting in the claimant's absence so that he had some "representation". Ms Ahir had not spoken to the claimant about the matter and did not understand the facts. She was not in a position to provide any meaningful representation on behalf of the claimant.

35. Mr Barot decided to dismiss the Claimant, without notice. He confirmed his decision to dismiss the claimant in writing on 11 September 2015. The letter stated:

> "The hearing was arranged following your repeated failure to provide sufficient documentation to evidence your ongoing right to work in the UK. As previously advised, this means that Asda is unable to satisfy itself that it is complying with its obligations not to employ illegal workers and to avoid exposure to any penalties under the immigration legislation…"

The letter went on to state:

> "As part of our discussions I reminded you of events that had led up to the hearing"

(Although the claimant had not been present at the hearing).

The letter added:

> "The hearing reconvened and I informed you of my findings
>
> [although in fact the Claimant had not been present]…
>
> Based on these findings I have concluded that you had failed to comply with Asda's reasonable request that you provide sufficient documents evidencing your on going right to work in the UK. …
>
> I have made the decision to terminate your employment with immediate effect. Your last day of employment will be 10 September 2015."

36. The claimant was advised of his right to appeal. This letter was sent by first class post and on the balance of probabilities the claimant received this letter some stage shortly thereafter.

37. On 14 September 2015 Ms Wiseman wrote again stating:

> "I have been waiting for the following documents from yourself which you should of (sic) received following your formal meeting with the claimant). You must provide all correspondence since the original application was made."

38. The claimant was granted indefinite leave to remain in the UK and the right to work on or about 14 October 2015.

39. The claimant was paid until 4 September 2015 when his final payslip was processed. The claimant brought a claim for unlawful deductions from wages under s.13(1) of the Employment Rights Act 1996 and claimed his wages from the date of his suspension onwards. The claimant also claimed a failure to provide a written statement of reasons for dismissal and wrongful dismissal (dismissal without notice).

40. By ET1 dated 29 January 2016 the claimant claimed unfair dismissal and unlawful deductions from wages.

Relevant legal provisions

41. Under s98 of the ERA 1996, it states:

> (1)In determining …whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

…(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(2) …Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

42. In the case of Bouchaala v Trust House Forte Hotels Limited [1980] IRLR 382 EAT it was held that:

> "Section 98(2)(d) of the Act does not apply where the employer genuinely believes that continued employment would be unlawful although in fact he was mistaken in that belief. There is no justification for expanding the clear words of subsection d to include the concept of genuine erroneous belief on the part of an employer."

43. In the case of Harper v National Coal Board [1980] IRLR 260 EAT the EAT held that :

> "Although an employer cannot claim that a reason for dismissal is substantial if it is whimsical or capricious reason which no person of ordinary sense would entertain, if he can show that he had a fair reason in his mind at the time when he decided on dismissal and that he genuinely believed it to be fair, this would bring the case within the category of some other substantial reason."

44. In the case of Nayak v Royal Mail UKEATS/0011/15/SM it was held as follows: In deciding whether a claimant was no longer legally allowed to work in this country:

> "…an employer must take all steps that are reasonable in the circumstances [before dismissal] **Kurumuth v NHS Trust Middlesex University Hospital UKEAT/0524/10/CEA**. Without taking those reasonable steps the respondent could not form a genuine and reasonably held belief that the claimant was no longer legally allowed to work in this country.

Conclusions

Can the respondent rely upon s 98(2) and illegality?

45. Applying Bouchaala v Trust House Forte Hotels Limited [1980] IRLR 382 EAT, section 98(2)(d) of the Act does not apply where the employer genuinely believes that continued employment would be unlawful but in fact

he was mistaken in that belief. In this case, the claimant was entitled to continue to work based on the 18 March 2015 letter from the Home Office and the letter of 13 July 2015, quoted above. The claimant was suspended without pay and dismissed on 10 September 2015 despite the fact that the respondent had previously had verification that he was entitled to work until 17 September 2015. So dismissal was not fair on the basis of s 98 (2) d as the belief he was not entitled to work at the date of dismissal was mistaken.

Can the respondent show some other substantial reason?

46. The case then turns on whether the Respondent could show that it had a fair reason in mind at the time when he decided on dismissal and that he genuinely believed it to be fair, such that this would bring the case within the category of some other substantial reason. In view of the above cases above the Tribunal needs to assess whether the respondent had taken such steps as were reasonable in the circumstances to assess whether the claimant was no longer legally allowed to work in this country.

47. If it had done so, the question would be whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, to be determined in accordance with equity and the substantial merits of the case.

48. Mr Barot placed extensive reliance on the negative verification notice which, in evidence, he accepted was the overriding reason for dismissal. Mr Barot also placed reliance on the fact that the claimant had not produced an original copy of the Home Office letter (although in fact the claimant had produced a copy of this to Ms Nathwani) and that it was not signed.

49. Mr Barot did not appreciate that the fact that the claimant could not provide up to date documents providing his right to return to work at a time when his application with the Home Office was pending (and the documents were not in his possession). In essence, Mr Barot required the claimant, essentially, to do something he simply could not do at that time, which Mr Barot would have known had he made reasonable enquiries of the file and the papers before the employer. Mr Barot would have established, had he made reasonable enquiries of the file, that the claimant was entitled to work until 17 September 2015 and had made an application which was pending as shown by the original letter from the Home Office shown to the employer.

50. The dismissing officer Mr Barot did not give material consideration to whether the employer had received a false negative verification (which was in fact the case).

51. He also did not take reasonable steps to identify whether the employer had itself used the wrong reference when seeking an ECS verification and therefore had obtained information which was incorrect due to a fault by the employer. Information which would have shown this was readily available on the file.

52. Neither Mr Barot nor Ms Nathwani made any steps to obtain an up to date position from the Home Office with a further ECS verification, using the

correct reference, an application which the claimant had encouraged the employer to do.

53. The respondent made the ECS check without seeking prior consent from the claimant. Had they done, as required by law, they would have been told that the claimant had made a new application to the Home Office and they would have had access to the new reference. Had the respondent provided the correct reference it would have been told by the Home Office that the Claimant was entitled to work (at least whilst his new application was in process).

54. The claimant was not aware of the wrong reference having been provided as he had had not been provided with the relevant paperwork, (as had been specifically recommended by Ms Wiseman) so he did not have a chance to put the respondent right with the error it had made. The reason for the false negative report therefore was not only a serious error made by the respondent, but an error which was made after failing to consult the employee, as required by law. The respondent did not give the claimant a reasonable opportunity to put its own error straight.

55. As regards the process prior to dismissal, the Respondent had also not sent the claimant the 60 day prior letter (Tool Kit Letter 1) or the 30 day prior letter (Tool Kit Letter 2).

56. The claimant had not been informed of the check being conducted by ECS and nor was he asked to consent to the check being carried out. In particular, the claimant was not asked for information as to the correct reference to use or whether there was any information he had which would affect his application.

57. The respondent also did not make enquiries as to whether the letter inviting him to the meeting (which was not sent by recorded delivery or signed for) had been received or not. He was not called or emailed on the day to find out the position. This was a further material failure of fair process.

58. The claimant was also not permitted any meaningful representation at the hearing instead, as the person asked to assist him did not know anything about his case.

59. In all the circumstances, and for the extensive reasons set out above, the respondent could not show it had conducted such investigation as was reasonable in the circumstances. The investigation conducted fell way outside the band of reasonable approaches to a case of this nature.

60. Further, the respondent failed to establish a fair reason in its mind at the time when it decided on dismissal and that it genuinely believed dismissal to be fair, so as to reasonably dismiss for some other substantial reason.

61. The process adopted also fell way outside the band of reasonable approaches in a case of this nature, for the detailed reasons listed above.

62. Accordingly the claimant's dismissal was unfair in law.

Unlawful deductions from wages

63. Dealing with the claim for unlawful deductions from wages, the claim succeeds, in so far as the claimant was not paid between 4 and 10 September 2015 at a time when he was suspended without pay, but he was actually entitled to work. The suspension was based on a mistaken belief that the claimant had no right to work in the UK, due to an error made by the respondent when providing the incorrect reference to the Home Office during the ECS check and not seeking the claimant's consent to such report.

64. This means he was paid nothing (ie less than the wages properly payable) for that period. It will be a matter for remedy as to whether this means any further sums are outstanding in respect of that mater, when taking into account what he was paid in his final payslip and/or in respect of notice pay.

65. The remedy hearing has been listed separately.

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Employment Judge Daniels

Date: 8 June 2017……………………

Sent to the parties on: 14 June 2017.......

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For the Tribunal Office