



EMPLOYMENT TRIBUNALS

Claimant: Mr T Cooley
Respondent: Ocado Retail Limited

Heard at: Watford Employment Tribunal (By CVP) **On:** 1 October 2021

Before: Employment Judge Cowen

Representation

Claimant: Mrs Cooley, Claimant's mother
Respondent: Did Not Attend

RESERVED JUDGMENT

1. The Claimant's claim for s.103A automatically unfair dismissal is successful and an award of £20,959.88 is made in compensation
2. The claimant's claims for unlawful deduction of wages and failure to provide written pay statements are dismissed.
3. The claim for unfair dismissal under s.98 Employment Rights Act 1996 is dismissed as the Tribunal has no jurisdiction to hear it.

REASONS

Introduction

1. The claim was issued by the Claimant on 4 January 2021 for unfair dismissal, unlawful deduction of wages, public interest disclosure and failure to provide a written pay statement. The claim was sent to the respondent on 12 January 2021. A further letter was sent to the respondent on 18 March 2021 warning them that as they had failed to respond, judgment may be entered against them under rule 21 of the Employment Tribunal Rules of Procedure. The respondent did not respond, nor file any response to the claim with application. On 6 June 2021 a notice of hearing of today's hearing was sent to the respondent. They have not attended this hearing.
2. The hearing was heard by CVP online video hearing. The claimant attended, as did his mother Mrs Cooley, as his representative. The claimant provided a written statement, a bundle of papers and gave his evidence after providing an affirmation to tell the truth.

The Facts

3. The Claimant, who has an engineering diploma, was employed by the respondent, initially as a packer, on 6 January 2020. After only a few weeks he was offered a position as a Technical Assistant. He worked 12 hour shifts with 4 days on and 4 days off. He received his January 2020 pay, but received no payslip in February and no pay in March. The claimant raised this with payroll and he was eventually paid the full amount owed. He was told not to raise the issue again. After the end of his probationary period in August 2020, the claimant ought to have received a pay rise, but this did not occur. He was told it would be paid in November 2020 but it was not.
4. The claimant was aware of a number of health and safety issues which he considered were concerning and he reported these to his managers. He told them that he was not provided with dust masks and tools, but was told that this was ok. He spoke to his manager on a number of occasions to say that he did not think this was ok, but nothing was done.
5. Around March/April 2020 the claimant went to the office on the site on the second floor. He spoke to a manager in the office and told him that he had been asked to clean under a lift which was not disconnected and was unsafe. He said the lift was very heavy and if it fell, whilst someone was cleaning underneath, it would cause injury. The claimant was told 'not to throw his toys out the pram' and to carry out the cleaning in any event, despite the fact he was not trained to do so. The claimant remained concerned about this, so he asked to speak to Wayne who was the manager of the site. He was told that Wayne would not wish to speak to him.
6. On a number of occasions which the claimant outlined in his witness statement he witnessed that cardboard and pallets were stored in areas of the warehouse which prevented access to fire extinguishers and fire exits. The claimant spoke to the Inbound Management about this, who said that they would deal with it, but it was still going on the next day. The claimant raised this with management as he was asked to do so by a colleague.
7. The claimant was also aware that the safety switch on the conveyor belt was blocked with a cable tie, to prevent it from working. The claimant also reported this on a number of occasions. This prevented the belt stopping, which led on one occasion to the fire alarm being triggered. The claimant was aware that fire exits were blocked by cardboard and he had reported this as a safety issue, which had not been rectified.
8. After raising these issues, the claimant was given cleaning jobs, whilst others were given easier jobs to do. The claimant also described receiving abusive messages on the public channel of the radios which they used during July – October 2020.
9. On one occasion the claimant described that he was asked to fix a blocked conveyor belt. This occurred on the third floor, so a ladder which was eight feet long was required. This was not a quick job. The claimant was told by the floor manager to hurry up as it was costing him (the floor manager) his bonus. The claimant refused on the basis that it was working at height and needed to be done carefully. After this he was called into the office and

given an informal warning.

10. The claimant described that a 'witch hunt' was launched to find out who had used the whistleblowing policy. As a result of this the claimant's mental health deteriorated, he suffered anxiety, nightmares and dreaded going to work. Ultimately, he had suicidal thoughts. He had three promotions denied to him because he had raised these issues. He resigned his position due to his mental health and underwent counselling and took medication to assist him.
11. The claimant has been able to undertake other work, and is currently employed at ASDA on a fixed term contract which is due to finish on 19 August 2022. He has spent £50 per session on 10-12 counselling sessions so far.

The Law

12. In order to claim s.98 Employment Rights Act 1996 ('ERA') unfair dismissal, the claimant is required to have two years of continuous service. Without this a claim under s. 98 cannot be made.
13. A claim for detriment as a result of making a protected disclosure (commonly referred to as 'whistleblowing') can only be made if the claimant has made a 'qualifying disclosure' as defined by s.43B ERA. This includes the fact that the claimant must disclose information which in the reasonable belief of the claimant tends to show one of the statutory reasons for disclosures. In this case, the claimant asserts his disclosures showed that the health and safety of an individual has been, or is likely to be endangered.
14. The claimant must also prove to the Tribunal that as a result of making that disclosure he has been subject to a detriment.
15. S.103A ERA sets out

“An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure”.

16. A dismissal can also be established where there is 'constructive dismissal'. This occurs where the respondent commits a fundamental breach of the contract and the claimant accepts that breach and ends the employment. It can occur where the claimant considers that the actions of the respondent indicate that they no longer wish to be bound by the terms of the employment contract.
17. A constructive dismissal can occur where there is more than one action by the respondent which together amount to a breach of the implied term of trust and confidence. The final act does not have to be of the same kind, but must contribute something to the breach. This is known as the 'last straw' doctrine; see [*Omilaju v Waltham Forest London Borough Council 2005 ICR 481, CA*](#)

The Decision

18. The claimant was employed on a full time contract with the respondent. He undertook this work in order to use it as a stepping stone to obtain work related to his engineering diploma. He was quickly promoted to a Technical Assistant which did require the use of some of his engineering knowledge. However, when the claimant used his knowledge to point out to the managers of the site that there were issues of health and safety arising, he was ignored and marked by them as a 'complainer'.
19. The actions of the claimant to tell his manager of his concerns that there were health and safety issues amount to protected disclosures. He made a number of protected disclosures to his employer via his managers in accordance with s.43B ERA, including the information that cardboard and pallets are blocking the fire exits, which indicates that the health and safety of those working in the warehouse could be endangered. Likewise, when he indicated that a repair to a lift was being done without the power to the lift being cut. The Tribunal heard direct evidence from the claimant which was not controverted by the respondent and therefore accepted by the Tribunal.
20. The Tribunal was satisfied that the claimant had a reasonable belief that what he was saying was true and that he made the disclosures in the public interest, for his colleagues and also for the customers of the respondent.
21. As a result of these disclosures the claimant was treated badly on a number of occasions. He was made to do the unpleasant work of cleaning, was not given support when asked to cover other absences and was insulted and harassed by way of the public radio channel, such that his colleagues could hear. Furthermore, when he applied for a promotion, he was turned down on three occasions. I received no evidence to suggest that there was any other reason why the respondent had acted in this way towards the claimant and therefore accepted the claimant's evidence.
22. The claimant's treatment by the respondent was related to his disclosures to them and on balance of probabilities I find that the failure to award him promotion was also related to his disclosures. All of these incidents were fundamental breaches of the implied term of trust and confidence in the contract of employment and indicators to the claimant that the respondent no longer wished to be a party to the contract. The treatment afforded to the claimant as a result of his disclosures, was the cause of his resignation. This amounts to a constructive dismissal.
23. On the basis of s. 103A, the reason for the dismissal was the protected disclosures and therefore it amounts to an automatic unfair dismissal.
24. There was no evidence to support the claim of unlawful deduction from wages, as the claimant gave evidence that his lack of pay in March/April 2020 was corrected. There was no evidence to support the increase in salary which the claimant asserted he was promised. Nor was there evidence to support the failure to provide pay statements.
25. As a result of this treatment the claimant has suffered a significant mental health illness and has had to undergo counselling which has cost him **£660**. He is entitled to recover this loss as a direct result of the actions of the respondent.

26. Furthermore, as a result of the detriment and the dismissal suffered he is entitled to injury to feelings. I consider the actions of the respondent extended over a period of time, made a significant impact on the claimant's life and have led to a loss of confidence in his own working abilities. I therefore assess this as being towards the top end of the lowest band of Vento damages and award **£ 6,000**.
27. The claimant earned £386.03 gross per week with the respondent. His gross earnings per week between 13 January 2021 and 13 April 2021 were £163.20. A loss of £222.83 per week for 12 weeks. I award **£2,673.96** as the lower earnings would not have reached the taxation threshold.
28. During the period April 2021 to 19 August 2021, the claimant was out of work and therefore his loss was £332.96 (net weekly pay) for 18 weeks; a total of **£5,993.28**.
29. From 19 August 2021, the claimant has worked as a delivery driver on a temporary contract with ASDA, earning £9.36 per hour for 24 hours per week; a sum of £224.64 per week. This is an ongoing loss of £ 108.32. I consider that the claimant will continue to have this loss to the end of the fixed contract in August 2022. The loss is therefore **£5,632.64**.
30. No award is made for the loss of statutory rights as none had accumulated at the time of dismissal.
31. I make no award for the failure to provide itemised pay statements and there is no outstanding unlawful deduction from wages.
32. The total award for the automatically unfair dismissal is £14,299.88, plus a further £6,000 for injury to feelings and £660 for treatment; a total award of **£20,959.88** to be paid by the respondent.

Employment Judge Cowen

11/1/2022

RESERVED JUDGMENT & REASONS SENT TO THE
PARTIES ON

13/1/2022

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FOR EMPLOYMENT TRIBUNALS