1304475/2017

EMPLOYMENT TRIBUNALS

Claimant: **Mr Z Ramzan**

Respondent: **Shop On Time Limited**

Heard at: **Birmingham** **On:** **3 July 2018**

Before: **Employment Judge Self**

Representation
Claimant: **In Person**
Respondent: **Attended – Observation only**

WRITTEN REASONS
(following Judgment on 30 July 2018)

1. The Claimant lodged his Claim Form on 18 December 2017 against the Respondent – Shop On Time Limited. Within that Claim Form he asserted that he had been employed between 4 July 2017 and 29 September 2017 and that he was not paid any notice pay. In the section Type and Details of Claim the Claimant asserted, by ticking boxes, that his claims related to:
   a) Unfair Dismissal;
   b) Age discrimination;
   c) Notice pay;
   d) Holiday pay;
   e) Other payments – personal effects.

2. It was noted by the Tribunal that the Claimant had not been employed for two full years and so the Tribunal may not have jurisdiction to hear the unfair dismissal claim and a letter dated 8 January was sent to the Claimant pointing out that fact and that on the face of it the case did not seem to fall into one of the exceptions and that he was required to show cause by 22 January as to why the unfair dismissal claim should not be struck out. The letter also specified that the Respondent would be told that no Response would be required to the unfair dismissal claim at this time pending the Claimant's response. In my experience such a letter is a reasonably common occurrence in such circumstances.

3. On the same day the Claimant was also ordered within 14 days to explain "the basis for his allegation that the mistreatment he complained about had anything to do with age". Further, on the same day, the Claim was sent to the Respondent to issue its Response to the other Claims. A Notice of Hearing was sent out to the parties indicating that a 90 minute PH to identify the issue would be held on 3 July 2018.

4. The Claimant responded promptly with two letters dated 10 January 2018. The first detailed the basis upon which he suggested that the conduct towards him was on account of his age. I considered those further today and consider that they gave a good indication of the heads of discrimination complained of which only needed a small amount of additional particularisation. They certainly complied with what was required by the Order of 8 January 2018.

5. In reply to the strike-out warning the Claimant made a number of assertions or as he put it his claim was "for a host of reasons which include ….. Disclosure of wrong doing, health and safety violations and failure to meet legal obligations of superiors". Whilst the Claimant is imprecise it could be said that his Response to the strike out claim was to assert that part of the reasoning for his treatment (including the dismissal) was potentially for a protected disclosure and/or for a health and safety reason which would amount to a potential claim for automatically unfair dismissal for which no minimum service requirement would be needed. That letter was forwarded on by the Tribunal.

6. It is clear from the file that the Claimant's Response to the strike out was considered as there is a note from an Employment Judge on the file that reads "Don't strike out as may be PID" i.e. it may be a section 103A Employment Rights Act 1996 (ERA) claim. Unfortunately however no further contact was made with the Respondent to indicate to them that the unfair dismissal claim had been accepted and that they needed to provide a Response to that Claim. That remained the case as at the start of this hearing.

7. On 9 February 2018 the Tribunal was emailed by a representative of Avensure Limited who indicated that they had been instructed to represent the Respondent in the proceedings and they have remained on the record throughout and indeed one of their representatives attended today.

8. By the time Avensure Limited contacted the Tribunal the date for a Response to the claims set out at 1b to 1e inclusive above had passed as it was due by 5 February 2018. Nothing happened on the file save for the Claimant writing on two occasions on 20 March and 5 April to the Tribunal copying the Respondent's representative in to note that no Response had been lodged.

9. On 14 April the Tribunal sent the following letter to the Respondent's representatives. It is a letter in standard form when a Response has not been lodged. It read:

   "You did not present a Response to the Claim. Under Rule 21 of the Rules because you have not entered a Response a judgment may now be issued. You are entitled to receive notice of any hearing but you may only participate in any hearing to the extent permitted by the Employment Judge who hears the case".

10. Under Rule 21(2) when no response has been filed a default judgment can be issued if a determination can be properly made on the claim. If not a hearing should be fixed before a Judge sitting alone.

11. On 18 April a letter requesting a detailed schedule of loss was sent to the Claimant and copied to the Respondent's representatives so that if necessary remedy could be dealt with. A schedule of loss was duly provided on 5 May 2018 again appropriately copied to the Respondent. On 22 June 2018 notice was sent out to the parties that the PH listed for 3 July would be converted to a full hearing at 10 am with 90 minutes allocated. Subsequently because of the availability of judicial resources that hearing was moved to 2pm.

12. That is the administrative background to this case. The Claimant attended today and so did a representative of the Respondent. I pointed out to the Respondent's representative that because of the failure to issue any Response that in the absence of any extension of time being granted to lodge a Response he was only entitled to participate in any hearing to the extent permitted by myself. I enquired as to what he saw that extent as being and gave him an opportunity to address me on the point.

13. The submissions were pithy. There was not, even at this stage, any draft Response and nor was there any application to lodge one out of time. I was told that the Respondent wished to be heard because it was in the interests of justice to do so and that it would be inequitable to award the Claimant monies to which he was not entitled. That was the full extent of the representations made. In response the Claimant pointed out that the Respondent had had every opportunity to take part but had chosen not to and so they should not be permitted to take part at the last minute.

14. Having considered matters I decided that the Respondent should not be entitled to make representations at the hearing. They had clearly elected to take no part in the proceedings and even today were not seeking to lodge a late Response. It seemed to me that their approach was to pitch up at the death and then, without any form of prior notice, were about to

put forward their position on either liability or remedy of which the Claimant would have no notice. I agreed with the Respondent that there was a need to guard against inequitable behaviour but in my view it was their conduct which sought to undermine the process and was inequitable. Having considered the overriding objective I indicated that we would proceed without representations from the Respondent's representative and also without the bundle of documents they had prepared.

15. The Claimant's age discrimination case was particularised in his letter of 10 January 2018 (erroneously headed 2017). At the start of the hearing some time was spent further clarifying those issues. The factual allegations of age discrimination were agreed as being.

    a) The Claimant was referred to as "kid" on a regular basis throughout his employment by Mr Idrissi and Mr Aslam. Specific examples are
        i) Where the Claimant was seeking to implement an internal system / control he was told "you don't know anything you're just a kid". This specific incident took place in the first two weeks of his employment.
        ii) On 13 July 2017 Mr Idrissi told another member of staff to "give the kid" some documents.
    b) In the first few days of the Claimant's employment Mr Idrissi told the Claimant that the Claimant should not complete certain matters which the Claimant considered within his remit because they were "beyond the Claimant's capabilities". He did so in a patronising and undermining tone. When the Claimant assured him that he considered that the tasks were basic for his line of work Mr Idrissi said "If it was up to me you would never have got this job you're too young and you don't know anything."
    c) At the start of August Mr Idrissi warned the Claimant that he should not get involved in certain matters and stated "You clearly don't have the level of experience necessary as you're too young so don't get involved".
    d) The final instance relied upon is when a major supplier was over from Dubai and the Claimant asserts that they were introduced to everybody apart from the Claimant. Later Mr Aslam when asked what the Claimant did stated "Oh the kid's just admin does nothing but emails". When asked whether the Claimant worked under Ali the Chief Financial Officer Mr Aslam replied "Yeah, he's like his sidekick or assistant. This was the day before the Claimant left.
    e) The Claimant also asserted that his dismissal on 29 September 2017 was either directly discriminatory or harassing in nature.

16. The Claimant considered the matters detailed above to amount to harassment related to his age extending over the full period of his

employment culminating in his dismissal. The particular age group was the 18 to 25 years old age group and the comparators where required for the direct discrimination claim was a hypothetical one.

17. The Claimant asserted that he was not paid his proper notice which he contended was for a period of 4 weeks and also that there was outstanding holiday as at the date of his dismissal for which he was entitled to be compensated. There was also a claim for the financial value for his personal effects that he left behind. I do not consider that that is a claim that stands alone but rather needs to be considered as a potential head of loss in the event that his discrimination claim is successful.

18. I pointed out to the Claimant at the start of the hearing that whereas the Respondent had been given every opportunity to respond to all claims other than the unfair dismissal it had not been given an opportunity to respond to the unfair dismissal claim and that if he wished to continue with an unfair dismissal claim then I would need to consider whether a postponement should be given to allow the Respondent a chance to lodge a Response to that claim. The Claimant considered matters and withdrew his claim for unfair dismissal. that being the case I considered it fair and reasonable to continue on the claims that the Respondent had had a chance to deal with but had failed.

19. The Claimant gave evidence at the hearing and was questioned by myself in order to elicit relevant information. He also provided a number of documents within his bundle that he took me to and asked me to read and confirmed the truth of them He confirmed that both his Claim Form and the letter of 10 January from which the issues in paragraph 15 have been derived were true to his best knowledge and belief. His oral evidence so far as is material is as follows.

20. The Respondent retails watches using various sales platforms they have about 12-13 staff. The CEO is Mr Idrissi but Mr Aslam was in charge day to day as the Operations Manager. The Claimant's line manager was called Ali. Ekta was the Head of Human Resources

21. The Claimant considers himself to be in the 18-25 age group for this Claim. He was the only employee in that age group but there were two employees who the Claimant believed were 27/28 years old but they were not in management roles. Mr Idrissi seemed to object to his appointment from the outset and made it quite clear that it was because of the Claimant's youth. Having said how young the Claimant looked Mr Idrissi pulled Mr Ali to one side and the clear impression to the Claimant was that the conversation was about his appointment. The Claimant was made to feel and did feel unwelcome and the Claimant does not consider that he

would have been treated that way had he not been in the age group he was.

22. Very early on in the Claimant's employment when Mr Idrissi found that Mr Ali had employed the Claimant as an accountant pulled Mr Ali aside saying he looks a bit young. The Claimant could not hear what they said after that point. The Claimant stated that at all times he was treated dismissively and not taken seriously because of his age notwithstanding his qualifications and competence for the job at hand. He suggested that this was summed up when he was described as "the kid who deals with admin and emails" at the end of his employment. The Claimant confirmed in evidence each of the specific allegations set out above.

23. The Claimant explained how the attitude and words of his employer made him feel. He described himself as a confident person normally but the regular comments left him doubting his abilities. Initially he tried to ignore it but gradually the comments took a toll upon him and he became increasingly uncomfortable and upset in the work place and was at times close to tears.

24. On 29 September 2017 the Claimant was called into a meeting the purpose of which was not clear or enunciated. When he entered he was told by Mike Stephens that it was a disciplinary process for a failure to perform. He was permitted to get a colleague down to accompany him but there was no clarification of the allegations against him and as soon as the colleague was present he was the Claimant was told that he was being dismissed for "failings with timekeeping and failure to perform". The Claimant told me and I accept that this was the first time that these matters had been brought to his attention. The Claimant pushed for specifics but none were offered. There was no suggestion that this disciplinary meeting was anything other than a means to communicate a pre agreed course of conduct namely the Claimant's dismissal. It did not comply with the relevant ACAS Code of Conduct.

25. Initially at the meeting the Respondent sought to indicate that the Claimant's notice period was 1 week but the Claimant indicated that it was 4 weeks and Ekta Subharmal-Parmar from HR confirmed that was correct. That is consistent with the signed contract on 18 July 2017 which I consider to be the binding contract in this case. There is an unsigned manifestation of the contract which indicates 1 weeks' notice but on the balance of probabilities I accept that the signed copy is the operative one. At the meeting Mike Stephens said that the notice pay would be paid but it never was. No good reason has been provided for that non-payments and I find that notice pay of 4 weeks is due and owing.

26. The Respondent indicated that he would not be paid any overtime and the Claimant countered by saying that the extra time had been approved by Mr Ali and should be paid. He pointed out that in the absence of an agreement to be paid he would not have undertaken the work. Mike Stephens indicated that he did not accept that although made no attempts to justify the same. I accept the Claimant's evidence that he was entitled to be paid for his overtime and in the signed contract payment for overtime is something that is clearly permissible and countenanced (notes to paragraph 8 of the contract).

27. The Claimant was not permitted personally to go back upstairs to get his personal effects. Some were brought down to him but not everything. I accept that not all of the Claimant's items were recovered but that in value terms that which was left was of a relatively nominal value.

28. The Claimant told me that he had been stressed and anxious since his employment and had been unable to sleep well. He had applied for jobs but in interviews he said that he lacked confidence in selling himself which he attributed to his experiences with the Respondent. I considered that the Claimant gave me an honest account of how he was made to feel. The Claimant did not try to exaggerate matters (save for one issue of remedy) but gave a believable account of both how he was treated and how it made him feel. Obviously because of the Respondent's choice not to take part in this process he was not the subject of cross examination but as I say I was satisfied as to the truth of what the Claimant said and indeed asked questions myself in order to elicit further information.

29. Accordingly I consider that all of the discrimination claims detailed above are made out. Having heard the Claimant's evidence I consider that each of the allegations detailed above are proven as being acts of harassment in that they amount to unwanted conduct which was related to the Claimant's age which had the purpose or the effect of both violating the Claimant's dignity and created a hostile, intimidating or offensive environment for the Claimant. In coming to my conclusions in respect of the effect on the Claimant I have taken into account section 26(4) of the Equality Act 2010. I accept that the matters relied upon amount to an act continuing over a period and that all have been lodged in time.

30. I am also satisfied that there was no basis to the suggestion that the Claimant was dismissed for timekeeping issues and/or capability. From what I have heard the Claimant was a diligent and capable employee. Although there was no express or overt mention of the Claimant's age in the dismissal meeting I am satisfied from having found that the Claimant was referred to often in his employment in disparaging terms because of his age and in particular his youth that the real reason for dismissal was directly as a consequence of his age and that that is an appropriate

inference to draw. I am mindful of the burden of proof provisions and consider them to be met in this case.

31. Having found that the claims amount to harassment there is no need for me to consider whether the same amount to direct discrimination. Such a finding would not add to any compensation and in any event direct discrimination and harassment are mutually exclusive pursuant to section 212 (1) of the Equality Act 2010. For the avoidance of doubt however had the harassment allegations not been proven I would have found that the conduct complained of in respect of direct discrimination would have been proven.

32. From the information at my disposal the Claimant's net weekly wage was 368.84 pounds per week. I listened to the Claimant's evidence and he told me that there was an oral agreement that he would be on 4 weeks' notice. I accepted that evidence and it seemed a notice period consistent with the level of role offered. In any event this sum would have been paid either as notice pay or would be added to the compensation for age harassment.

33. I heard oral evidence and accepted that the Claimant was owed 7 days' holiday or 1.4 weeks which equals 516.38 pounds.

34. I heard and accepted evidence that the Claimant had undertaken some overtime which had been approved by Mr Ali and that unpaid overtime amounted to 1.3125 weeks or 484.10 pounds and this sum should be paid as an unlawful deduction of wages or a breach of contract.

35. I valued his loss of personal effects which had to be left at the business at 50.00 pounds and considered that the values the Claimant ascribed to goods was over played mainly on account of him trying to place some form of sentimental value on the same.

36. I award 7,500 pounds for injury to feelings. I have taken into account the evidence of the Claimant as to the effect that the course of conduct had on him and accept that evidence. I remind myself that such an award is designed to compensate and not to punish and that I should bear in mind the value in everyday life for the award which is given. I have also borne in mind the relevant Vento guidelines and consider that the award given earlier in this paragraph at the high end of the lowest band is an appropriate award based on the evidence given. Whilst the comments caused the Claimant some distress and that that has lasted for some time I was satisfied that 7500 pounds is adequately reflected of the loss.

37. As stated above the Claimant was earning 368.84 pounds per week in salary. As at the date of the hearing the Claimant had not been able to obtain other work. He told me and I accepted that his confidence had

been badly affected and that although he had applied for jobs and had had interviews he had not performed to an adequate standard and had not been successful. I was satisfied in all the circumstances of what I was told that the Claimant had mitigated his loss as well as he was able taking into account the unfortunate experience he had suffered. I considered however that the Claimant should be able to gain employment at a similar level within 13 weeks of the hearing or if he did not do so then he should. That was the basis of the loss of earnings award.

38. The past loss of earnings was therefore a period of 35 weeks and 2 days and led to a total of 13,012.68 pounds. I have ensured that the notice period has not been double counted. The further 13 weeks amounts to 4,794.92 pounds which gives a total loss of earnings figure as 17,810.01 pounds.

39. I find that the ACAS code did apply to this dismissal as it was purported to be for capability reasons and there was no ACAS compliant process attempted at all. I have given an uplift of 20% which equates to a sum of 5,690.44 pounds. I have calculated interest on the discrimination claims on the standard basis and award 616.35 pounds in respect thereof.

40. A definitive list of the sums owed to the Claimant has been set out in the Judgment which was sent out soon after the hearing and totals 34,142.64 pounds.

Employment Judge Self

19 November 2018