



EMPLOYMENT TRIBUNALS

Claimant: Mr R Szarkowski

Respondent: DFS Trading Limited

Heard at: Nottingham by Cloud Video Platform

On: 9, 10, 11 November and 17 December 2020

Before: Employment Judge Blackwell

Members: Mr G Austin
Mrs R Wills

Representatives

Claimant: Mr G Tinsley, NTU FRU Volunteer
Ms I Zieba, Polish Interpreter

Respondent: Mr Zovidavi of Counsel

RESERVED JUDGMENT

The unanimous decision of the Employment Tribunal is as follows:-

1. The claim of unauthorised deduction from wages fails and is dismissed.
2. The claim of less favourable treatment pursuant to section 13 of the Equality Act 2010 in respect of rates of pay fails and is dismissed.
3. The claim of automatic unfair dismissal pursuant to section 104 of the Employment Rights Act 1996 fails and is dismissed.
4. A claim of less favourable treatment in respect of dismissal pursuant to section 13 of the Equality Act 2010 also fails and is dismissed.

RESERVED REASONS

Background

1. Mr Tinsley, volunteer represented Mr Szarkowski who he called to give evidence. Mr Zovidavi of Counsel represented the Respondents (DFS) and he called Mr E McDermott, Mr S McKay and Ms C Hargreaves.

There was an agreed bundle of documents and references are to page numbers in that bundle. Because we were unable to conclude proceedings with the allotted time we had the benefit of written submissions from both sides, including comments from both sides on the other's submissions.

Issues and the law

1. These were determined at a Preliminary Hearing held in private by telephone on 10 September 2019 before EJ Clark:

“(2) The claim was presented by Mr Szarkowski in person and has already been subject to further particulars and an amendment granted to set out the basis of the automatic unfair dismissal and aspects of the race discrimination claim. There remained some suggestion the claim went further still. I have set out below the claims as I determined were before the tribunal and I permitted some development of the race discrimination claim based on the way the current pleadings are set out. I made clear, however, that if Mr Szarkowski believes his claim includes some other claim, or the current claims include a different basis of claims, that is not before the tribunal and will not be determined further without permission being granted to amend the claim. The pleaded claims are as follows:-

- (i) A claim of unauthorised deduction from wages. This is based on the claimant's assertion that there was an established contractual rate of pay for the role of CNC Machinist and, when he was moved to that role, the respondent paid him at the lower rate established for his previous post of Warehouse Assistant.
- (ii) A claim of less favourable treatment because of his race (Polish nationality/language) under s.13 of the Equality Act 2010. This arises from the same issue of rates of pay and is advanced on two alternative bases.
 - a. If there was a contractual entitlement to the higher rate of pay (such that there was also an unauthorised deduction from wages) the decision to pay him at the lower rate was an act of less favourable treatment because of his race. The claimant compares himself to the other CNC machinists, none of whom were Polish.
 - b. If there was no contractual entitlement to the higher rate of pay (such that the unauthorised deduction from pay claim fails), the respondent's decision not to apply a discretionary higher rate of pay to the claimant was less favourable treatment because of his race. He relies on the same comparators.
- (iii) A claim of automatic unfair dismissal relying on an assertion of a statutory right under section 104 of the Employment Rights Act 1996, in particular, the right not to suffer an unauthorised deduction from wages.

The claimant's case is that he has repeatedly talked to his managers and sent emails asking when he will change his hourly rate. There will be an issue as to whether such communications amounted to an assertion of the statutory right and, if they do, whether the claimant has shown that to be the reason or principal reason for his dismissal (the burden falling on him due to his lack of qualifying service).

- (iv) I also accepted a further claim arose on the existing case that the dismissal was itself an act of less favourable treatment limited to the contention that there was a discriminatory decision to pay him at the lower rate of pay and his previous complaints about that influenced the decision to dismiss him. It is not said that the previous complaints amount to a protected act to engage section 27 of the Equality Act 2010 and the allegation must be framed as a claim of direct discrimination."

- 2. Thus, the relevant statutory law is section 13 of the Equality Act 2010 and section 104 of the Employment Rights Act 1996.

"13 Direct discrimination

(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.

(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.

(4) If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.

(5) If the protected characteristic is race, less favourable treatment includes segregating B from others.

(6) If the protected characteristic is sex—

- (a) less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;

- (b) in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth.

- (7) Subsection (6)(a) does not apply for the purposes of Part 5 (work).
- (8) This section is subject to sections 17(6) and 18(7).”

“104 Assertion of statutory right.

- (1) 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—
- (a) brought proceedings against the employer to enforce a right of his which is a relevant statutory right, or
 - (b) alleged that the employer had infringed a right of his which is a relevant statutory right.
- (2) It is immaterial for the purposes of subsection (1)—
- (a) whether or not the employee has the right, or
 - (b) whether or not the right has been infringed;
- but, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith.
- (3) It is sufficient for subsection (1) to apply that the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.
- (4) The following are relevant statutory rights for the purposes of this section—
- (a) any right conferred by this Act for which the remedy for its infringement is by way of a complaint or reference to an employment tribunal,
 - (b) the right conferred by section 86 of this Act,
 - (c) the rights conferred by sections 68, 86, 146, 168, 169 and 170 of the Trade Union and Labour Relations (Consolidation) Act 1992 (deductions from pay, union activities and time off)
 - (d) the rights conferred by the Working Time Regulations 1998, the Merchant Shipping (Working Time: Inland Waterway) Regulations 2003, and
 - (e) the rights conferred by the Transfer of Undertakings (Protection of Employment) Regulations 2006.

- (5) In this section any reference to an employer includes, where the right in question is conferred by section 63A, the principal (within the meaning of section 63A(3)).

Introduction

3. Mr Tinsley, who acted for Mr Szarkowski both today and in the Preliminary Hearing referred to above, told us that he was a lay person and a volunteer. He was thus given considerable latitude during his cross-examination of DFS's witnesses.
4. However, it was apparent that his cross-examination seemed to be based upon a misunderstanding of the issues. His cross-examination seemed to us to be based on the premise that this was a case where the Claimant was dismissed for making protected disclosures (whistleblowing) and/or for bringing to his employer's attention matters relating to health and safety.
5. Mr Szarkowski's evidence seems to labour under the same misapprehension – see for example paragraphs 54 to 65. In our view, the maintenance of the CNC machine in question and the general health and safety regime is only relevant to the extent that it may have caused or contributed to the incident which led to Mr Szarkowski's dismissal on 16 July 2018.
6. Notwithstanding repeated reminders, Mr Tinsley persisted with his line of cross-examination to the extent that at one point we adjourned the Hearing so that he could re-read the issues and also read the letter of 7 August 2019 (not in the bundle) sent by his predecessor from the Free Representation Unit, which in our view succinctly identified the issues.

Findings of fact

7. Mr Szarkowski commenced employment with DFS on 21 March 2017 as a Warehouse Assistant/Cleaner (see Contract of Employment page 45) at an hourly rate set out in that Contract of £7.94. He worked at the relevant time at the Heanor Gate wood mill.
8. DFS are a large national concern manufacturing and selling furniture and have a dedicated Human Resources Department.
9. On 26 May 2017, Mr Szarkowski became a CNC Machinist (see page 50) at an increased rate of pay of £8.76 per hour on a 39 hour week. Mr Szarkowski tells us that he never received such letter because it was sent to the wrong address. However, we are satisfied that he knew that both that he had become a CNC Machinist and that there had been an increase in his pay. See, for example, Mr McDermott's email at page 91.
10. The CNC is a wood cutting machine that is computer programmed to carry out various tasks preparing components parts for assembly.

11. Mr Szarkowski continued to be paid at the rate of £8.76 per hour until he was dismissed with pay in lieu of notice, with an effective date of termination of 16 July 2018.
12. Mr Szarkowski wrote a series of brief emails to his line manager, Mr McDermott, beginning in August 2017, both asking for a new contract and an increase in his rate of pay to be met with the response *“As for rates of pay you will still be on £8.76. I will not be altering your rates of pay. This has never been discussed with you and that is the rate for the job.”* (See page 88).
13. Mr Szarkowski continued to query his rate of pay until March 2018 but without written response.
14. On 10 July 2018, an incident took place involving the CNC machine on which Mr Szarkowski was working. His account is that he went for a break having left the cutting tool of the machine withdrawn from the wood it had been cutting, thus not in any contact with the wood.
15. He says that a colleague, Mr A Sobis, came to him in the yard and told him to check the machine because there was a smell of smoke.
16. Mr Szarkowski goes on to state that there were embers glowing underneath the plate but the machine tool was away from the surface. There were no flames *“but I could smell smoke”*. He tipped his water over it and, according to his account, that stopped the smouldering.
17. He was then instructed to continue his work but some 20 minutes later the factory alarm went off because there appeared to be a serious problem in the ventilation system and the whole shift was ordered to go home.
18. There was an incident report and investigation (see pages 110 to 113) including brief statements from Mr Sobis and from Mr Adams.
19. As a consequence, Mr McKay was instructed to hold a fact finding meeting with Mr Szarkowski on 16 July 2018, the brief notes of which are at pages 114 and 115. We accept that Mr Szarkowski was given no warning of the interview, nor was he informed that a possible outcome could be dismissal.
20. As a consequence of that interview, Mr McKay determined to dismiss Mr Szarkowski and did so by letter of 18 July at page 116. The reason given was *“I feel you breached the Health and Safety Regulations in leaving your machine and was negligent in your role of CNC wood machinist”*.
21. After Mr Szarkowski was dismissed, DFS made a gross payment to him in October 2018 of £4,296.24 to reflect an increase of pay from £8.76 to £12 per hour for hours worked between 25 November 2017 to 16 July 2018. It is clear that that payment was made on a commercial basis in order to deter Mr Szarkowski from bringing these proceedings.

Conclusions

Issue 1

1. The first question is what was the established contractual rate for Mr Szarkowski? The answer to that lies in the contract of employment beginning at page 45 which Mr Szarkowski accepted in cross examination was his contract of employment. In that document the rate of pay is £7.94 per hour. That was the rate paid to Mr Szarkowski whilst he remained a Warehouse Assistant. When he commenced work as a CNC Operator his rate of pay was increased to £8.76 per hour and this was recorded at document 50. In our view then the contractual rate of pay was £8.76 from 26 May 2017 and it is common ground that he was paid at that rate throughout the rest of his employment. In our view then that is clearly the contractual rate of pay.
2. The matter however does not end there because Mr Szarkowski in his witness statement at paragraph 9 says:

“During the interview I was told that the rate for a CNC machinist was more than £12.00 per hour. My new workmates also confirmed this.”
3. Mr McDermott denied that there was any such conversation during the interview and he further denied orally increasing the £8.76 per hour rate of pay to the enhanced one of £12.00 per hour. When cross examined on the point Mr Szarkowski notwithstanding his evidence in chief could not recall any such conversation. Making due allowance for the fact that Mr Szarkowski gave evidence throughout through an interpreter we found him to be an evasive witness who lacked credibility.
4. There were voluminous submissions on both sides about the payment of £4,296.24 paid in October 2018 to reflect an increase of pay from £8.76 to 12.00 per hour for hours worked between 25 November 2017 to 16 July 2018. Mr Tinsley asserts that that is evidence that there was a contractual right to the enhanced rate of pay. We reject that submission. Ms Hargreaves’s evidence was clear that the payment was made at a time when communications had begun with ACAS preparatory to the service of the claim form on DFS. She went on to say that the payment was made on a commercial basis so as to persuade Mr Szarkowski from pursuing Tribunal proceedings against DFS. We accept that evidence and therefore no adverse inference can be drawn from the payment.
5. We therefore preferred the evidence of Mr McDermott that there was no oral variation to the rate of pay. It must therefore follow that the unlawful deduction from wages claim must fail.

Issue 2

Claim of less favourable treatment

Contractual entitlement to a higher rate of pay

6. Because there was no contractual entitlement to the higher rate of pay this element of the claim must fail because there was no less favourable treatment.

Unfavourable treatment in not applying a discretionary higher rate of pay

7. This is a claim of direct discrimination. No employer ever admits to discrimination and we acknowledge that on occasions discrimination is a subconscious act. Therefore we must look for inferences that can be drawn from the evidence to suggest that the less favourable treatment ie being paid at £8.76 per hour rather than £12.00 per hour was influenced by Mr Szarkowski's race. Clearly he was paid at the lesser rate for some 14 months from May 2017 to his dismissal in July 2018. Mr Szarkowski cites two comparators Messrs Adams and Wymant both of whom from dates in 2017 were paid at the higher rate. Both were also comparable CNC operators in the same factory and were both of English origin.
8. Mr McDermott who was Mr Szarkowski's line manager at all relevant times explained the continuing decision not to pay Mr Szarkowski at the higher rate was because Mr Szarkowski never attained the level of skills that were necessary for him to achieve the higher rate of pay. For example he said Mr Szarkowski lacked the skill to find and correct faults. In evidence Mr Szarkowski accepted that he could not remedy the fault shown on the machine at page 245.
9. Mr McDermott's evidence in summary was that the level of skills necessary to achieve the higher rate of pay meant that a CNC operator had to have sufficient ability to operate without another skilled operator to hand. Mr McDermott's evidence was that Mr Szarkowski never achieved that level of skill and thus had to have a fully skilled operator working with him at all times. That was generally Mr Adams. As to Mr Adams it is clear that he began employment in 2014 and it was not until 1 September 2017 that he achieved the higher rate. As to Mr Wymant he too began his employment in 2014 and was paid at the enhanced rate on 9 June 2017. We would also add that the material provided at page 244a whilst accepting that Messrs Wymant and Adams were the correct direct comparators because most of the rest of the employees were paid on piece rate rather than per hour, nonetheless the material on that page does not point to any discrimination against other Polish workers. In our view taking the evidence as a whole there is nothing to suggest that Mr Szarkowski's rate of pay was influenced in any way by the fact that he was of Polish origin. That element of the claim must therefore also fail.
10. However Mr Tinsley is right to submit that the discretion to pay the higher rate has as a matter of law to be applied reasonably. On the same facts it seems to us that Mr McDermott's reasons for not paying Mr Szarkowski the higher rate of pay are rational and therefore that head of claim also fails.

Issue 3

Section 104 claim

11. Mr Szarkowski cannot pursue a claim under section 94 and section 98 of the Employment Rights Act 1996 because he has insufficient service. Section 104 requires no such service. Nonetheless it seems sensible to start with the reason advanced by DFS for the dismissal.

That emerges from Mr McKay's letter of 18 July at page 116 the relevant sentence being:

"I feel you have breached the health and safety regulations in leaving your machine and was negligent in your role of CNC Wood Machinist."

12. Thus the reason advanced is clearly one of conduct.
13. As we indicated in our introduction Mr Tinsley spent time in cross examination pursuing alleged deficiencies in Mr Szarkowski's training. He also pursued alleged deficiencies in the maintenance of the CNC machine. He also pursued alleged failures of DFS in relation to various health and safety matters. The latter included the fact that Mr Szarkowski was permitted to continue working after the fire at his machine until the whole shift was sent home because of a fire in the ventilation system. It seems to us that none of that is relevant to the issues that we have to determine. Mr Szarkowski's case in relation to the fire begins at paragraph 85 in which he says that he thinks it's possible that the grill system allow a pile of dust to grow under the part being machined and this pile was under a spark or hot ember from the tooling which caused the dust to burn. He also makes allegations that the ventilation became clogged and that the CNC machine was over worked and poorly maintained. He also added in cross examination when asked about the fire in the ventilation system *"there are other machines connected to the ventilation system"*.
14. Both Mr McDermott and Mr McKay's evidence was clear. They both said that the damage set out in the photographs at page 109 could only have been caused by the cutting machine being in contact with the wood, ie carrying out its programme. Thus it could not have occurred if as Mr Szarkowski asserts he had left the cutter away from the wooden component.
15. Mr Szarkowski says that the photographs at page 109 are faked, relying on the fact that he had changed the cutting tool after the fire at his machine and that therefore the one shown cannot have been the blunt tool.
16. That may well be the case but we accept that the remaining photographs are genuine and show significant fire damage which can only have been caused by contact between the cutting tool and the wood.
17. We accept that on the balance of probabilities Mr Szarkowski did leave the machine running, went to take his break and then the combustion occurred and that was why he was dismissed.
18. Turning now to section 104 itself and Mr Szarkowski needs to show that the employer had infringed a right of his which is a relevant statutory right. Not being paid at the correct contractual rate would be unauthorised deduction from wages and a relevant statutory right.

However we have found that Mr Szarkowski was paid at the correct rate but for that subsection to apply:

“It is immaterial for the purposes of subsection 1:-

- a) *Whether or not the employee has the right, or;*
- b) *Whether or not the right has been infringed.*

But for that subsection to apply the claim to the right and that it has been infringed must be made in good faith.”

Looking at the e-mails despatched to Mr McDermott and the nature of the evidence we think that the communications amount to no more than requests for a pay rise. We do not therefore accept that Mr Szarkowski was asserting that a right had been infringed at all. On this ground alone the section 104 claim must fail.

19. If we are wrong about that Mr McKay’s evidence, and we found Mr McKay to be a straightforward and credible witness was that he had no idea that Mr Szarkowski made complaints about his pay. We note that Mr McKay is from a different factory and we further note that the e-mail correspondence between Mr Szarkowski and Mr McDermott was not copied to anyone. We therefore accept Mr McKay’s evidence that he had no knowledge of the alleged assertion of statutory rights.
20. The section 104 claim therefore fails on a number of grounds.

Issue 4

Less favourable treatment in respect of the dismissal

21. This is not put as a claim that Mr Szarkowski was dismissed because of his race rather than there was a discriminatory decision to pay him at the lower rate of pay and his previous complaints about that influenced the decision to dismiss him. Firstly we have held that there was no discrimination involved in the payment of Mr Szarkowski and further we have accepted Mr McKay’s evidence that he was unaware of the alleged previous complaints. That claim must therefore also fail.
22. It follows that all of Mr Szarkowski’s claims fail.

Employment Judge Blackwell

Date: 08 January 2021

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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