

**Reserved judgment**



## **EMPLOYMENT TRIBUNALS**

**Between:**

**Claimant: Mr B Khan**

**Respondent: Roadrunners (GB) Limited**

**Heard at London South Employment Tribunal on 11 September 2018**

**Before Employment Judge Baron**

**Lay Members: Ms N A Cristofi and Ms C A Oldfield**

**Representation:**

**Claimant: Rudi Capek - Consultant**

**Respondent: Patrick Foster - Director**

### **JUDGMENT**

It is the judgment of the Tribunal as follows:

- 1 That the complaint under section 23 of the Employment Rights Act 1996 (relating to unlawful deductions from wages) succeeds;
- 2 That the complaint under section 111 of the Employment Rights Act 1996 (relating to unfair dismissal) succeeds;
- 3 That the claim under section 93 of the Employment Rights Act 1996 (relating to the provision of written reasons for dismissal) succeeds;
- 4 That the Tribunal declares in accordance with section 124 of the Equality Act 2010 that the Claimant was unlawfully discriminated against because of his age;
- 5 That any remedies for the Claimant be considered at a further hearing.

### **REASONS**

- 1 At this hearing we heard evidence from the Claimant and Mr Foster. Mr Hussain, to whom we refer below, did not attend. Mr Foster said that he suffered from gout and was unable to leave the house that day. There was no medical evidence to support that statement and we took it at face value. A statement from Mr Hussain was provided, but of course Mr Capek was

not able to cross-examine him on its contents. We were also provided with a bundle of some 100 pages but were referred to very few of them.

- 2 The Claimant was employed from September 2007 by Roadrunners Gatwick Limited. That was a company of which Muzaffar Hussain was the controlling influence. Its business was that of running a taxi and mini-cab business. In December 2013 Mr Hussain committed an offence under the Bribery Act 2010 which resulted in him being imprisoned from March 2016. The Respondent was incorporated on 29 August 2014. Mr Foster is the sole director and member of the Respondent. Mr Foster had been an employee of Roadrunners Gatwick Limited acting as a manager. On 17 October 2014 Mr Hussain wrote to the Claimant informing him that his employment was to be transferred to the Respondent on the following day in accordance with the Transfer of Undertakings (Protection of Employment) Regulations 2006. Mr Foster, for the Respondent, accepted that there had been such a transfer and that the Claimant's continuous employment with the Respondent had commenced in 2007 for the purposes of the Employment Rights Act 1996. Mr Foster said he retained Mr Hussain in the business as a consultant until his imprisonment. In the light of what later occurred we consider that to be an understatement.
- 3 The Claimant was not at any time issued with a statement of terms of employment by either Roadrunners Gatwick Limited or the Respondent.
- 4 Mr Hussain was released from prison in December 2016. We accept the Claimant's evidence that on his release he 'reappeared in the business and reasserted his authority.' Further he radioed all drivers saying 'The boss is back'. Mr Foster told the Tribunal that Mr Hussain was now an employee in a managerial capacity.
- 5 The Claimant had been a driver working in the business, but from at least the beginning of 2015 he had worked in the office. There were several telephonists on duty at any one time who answered calls from customers requesting a booking. Those bookings were entered onto a computer system which allocated most jobs to drivers automatically. There was one controller on duty at any one time. The function of the controller was to oversee the automated process, and also to deal with bookings for special types of vehicle. The Claimant's principal role was that of controller, although he had acted as a telephonist from time to time. From at least the beginning of 2015 the Claimant had worked four shifts each week of 12 hours each. Sometimes he undertook additional shifts when required. The Respondent employed four or five controllers.
- 6 In early 2017 the Respondent 'took over' Belfry Cars. We were not told of the exact legal arrangements but the practical outcome of a takeover was not in dispute. Belfry Cars had its own computer system and also employed a similar number of controllers to the number employed by the Respondent, meaning that there was a total of about nine controllers. As at the date of this hearing the total number of controllers employed by the Respondent, said Mr Foster, was six or seven.
- 7 There was a meeting on 19 June 2017 and what occurred at this meeting is central to most elements of the claims in these proceedings. The

Claimant was not due to work that day. Mr Hussain telephoned the Claimant and asked that he go to the Belfry Cars offices for a meeting. The Claimant arrived about 1.30 pm and met Mr Foster and Mr Hussain. That much is agreed.

- 8 It was the Claimant's evidence that the meeting lasted for only two or three minutes and that Mr Hussain said:

I don't know how to say this, you've become part of the furniture, but you're too old to work here. I will pay £10 of £20 every month into your bank account every month for two years, or I can give you a package.<sup>1</sup>

- 9 The Claimant also said that it was only Mr Hussain who spoke, and that Mr Foster was obviously sad and had tears in his eyes. Mr Hussain later said that Mr Foster would work out a package for the Claimant. After the meeting the Claimant went upstairs and spoke to one of his colleagues, Gemma, and asked her to arrange a taxi to take him to an ex-servicemen's club to which he belonged. The Claimant was insistent that it was only Mr Hussain who had spoken to him, and that he was the boss and had fired many people.

- 10 The Claimant agreed that there was some discussion about retirement. At the time he thought that his State retirement date was about two years away, but he had later learned that it was three years away.

- 11 The evidence by Mr Foster was as follows. He said that there had been complaints by drivers about the Claimant, and also that he was struggling with the additional pressure caused by the takeover of Belfry Cars. It was he, Mr Foster, who had spoken at the meeting and not Mr Hussain, and that the Claimant had agreed that he was struggling with the pressure. The meeting, said Mr Foster, lasted for 30-40 minutes, and was relaxed and amiable. There was a discussion about what the Claimant wanted to do. Mr Foster said that he asked the Claimant whether he wished to retire at that time, and the Claimant confirmed that that was the case. In his witness statement Mr Foster said that the Claimant's retirement was agreed mutually and it was not forced on the Claimant in any form. Mr Foster said that he also said that he would make a weekly payment to ensure that the Claimant had sufficient weekly money.

- 12 The difficulty facing any court or tribunal in such circumstances is that there is no specific evidence as to what occurred at the meeting other than the evidence of those present. It is always possible at a meeting that each of the two parties thinks they know what happened but may come away with very different views of the outcome.

- 13 We do not accept that either version is entirely accurate, and we are allowing for any misunderstanding. We do not accept that the meeting only lasted for two or three minutes, nor Mr Foster's evidence that it was as long as 30-40 minutes. We find that Mr Hussain was the person who spoke to the Claimant at the meeting. On this point we prefer the evidence of the Claimant, and that has to affect our assessment of the credibility of

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<sup>1</sup> This is a quotation from the Claimant's witness statement purporting to be a verbatim record of what Mr Hussain said.

the remainder of the evidence given by Mr Foster. It was Mr Hussain who had owned and run the business until at least 2014, he had remained after the Respondent was incorporated, and then had returned when he was released from prison. We accept the Claimant's evidence that Mr Hussain was forceful.

- 14 On a balance of probabilities we also find there had been concerns about the ability of the Claimant to cope with the increased volume of work, and that there had been complaints from some drivers. There was a surplus of controllers. We find that there was a discussion about when the Claimant was to retire and he said that that was to be two years hence. We accept the Claimant's crucial evidence that Mr Hussain also said that the Claimant was too old and that he then terminated the Claimant's employment. It is simply not credible that the Claimant was summoned to a meeting without being given any information about the subject matter of that meeting in advance, and then simply agreed to retire immediately. He was not able to draw his State pension at the time and had been earning about £325 a week net. That income could not be replaced immediately.
- 15 There are two further pieces of evidence which have the ring of truth. In oral evidence the Claimant stated that after the meeting he immediately told Gemma that he had been fired. We did not hear from Gemma, but we consider that it would be unduly creative of the Claimant to have decided during the heat of the hearing to invent that detail. Further, in his written statement the Claimant said that Mr Foster had tears in his eyes.
- 16 We therefore find that there was a dismissal of the Claimant by the Respondent. The Respondent must show the actual reason for the dismissal and also that it was one of the potentially fair reasons within section 98 of the Employment Rights Act 1996. It was the Respondent's case that the employment terminated by consent. We have rejected that proposition and the Respondent has not shown a potentially fair reason for the termination. We therefore find that the dismissal was unfair.
- 17 I asked for submissions to be made as to the relevance, if any, of section 111A of the Employment Rights Act 1996. That is as follows:

**111A Confidentiality of negotiations before termination of employment**

- (1) Evidence of pre-termination negotiations is inadmissible in any proceedings on a complaint under section 111.  
This is subject to subsections (3) to (5).
- (2) In subsection (1) "pre-termination negotiations" means any offer made or discussions held, before the termination of the employment in question, with a view to it being terminated on terms agreed between the employer and the employee.
- (3) Subsection (1) does not apply where, according to the complainant's case, the circumstances are such that a provision (whenever made) contained in, or made under, this or any other Act requires the complainant to be regarded for the purposes of this Part as unfairly dismissed.
- (4) In relation to anything said or done which in the tribunal's opinion was improper, or was connected with improper behaviour, subsection (1) applies only to the extent that the tribunal considers just.
- (5) Subsection (1) does not affect the admissibility, on any question as to costs or expenses, of evidence relating to an offer made on the basis that the right to refer to it on any such question is reserved.

- 18 We accept the submission of Mr Capek that that provision is not relevant in these circumstances because the issue we had to decide was how the employment had terminated and there had not been any pre-termination negotiations within subsection (2). We were not therefore prevented from considering that meeting in connection with the claim of unfair dismissal.
- 19 On 13 July 2017 Mr Capek wrote to the Respondent asking for written reasons for the dismissal of the Claimant in accordance with section 92 of the Employment Rights Act 1996. No reasons were provided. As we have found that there was a dismissal, this claim must succeed also.
- 20 The Claimant also maintains that the dismissal was an act of direct age discrimination. We have found that there was mention of the Claimant's age and his retirement date during the meeting on 19 June 2017. In our judgment that finding is sufficient which would enable us reasonably to conclude that the dismissal was because of the Claimant's age. The burden therefore moves to the Respondent to show that age was to no extent a cause of the dismissal. The Respondent has not discharged that burden. We therefore find that the claim of age discrimination succeeds.
- 21 There is a separate head of claim of unlawful deductions from wages. We have found that for at least two years the Claimant had normally worked four shifts each week, each shift being of 12 hours. On some occasions he works extra shifts. We now find that in various weeks in May and June 2017 the Claimant was allocated a total of 111 fewer hours. In four of the weeks he was not allocated a total of eight shifts, and in one week he was allocated 15 hours.
- 22 We find that it was a term of the contract of employment that the Claimant would be provided with four shifts totalling 48 hours, and that therefore the failure to provide such shifts was a breach of contract.
- 23 Finally, there is a claim for leave pay. The Claimant states that he had never taken any holidays during his employment and had not received any payment in lieu. It was agreed to stay this element of the claim pending the consideration by the Court of Appeal of the judgment of the CJEU in *King v. Sash Windows*.
- 24 Section 112 of the Employment Rights Act 1996 provides that where there has been a finding of unfair dismissal then the Tribunal shall explain to the Claimant the remedies which are potentially open. This I now do. The summary below is not intended to be an exhaustive exposition of the law, but merely a guide.
- 25 The first remedy is that of reinstatement. The effect of such an order is that the Respondent is to treat the Claimant in all respects as if he had not been dismissed. The second order is that of re-engagement. The effect of that order is that the Claimant is re-employed by the Respondent in such post, from such date, and on such terms as the Tribunal may order. The post is to be comparable to the post from which the Claimant was dismissed or other suitable employment. The Tribunal has a discretion as to whether to make either of such orders and in exercising that discretion the Tribunal must consider whether it is practicable for the Respondent to comply with such order, and also whether the Claimant caused or

contributed to the dismissal. The Claimant is not entitled to either of such orders as a matter of right.

- 26 The final order is that of compensation which comprises a basic award, and a compensatory award. The basic award is an arithmetical calculation based upon the Claimant's age, length of service and salary subject to a statutory maximum. The amount may be reduced where the Tribunal considers that it is just and equitable to make such reduction due to any conduct of the Claimant. The principal provisions as to the amount of the compensatory award are in sections 123(1) and (6) as follows:

**123 Compensatory award**

(1) Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

(2) – (5) . . .

(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

- 27 The Claimant is requested to inform the Tribunal and the Respondent within 14 days of the date upon which this document is sent to the parties as to whether he wishes to apply for an order for (a) reinstatement or re-engagement, or (b) compensation. If he is to seek reinstatement or re-engagement then a preliminary hearing to be held by telephone will be arranged to discuss the appropriate case management orders.
- 28 This matter has been listed for a hearing to determine remedies for the Claimant for 17 December 2018.

**Employment Judge Baron  
Dated 13 September 2018**